Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00910/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29th September 2017	**On 16th October 2017**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

E T
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Jaisri, instructed by ADH Law Solicitors
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Cyprus born in 1983. He appeals against the decision of First-tier Tribunal Judge J Bartlett, dated 27th April 2017, dismissing his appeal against deportation on human rights grounds.

2. The Appellant appealed on four grounds. Deputy Upper Tribunal Judge Hill QC refused permission on three of the grounds. He granted permission on the following basis:

> "It is arguable that the judge made an error of law in paragraph 48 in having regard to a juvenile conviction for wounding, notwithstanding the approach apparently advocated in Rexha (S.117C – earlier offences) [2016] UKUT 00335.

If, as the applicant submits, the respondent did not rely upon it when making the order, it may not have been open to the judge to do so."

Submissions

3. Mr Jaisri submitted that the judge considered the Appellant's conviction for grievous bodily harm in January 1999 [the GBH conviction] at paragraph 48 when considering whether it would be unduly harsh for the Appellant to be deported. Following paragraph 14 of Rexha, the judge was not able to take the GBH conviction into account because it was not relied on as part of the Respondent's deportation decision. At paragraph 34, the judge agreed with the submission by the Presenting Officer and found that the GBH conviction was relevant to the consideration of section 117C of the Nationality Immigration and Asylum Act 2002. However, the Respondent did not rely on the GBH conviction, for which the Appellant was sentenced to a term of imprisonment of more than four years, as the index offence in the decision letter. Therefore, the judge was not able to rely on it when assessing proportionality and the relevant factors in section 117C.

4. The consequences of the judge's findings were apparent from paragraph 52 of the decision where the judge stated "Taking all factors into account, I do not find that it is unduly harsh for the Appellant's children to remain in the UK without the Appellant." It was clear that the judge had taken into account the GBH conviction and she was not entitled to do so. Had she disregarded this conviction in her assessment under section 117C, she could have come to a different decision.

5. Mr Melvin relied on the Rule 24 response and accepted that the Respondent was not relying on the sentence of imprisonment in excess of four years under the Immigration Rules. However, the judge was entitled to consider the GBH conviction under section 117C. Mr Melvin submitted that just because the Respondent was not relying on the GBH conviction in coming to her decision to deport the Appellant, it did not mean that the judge could not consider the whole of the Appellant's offending behaviour when looking at whether his deportation would be unduly harsh.

6. Mr Melvin submitted that it was clear from the panel's finding in the case of Johnson (deportation - 4 years imprisonment) [2016] UKUT 282 (IAC), that the judge was not prevented from looking at the overall immigration history when considering section 117C. The judge had taken into account the warning letter sent to the Appellant in this case and the judge's findings at paragraphs 48 and 59 were open to the judge on the evidence before her.

7. Mr Melvin submitted that paragraphs 31 and 32 of Johnson demonstrated that the judge was entitled to take into account the factors she did. The Appellant's GBH conviction in 1999 could not be ignored even though it was not directly relied upon by the Secretary of State because the judge could not ignore something that factually happened. It was clear in the refusal letter, when the Respondent set out the Appellant's immigration history, that the GBH conviction was taken into account and therefore there was no material error of law in the judge's decision.

8. In response, Mr Jaisri submitted that the Respondent had not relied on the GBH conviction and therefore the judge could not rely on it in assessing section 117C.

The Appellant's Immigration History

9. The Appellant was born in northern Cyprus and arrived in the UK on 18th May 1991 when he was 7 years of age. He was accompanied by his mother and brother. His father subsequently lodged an asylum application with the Appellant as his dependant. On 21st August 2000, the Appellant was granted indefinite leave to enter the United Kingdom in line with his father, who had been granted refugee status.

The Appellant's Criminal Convictions

10. On 4th January 1999, the Appellant was convicted of wounding with intent to do grievous bodily harm and sentenced to five years and six months' imprisonment. On 31st January 2010, he was convicted for driving a motor vehicle with excess alcohol and fined £200, ordered to pay £50 costs, disqualified from driving for sixteen months, and had his driving licence endorsed. On 27th October 2010, he was convicted of possessing class B controlled drugs (cannabis) with intent to supply and facilitating the acquisition of criminal property and sentenced to six months' imprisonment. On 1st February 2011, the Appellant was convicted of possessing class B controlled drugs (cannabis) with intent to supply and acquiring criminal property. He was sentenced to one year and nine months' imprisonment.

