Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP001492016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 July 2017	**On 07 August 2017**

Before

UPPER TRIBUNAL JUDGE WARR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JOHN WILLIAM CARABALI LOPEZ
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr P Armstrong
For the Respondent: Miss N Nnamani of Counsel instructed by Howe & Company Solicitors

DECISION AND REASONS

1. This is the appeal of the Secretary of State but I will refer to the original appellant, a citizen of Colombia born on 1 November 1992, as the appellant herein. The Secretary of State appeals the decision of a First-tier Judge following a hearing on 10 May 2017 to allow the appellant's appeal on human rights grounds against the decision of the Secretary of State on 30 September 2016 to make a deportation order against him under Section 32(5) of the UK Borders Act 2007. The appellant had been convicted of

four counts of robbery in 2011 as a result of which he had been sentenced to a total of three years' detention.

2. The appellant arrived in this country in March 2000 with his parents. The appellant's father made an application for asylum on behalf of his family. Although the claim was refused an appeal against the decision was allowed upon the basis that there was a substantial risk of persecution if the family were removed to Colombia. The family was granted refugee status with leave in line. The respondent considered that under Section 72 of the Nationality, Immigration and Asylum Act 2002 the appellant had been convicted of a particularly serious crime and constituted a danger to the community of the UK. The appellant was issued with a notification of intention to cease his refugee status in 2014. Reference was made to Article 1C(5) of the 1951 Refugee Convention in the light of significant changes in Colombia since the appellant's arrival.

3. I mention this simply by way of background because the First-tier Judge rejected the appellant's claim under the Refugee Convention accepting there had been a fundamental change in Colombia. The appeal was allowed under Article 8 and there was no cross appeal or challenge to the other aspects of the judge's decision. The judge heard from the appellant and his parents and his fiancée and sister.

4. The judge in paragraph 36 of her determination sets out the sentencing remarks following the appellant's conviction at Blackfriars Crown Court on 10 February 2011. On 24 March 2011 the appellant was sentenced to concurrent terms of imprisonment of three years in respect of counts 2 to 4 and nine months' imprisonment in respect of count 1. The judge stated as follows:

> "In the early hours of the morning n 23 December last year the two of you engaged in four street robberies in quick succession. Three of them were accompanied by violence. … You Carabali took the leading role. Count 1 concerns Mr W a duty manager standing at a bus stop. One of you put your face right into his and shouted at him to give up his telephone. The other stood nearby. He gave up his phone. Count 2 concerns a restaurant manager walking home alone. You Carabali demanded her phone on a number of occasions. You then raised your right hand and slapped her on the side of her face with a semi-clenched fist, knocking her to the ground. You said 'give me the phone bitch.' You M were against there as backup. She gave up her phone. Count 3 concerns Mr BS, a young man on his way home after a night out. You Carabali said 'we went your phone'. He ran off. You pursued him shouting at him. You attacked him. He recalls being on the floor with Carabali over him kicking him and you M nearby telling Carabali to stop. You took his wallet and mobile telephone. He suffered a cut above his left eye, a cut and swollen nose and grazes to his hand and knee. He had a blow to the jaw which made it difficult to eat for two weeks. It had a significant impact on his confidence even a month later. Count 4 concerns KS walking with her sister to the tube station. You Carabali put your arm around her neck and forcibly took her handbag from her grip. You went through the handbag while M stood between saying 'calm down. Let him do it, it will be ok.' At the end of the incident, you Carabali threw her handbag back. She suffered injury in the incident. These are the four robberies. You were caught red handed by police close by each with

> some property from the robberies on you. Counts 2 to 4 are serious robberies. They are far too serious for anything other than a custodial sentence. Violence was involved. The offences were late at night. They were perpetrated on people who were entitled to use the streets peacefully but were vulnerable because it was late at night. Force was used and in two cases injury caused."