The Respondent's Decision

11. The Respondent's decision is summarised as follows. In light of the Appellant's conviction of one year and nine months, it was considered that paragraph 398(b) applied. The Respondent then considered paragraph 399A as the Appellant claimed to have a parental relationship with two British children, R and I. The Respondent did not accept that the Appellant had a genuine and subsisting relationship with his children and records showed that he lived with his parents in Hackney, but his children lived with their mother in Enfield.

12. The Respondent did not accept that it would be unreasonable for R or I to reside in northern Cyprus with the Appellant. They were young enough to adapt with the help of the Appellant and their mother. Their mother was born in Northern Cyprus and she was familiar with Turkish culture. In addition, English was widely spoken there. The children's mother was able to care for them in the UK and contact could be maintained through modern means of communication or visits. It was not accepted that the Appellant's right to family life with his children outweighed the public interest in the Appellant being deported.

13. It was not accepted that the Appellant was in a genuine and subsisting relationship with AT, his wife. It was accepted that she was a British citizen and that she had

lived in the UK with valid leave for at least fifteen years preceding the immigration decision. However, the Respondent did not accept that there were insurmountable obstacles to family life continuing outside the UK. There was no evidence that the Appellant had been living with AT. She was able to join the Appellant abroad or maintain contact through visits.

14. The Appellant could not satisfy paragraph 399A of the Immigration Rules. Once his criminal convictions had been discounted his residence in the UK immediately preceding the decision was less than twenty years. The Appellant spent his formative years in Northern Cyprus, he spoke Turkish and would be able to build an adequate private life there. The Appellant had extended family members in Northern Cyprus and they had friends or other contacts.

15. The Appellant's brother was deported from the United Kingdom to Cyprus on 16th March 2009 following his conviction for five counts of possession with intent to supply drugs. The Appellant also had grandparents in Northern Cyprus. The Appellant's other brother was served with a deportation order in 2011 following a conviction for possessing a class A controlled drug (cocaine) with intent to supply. He was appeal rights exhausted and removal had not yet been enforced.

The Judge's Conclusions

16. The judge's findings relevant to the issue on appeal are as follows:

> "29. Section 32 of the Borders Act 2007 provides that the Appellant's deportation is conducive to the public good save for the applicability of one of the exceptions in Section 33."
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> "31. The Appellant's deportation is conducive to the public good and in the public interest in accordance with paragraph 398(b) because he was convicted of an offence in 2011 for which he was sentenced to a period of one year and nine months which is less than four years but greater than twelve months. In accordance with paragraph 398(b) I must consider whether paragraph 399 or 399A applies."

17. The judge then considered MM (Uganda) [2016] EWCA Civ 450 and properly directed herself on the meaning of unduly harsh. At paragraph 33 she stated:

> "33. I have given consideration to Section 117C and Rexha (S.117C - earlier offences) [2016] UKUT 00335 (IAC) which states:
>
> > '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.'"

18. At paragraph 34 the judge agreed with the submissions made by the Home Office representative, stating that:

> "34. In carrying out the assessment under Section 117C I must have regard to all of the Appellant's offending history including his previous sentence to a term of imprisonment in excess of four years. However for completeness I state that I have considered whether Exception 1 and Exception 2 of Section 117C(4) applies in the Appellant's case as part of my assessment under the Immigration Rules which as I have set out above is the same in Section 117C.

19. The judge considered the best interests of the children and noted that "the Appellant's convictions for possessing and dealing drugs in 2010 and 2011 were at a time when he had two reasonably young children. In relation to the second conviction the Appellant was arrested with drugs paraphernalia at the family home where his children live. The Appellant's evidence was that he did not store it at his children's home and that his customers did not come to the family home. However, on the Appellant's own evidence he was smoking cannabis up to ten times a day, he had a drugs paraphernalia and drugs in the family home. In addition, I find that he carried out activities relating to dealing drugs at the family home because he had drugs, scales and bags for the drugs at the family home. It is obvious that drug dealing at the family home is not in the best interests of the children. I find that the Appellant had a complete disregard for the welfare of his children and instead prioritised his own drug habit and drug dealing. I do not accept the Appellant's evidence that he only started dealing drugs shortly before he was arrested. By January 2011, the date of his second drugs conviction, the Appellant's second child was approximately 14 months old and he had had problems with his marriage due to his drugs from the pregnancy of his second child which would have been early 2009. On the Appellant's own evidence he had smoked cannabis for some time, two of his brothers have been convicted of drug dealing offences and in these circumstances I find that the Appellant was surrounded by and involved in drugs. I do not accept the Appellant's attempt to portray his involvement in cannabis dealing as a very minor activity."

20. The judge dealt with the comments of the sentencing judge and the evidence of AT's depression and then the evidence relating to his children. At paragraph 48 the judge stated:

> "48. In considering whether it is unduly harsh I must also consider the Appellant's immigration and criminal history. The Appellant has a long offending history which I have set out above. The Appellant's evidence was that he had a troubled youth and now he is a reformed character. I disregard the caution relating to shoplifting but I must give consideration to the Appellant's conviction when he was 14½ years of wounding with intent to do grievous bodily harm which involved hitting a man with a sword. This is a very serious offence and the Appellant was charged with attempted murder though he was found not guilty of that charge. The

Appellant rightly points out that this was his only offence of violence. The Appellant then remained crime-free for approximately eleven years after which he was convicted of drink driving in 2010…
Later in 2010 he received his first conviction for drug dealing and then in early 2011 he was again convicted of a drug dealing offence. I recognise that the Appellant has pleaded guilty to all these offences. I also recognise that this last conviction was six years ago.…
I find that the Appellant's history of offending is long and varied. I accept that the evidence before me is that the Appellant is at low risk to the public but the Probation Service identifies that he was at medium risk of reoffending because of his connections to the drugs world in a drugs lifestyle…."

21. The judge took into account the Appellant's length of lawful residence in the UK and the warning letter from the Respondent in 2002 and concluded that it would not be unduly harsh for the Appellant's children and wife to remain in the UK without the Appellant or for the Appellant's children and wife to live in Northern Cyprus.

22. At paragraph 56 the judge found:

> "56. I have considered paragraph 399A and Exception 1 in Section 117C(4). I find that at the date of the hearing the Appellant has lived in the UK for the majority of his life even when his periods of imprisonment have been excluded. I consider that the Appellant is culturally and socially integrated into the United Kingdom due to his fluency in the English language, his long period of residency in the United Kingdom and his employment. This however does not diminish his familiarity with the culture Northern Cyprus. I do not accept that there would be very significant obstacles to his integration into northern Cyprus."

23. The judge then gave her reasons for coming to that conclusion and recognised, at paragraph 57, the considerable weight to be attached to the public interest in the Appellant's deportation.

24. At paragraph 59 the judge stated:

> "59. I note that the Appellant's life and that of his family has not been unlawful or precarious in terms of Section 117B. I find that the Appellant speaks English and he has a job so that he is financially independent. I have considered the Appellant's and his family's circumstances, the children's best interests and whether the circumstances may be unduly harsh. As set out above and for the reasons set out above I find that the Appellant's wife and children returning to Northern Cyprus with him or remaining in the UK without him is not unduly harsh. I remind myself of the provisions of Section 117C of the 2002 Act and I find that even if I was required to consider Section 117C(3) Exceptions 1 and 2 do not apply for the reasons set out above. In relation to Section 117C(6) I consider in all of the

circumstances and in light of my detailed findings above including the Appellant's long residency in the United Kingdom, his family life, the best interests of his children, and even according him a low risk of reoffending that there are not very compelling circumstances. I find that the deportation of the Appellant is proportionate to the public interest in his deportation. For completeness I note that the public interest in deportation has several elements including the risk of reoffending, the need to deter foreign criminals from committing serious crimes and the expression of society's revulsion at criminal behaviour and the building and maintenance of public confidence in the treatment of foreign criminals."

Relevant Law

25. 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 the public interest in deportation of the criminal.

(3) In the case of foreign criminal ('C') who has not been sentenced to a period of imprisonment for 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) 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 that the offence or offences for which the criminal has been convicted.'

26. In Johnson, the panel, Mr Justice Turner and Upper Tribunal Judge Jordan, held:

"When a foreign offender has been convicted of an offence for which he has been sentenced to imprisonment of at least four years and has successfully appealed on human rights grounds, this does not prevent the Secretary of State from relying on the conviction for the purposes of paragraph 398(a) of the

Immigration Rules and Section 117C of the 2002 Act if and when he reoffends even if the later offence results in less than four years' imprisonment or, indeed, less than twelve months' imprisonment."