5. The judge noted what had been said to the probation service but stated as follows in paragraph 38 of her decision:

> "I find that the version of events given by the appellant to the probation officer does not tally with the sentencing remarks of His Honour Judge Richardson. I find that it is clear from the judge's sentencing remarks that it was the appellant who took the lead. It was the appellant who robbed the victims and it was the appellant who carried out acts of violence on innocent people. Yet in his evidence the appellant said that he is remorseful and regrets his actions. I find that inability to accept his part in the commission of the offences reduces his credibility and his claim of genuine remorse. In evidence he said that he was very angry that night and that his girlfriend's best friend told him that she had aborted his child. I find that the appellant made no reference to his former girlfriend aborting his child when he was interviewed by the probation officer. Nor is there any mention in the judge's sentencing remarks about the appellant's anger on the night when the offences were committed. There is some reference in the judge's sentencing remarks to the appellant claiming that he was drunk. In evidence the appellant said that his actions have affected his life. He said that he recognises that he caused emotional and physical damage to the victims."

6. Having referred to the evidence of the appellant's parents the judge stated at paragraph 41 of her decision as follows:

> "I take into account the appellant's evidence that he has undertaken a number of courses whilst he was in prison. The certificates relating to those courses are not in the bundle. I find that whilst the appellant has expressed remorse about his actions it is primarily because it has caused significant upset to his family and has disrupted his plans to study and follow a career or start a business. I find that the appellant's evidence abut the impact of his actions on his victims was minimal. I find that in his interview with the probation officer, the appellant still sought to put the blame on his co-defendant rather than take responsibility himself for both robbing the victims as well as using violence against them. I accept in assessing the evidence as a whole that the appellant's removal will negatively impact on his family."

7. She accepted that if removed to Colombia the appellant would miss his younger brothers growing up and this may have an impact on their relationship with him. She noted that the appellant's girlfriend was unable to provide clear and credible evidence about why she believed the appellant was remorseful for the offences he had committed. She rejected the explanation given that the appellant had committed the offences because he had been angry with a former girlfriend. The judge found that the appellant had consumed an excessive amount of alcohol and "gratuitously meted out violence to members of the public." She noted that while the probation officer had put the risk of the appellant's reoffending and the risk to the public as low the officer's report had been criticised by the Presenting Officer. Having set out

relevant authorities such as **N (Kenya) [2004] UKIAT 0009** and Section 72(2) of the Nationality, Immigration and Asylum Act 2002. The judge's determination concludes as follows:

> "51. From 28 July 2014, Section 19 of the Immigration Act 2014 (Commencement Number 1, Transitory and Saving Provisions) Order 2014 came into force. It amends the Nationality, Immigration and Asylum Act 2002 by introducing a new Part 5A which contains Section 117A to D. The statutory provisions apply to all appeals heard on or after 28 July 2014 irrespective of when the application or immigration decision was made. However Part 5A only applies where the Tribunal considers Article 8(2) ECHR directly. The Immigration rules already contain the public interest question. I take into account Section 117C and D. The starting point is that the deportation of foreign criminals is in the public interest. In **Chege (section 117D – Article 8 – approach) [2015] UKUT 00165 (IAC)** the court held that the correct approach, where an appeal on human rights grounds has been brought in seeking to resist deportation, is to consider:
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> i. is the appellant a foreign criminal as define by s117D(2)(a), (b) or (c);
> ii. if so, does he fall within paragraph 399 or 399A of the Immigration Rules;
> iii. if not are there very compelling circumstances over and beyond those falling within 399 and 399A relied upon, such identification t be informed by the seriousness of the criminality and taking into account the factors set out in s117B.
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> The court held that compelling as an adjective has the meaning of having a powerful and irresistible effect; convincing. The purpose of paragraph 398 is to recognize circumstances that are sufficiently compelling to outweigh the public interest in deportation but do not fall within paragraph 399 and 399A. The task of the judge is to assess the competing interests and to determine whether an interference with a person's right to respect for private and family life is justified under Article 8(2) or whether the public interest arguments should prevail notwithstanding the engagement of Article 8. The court further held that if an appeal does not succeed on human rights grounds, paragraph 397 provides the respondent with a residual discretion to grant leave to remain in exceptional circumstances where an appellant cannot succeed by invoking rights protected by Article 8 of the ECHR.
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> 52. I find that the appellant has been convicted in the United Kingdom of an offence and sentenced to a period of imprisonment of at least two years. I find that the crime that he committed was a serious crime and which constituted a danger to the community because violence and street robbery was perpetrated on members of the public unknown to the appellant. However I find that the appellant has served his sentence of imprisonment and he attended all his probation appointments. Ms Nnamani on the appellant's behalf submitted that the appellant pleaded guilty and has shown remorse. She said he committed the offences under the influence of alcohol and since those offences were committed he has not committed any further offences. I bear in mind that the appellant was of previous good character before he committed the offences which were committed over one night. Despite the criticisms made by Miss McKenzie of the OASys Report, I nonetheless bear in mind that the probation officer concluded

with all the information before her that the appellant is of low risk of reoffending and of being a risk to the public.