27. The panel made the following findings relevant to this appeal:

> "31. ……Our conclusion is that, once the Appellant has been sentenced to a term of imprisonment of four years or more, he falls within the terms of paragraph 398(a) and the Secretary of State is entitled to rely upon it in deciding whether or not to make a deportation order. It is no bar to the Secretary of State that she took no action to deport the offender as a result of the conviction and sentence nor that the Appellant successfully appealed following his conviction and sentence. Such a claimant is no longer entitled to rely upon the exceptions set out within Section 117C."
>
> "32. It is impermissible to rely upon the contents of the Respondent's own instructions to caseworkers as a means of interpreting the contents of a statutory instrument. Immigration Directorate Instructions (IDIs) may be used to identify a policy more favourable to an Appellant than the Immigration Rules but cannot impose requirements more onerous to a claimant than the Rules. Hence, the IDIs are of limited use as a means of construction. However, the relevant IDI (Chapter 13) in this case is in the following terms, where material:
>
> '**Chapter 13: criminality guidance in Article 8 ECHR cases**
>
> 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 year 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 public good and in the public interest for the four year sentence as well as any subsequent sentences.'"

28. In Rexha (S.117C - earlier offences) [2016] UKUT 335 (IAC), the panel of Mr Justice Dove and Deputy Upper Tribunal Judge Grimes held:

> "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."

29. At paragraphs 14 and 15 the panel concluded:

"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 to 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)."

30. At paragraph 18 the panel found: "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."

31. The panel considered the guidance at paragraph 2.2.2 of the IDIs and commented at paragraph 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."

Discussion and Conclusions

32. The issue in this appeal is a narrow one: whether the judge was entitled to take into account the entirety of the Appellant's offending behaviour in considering section 117C when the Respondent had not relied on a previous conviction, in which the Appellant was sentenced to a period of more than four years' imprisonment, in coming to the decision to deport him under paragraph 398 of the Immigration Rules.

33. In this case the Respondent relied on the Appellant's last conviction for which he was sentenced to a term of imprisonment of more than twelve months. Therefore, Exceptions 1 and 2 of section 117C (paragraphs 399 and 399A of the Immigration Rules) applied.

34. Mr Jaisri argued that since the Respondent had not taken the course of relying on the sentence of more than four years' imprisonment, the GBH conviction, as the index offence giving rise to the decision to deport, then it was not open to the judge to consider that conviction in assessing the public interest. The judge clearly had considered the GBH conviction when assessing the public interest and in balancing it against the Appellant's Article 8 rights. It was accepted by all parties that she had taken into account the GBH conviction in considering whether the Appellant's deportation was unduly harsh. The question was whether she made an error of law in doing so.

35. I am persuaded by Mr Melvin's submissions that, on reading both the authorities of Rexha and Johnson, the whole of the Appellant's criminal behaviour was relevant to any assessment under section 117C. The fact that it was not specifically relied on as the index offence giving rise to the decision to deport under paragraph 398 of the Immigration Rules did not preclude the judge from taking it into account.

36. The Respondent referred to all of the Appellant's criminal convictions in her decision. She was entitled to rely on the GBH conviction in 1999 for which the Appellant received a sentence of more than of four years, as the index offence. However, she did not do so and the Appellant had the benefit of Exceptions 1 and 2. The judge was entitled to take into account all Appellant's criminal convictions under section 117C(7).

37. In any event, I find that any error of law was not material because it is quite clear, from the paragraphs I have set out above, that the judge dealt with the Appellant's drug dealing in assessing the best interests of the children and she attached significant weight to both of the convictions for supplying drugs. It is clear that she attached little weight to the GBH conviction because she acknowledged that it was the Appellant's only offence of violence, he was 14 ½ years old and he remained crime free for a period of 11 years thereafter. The proportionality assessment was not finely balanced in this case. Removing the GBH conviction from the proportionality balancing exercise would not result in a different decision.

38. I find that there was no material error of law in the judge's decision of 27th April 2017 and I dismiss the Appellant's appeal.

Notice of Decision

The appeal is dismissed.

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 Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

J Frances

Upper Tribunal Judge Frances Date: 13th October 2017

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed

J Frances

Upper Tribunal Judge Frances Date: 13th October 2017