53. The appellant gave evidence that he has family life with his fiancée Ms M. Both he and Ms M gave evidence that they have been in a relationship since 2015. I find that the appellant does not live with Ms M. She lives with her daughter whilst the appellant lives with his family. Whilst I accept that they are in a relationship, I do not find the relationship constitutes family life within the meaning and purpose of Article 8. Ms M said that if the appellant returns to Colombia she will not be able to go with him because her 6 year old daughter has started supervised contact with her own biological father and he will not allow her to move away to live in Colombia. I take into account Section 117B; the public question means the question of whether an interference with a person's respect for private and family life is justified under Article 8(2). I find that Ms M accepted in cross-examination that she knew about the appellant's immigration problems even before she commenced a relationship with him in July 2015. I find that she entered into a relationship with the appellant in the full knowledge that he could be removed from this country. I accept that the appellant has a good relationship with Ms M's 6 year old daughter. I bear in mind that Ms M's mother is half Colombian and has visited Colombia. I find that she would be able to maintain contact with the appellant through telephone calls and visits to Colombia. She does not presently live with the appellant.

54. I find that the appellant came to the United Kingdom at the age of 7 and has not returned to live in Colombia since then. Whilst he has some relatives in Colombia, I find that he does not have a network of support that would enable him to settle there. I find that the appellant's father went back to Colombia two years ago specifically to see his mother who was very ill. The appellant's mother has not returned to Colombia since she came to this country in 2000. The appellant himself has not returned to Colombia even for a holiday since he arrived in this country. In **Kugathas [2003] EWCA Civ 31** the court held that there is no family life between a parent and an adult child unless it goes beyond normal emotional ties to a relationship of real, committed and effective support. I do not find that the appellant has family life with his parents within the meaning and purpose of Article 8.

55. I find that the appellant has family life with his younger siblings. I find that he has a good relationship with his sister and has begun to have a relationship with his younger brothers since he came out of prison. I find that the appellant has a supportive family, his parents continue to have faith in him and are positive that he has matured since the offences were committed and would now like to settle down and concentrate on his future. In taking the evidence as a whole on a balance of probabilities I find that any interference in the appellant's family and private life will be disproportionate. Consequently I find that the appellant meets the exception in Section 33(2) of the 2007 Act in that removal of pursuance of deportation will breach the appellant's Article 8 rights. Consequently I find that deportation is not in the public interest."

The respondent sought permission to appeal arguing that the judge had failed to consider the appellant's deportation under both the Rules and Section 117C of the

2002 Act. Reference was made to **NE-A (Nigeria) v Secretary of State for the Home Department [2017] EWCA Civ 239**. Section 117C formed a complete code for considering Article 8 in deportation cases. The judge had accordingly failed to attach the correct weight to the public interest and carry out the unduly harsh test as defined by the Court of Appeal in **MM (Uganda) [2016] EWCA Civ 617** where the Court of Appeal had stated at paragraph 26 that the expression "unduly harsh" in Section 117C(5) and Rule 399(a) and (b) required regard to be had to all the circumstances including the criminal's immigration and criminal history. Permission was granted on all grounds by the First-tier Tribunal in a decision dated 8 June 2017. It was arguable that the First-tier Judge had not directed her mind to the right test but had carried out a freestanding Article 8 analysis.

8. Mr Armstrong relied on the grounds and submitted that while the case of **Chege (section 117D – Article 8 – approach) [2015] UKUT 00165 (IAC)** had been referred to it had not been applied. The judge had not referred to paragraph 399A or Section 117C(4). Mr Armstrong took me to paragraphs 13 to 16 of **NE-A (Nigeria)** where the Court of Appeal had approved the approach in **Rhuppiah v Secretary of State for the Home Department [2016] EWCA Civ 803** in holding that

> "Sections 117A – 117D, taken together, are intended to provide for a structured approach to the application of Article 8 which produces in all cases a final result which is compatible with Article 8. In particular, if in working through the structured approach one gets to Section 117C(6), the proper application of that provision produces a final result compatible with Article 8 in all cases to which it applies ..."

The judge had erred in carrying out a freestanding Article 8 analysis. Reference was made to the sentencing remarks which I have set out above. All the victims were vulnerable and it had been incumbent on the judge to get the law correct.

9. Counsel submitted that the determination had been quite thorough and adequately reasoned and there were complex issues. The appellant had arrived as a child and had committed the offences in 2010. The judge had set out the details of the offences. She had referred to the probation officer's findings and the appellant had been out of prison for some four and a half years. While the appellant had shown limited remorse he had been supported by his family and there was a low risk of offending. The decision of an expert Tribunal should be respected and it was necessary to prove that there had been a material error of law. The judge had directed herself correctly. The judge's approach had been even-handed and looked at cumulatively the appellant had ties in the UK and a lack of ties in Colombia. The offences were some seven years ago and could be looked at as a single offence. The appellant had been of previous good character and had undertaken courses in prison.

10. In response Mr Armstrong acknowledged that the judge had referred to **Chege** but had not considered Section 117C. He submitted that while the judge had set out the law in paragraph 51 it was not shown where the compelling circumstances were. The appellant did not live with his fiancée. No proper assessment had been made by reference to Section 117C(4).

11. If a material error of law was identified the appeal should be remitted for a fresh hearing de novo and I was not invited by Mr Armstrong to preserve any of the findings of fact.

12. At the conclusion of the submissions I reserved my decision. I remind myself that I can only interfere with the decision if it is was materially flawed in law. When reading the determination it has to be said that the conclusion of the judge in paragraph 55 comes as somewhat of a surprise given the number of negative findings made in respect of the appellant. Counsel argued that the determination showed a balanced approach.

13. One feature is the issue of the appellant's claimed remorse. Frequently during the course of the determination the judge rejects the appellant's expression of remorse – for example in paragraphs 38 and 45. In paragraph 41 she noted that while the appellant had expressed remorse this was primarily because his actions had caused significant upset to his family and had disrupted his plans to study and follow a career or start a business. She also found that the appellant's evidence about the impact of his actions on his victims was minimal. He had still sought to blame his co-defendant. In paragraph 52 the judge simply records Counsel's submission that the appellant had pleaded guilty and had shown remorse. It is also to be noted that the judge found that what the appellant had said to the probation officer did not tally with the judge's sentencing remarks. In fairness to the judge she does note the criticisms made by the Presenting Officer but it has to be said it is difficult to reconcile the detailed fact-finding with the decision reached.

14. As is submitted by Mr Armstrong this is a case involving serious offences against members of the public. It is a case in which the requirements of the legislation and the Rules need to be followed particularly where the determination was by no means overwhelmingly positive in favour of the appellant on issues such as remorse.

15. The closest one comes in the reasoning to any difficulties in returning to Colombia would be that the appellant did not have "a network of support" there which would enable him to settle. It would be very difficult to read this as satisfying the requirement that there should be "very significant obstacles" to the appellant's integration into Colombia. As submitted by Mr Armstrong the judge does not appear to have taken into account Section 117C(4). The same point can be made by reference to Rule 399A(c). It is not clear from the determination whether the judge found that either of these paragraphs applied. Of course if they do not it would be necessary to identify "very compelling circumstances over and above those described" in those paragraphs.

16. In my view the judge's decision is flawed by failing to deal expressly or even by implication with the learning which I accept had been set out at an earlier stage in the decision. This is not a decision where an inference can be drawn that matters were approached correctly and I accept the submissions made on behalf of Mr Armstrong.

17. The determination was flawed by a material error of law. Both sides were in agreement that should I so find a fresh hearing de novo was required. It was accepted by Mr Armstrong that none of the negative factual analysis should be preserved. The hearing will be de novo.

Notice of Decision

The appeal is allowed and remitted to the First-tier Tribunal for a fresh hearing before a different First-tier Judge.

Anonymity Order

The First-tier Judge made no anonymity order and I make none.

TO THE RESPONDENT
FEE AWARD

The First-tier Judge made no fee award and I make none.

Signed Date 3 August 2017

G Warr, Judge of the Upper Tribunal