Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/06907/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30th October 2017	**On 09th November 2017**

Before

UPPER TRIBUNAL JUDGE KING TD

Between

DB
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr.A.Eaton,of Counsel, instructed by Shaddai & Company
For the Respondent: Mr P Duffy, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Algeria seeking to appeal against the respondent's decision dated 16th June 2016 to deport him from the jurisdiction.

2. On 17th January 2015 the appellant committed offences involving drugs, possession of money pertaining to the proceeds of crime and possession of offensive weapon. On 4th June 2015 he was convicted for possessing a controlled drug with intent to supply and for using or possessing criminal property. He was sentenced to four months' imprisonment in relation to one offence and eight months' imprisonment in

respect of another, to be served consecutively, making a sentence of twelve months' imprisonment.

3. The appellant's appeal came before First-tier Tribunal Judge Davey for hearing on 20th March 2017. The asylum claim was dismissed on its merits. In terms of the claims for human rights the Judge noted that the appellant was a foreign criminal and proceeded to evaluate the matter in the light of the undoubted interest of the public in deportation, having regards to paragraphs 396, 398, 399 and 399A, together with Section 117C of the 2002 Act. The claim for human rights was dismissed.

4. The appellant sought to appeal against that decision on the basis that the Judge had fallen into error in considering him to be a foreign criminal on the basis of his consecutive sentence. Reliance was placed upon **Olo & Ors (para 398 - "foreign criminal") [2016] UKUT 0056 (IAC)**. In that case it was held that consecutive sentences totalling twelve months did not make an appellant a foreign criminal under the Immigration Rules or for the purposes of Section 117C.

5. Thus the matter came before me to determine the issue on 10th July 2017. It was conceded most fairly by Mr Duffy that the Judge was indeed in error in taking that approach, but I was invited to find that the error was not in the event a material one as the appellant was undoubtedly a foreign criminal within the terms of 117D(2) of the Nationality, Immigration and Asylum Act 2002. He had been convicted of an offence that had caused serious harm.

6. I adjourned the matter for both parties to advance their respective arguments on that issue. I am grateful to both for their submissions.

7. Mr Duffy draws my attention to the terms of Section 117D(2) which defines a foreign criminal as a person –

   (a) who is not a British citizen,

   (b) who has been convicted in the United Kingdom of an offence, and

   (c) who—

      (i) has been sentenced to a period of imprisonment of at least 12 months,

      (ii) has been convicted of an offence that has caused serious harm, or

      (iii) is a persistent offender.

8. Mr Duffy indicates that it was always the intention of the Secretary of State to treat the appellant as a foreign criminal on the basis he had been convicted of an offence which has caused serious harm. In that connection my attention was drawn to the decision of 16th June 2016 and particularly to the passage dealing with reasons for deportation which are as follows:-

> "On 18 May 2015, at North London Magistrates' Court, you were convicted of one count of possessing an offensive weapon in a public place. On 4 June 2015, at Blackfriars Crown Court, you were convicted of one count of possessing a controlled drug of Class B (Cannabis) with intent to supply, and one count of acquiring, using or possessing criminal property. On 7 August 2015, at Blackfriars Crown Court, you were sentenced to four months' imprisonment for the conviction you received on 18 May 2015 and eight months' imprisonment (comprised of concurrent sentences of one month and eight months) for the conviction you received on 4 June 2015. Both sentences were ordered to be consecutively, thereby making a total sentence of 12 months' imprisonment."

9. The decision goes on in a later paragraph:-

> "Your deportation is conducive to the public good and in the public interest because you have been convicted of an offence which has caused serious harm. This is because on 18 May 2015, at North London Magistrates' Court, you were convicted of one count of possessing an offensive weapon in a public place, and on 4 June 2015, at Blackfriars Crown Court, you were convicted of one count of possessing a controlled drug of Class B (cannabis) with intent to supply, and one count of acquiring, using or possessing criminal property. Therefore, in accordance with paragraph 398 of the Immigration Rules, the public interest requires your deportation unless an exception to deportation applies. The exceptions are set out at paragraphs 399 and 399A of the Immigration Rules."

10. Thus Mr Duffy submits that the appellant is rightly to be treated as a foreign criminal, accordingly there was no material error in the approach taken by First-tier Tribunal Judge Davey.

11. Mr Eaton, in his submissions, contends that the view of the Secretary of State as to seriousness should not be treated by the Tribunal as determinative, but that there should be an evaluation of whether the offence is, in itself, one that should be so described. He submits that a blanket approach with regard to all offences is not the appropriate way to approach this matter. This is an offence involving class B drugs rather than class A. He submits that it cannot safely simply be said that the offence without more meets that stringent test and that a Judge, properly considering the matter, may have come to a different conclusion. If the appellant is not to be regarded as a foreign criminal then other considerations fall to be applied relating more to his human rights than to the statutory framework which otherwise would be in place. He invites me to overturn the decision and send the matter back to the First-tier Tribunal for a Judge to determine the issue of whether or not the appellant is indeed a foreign criminal. In the course of his submissions Mr Eaton relied upon a number of authorities.

12. It is to be noted that there is no definition of what causing serious harm means in the context of the Immigration Rules, or indeed within Section 117.

13. Some guidance has been provided by the Home Office in their policy "Criminality: Article 8 ECHR cases" published on 22nd February 2017.

14. That sets out the definition of serious harm as follows:-

> "It is at the discretion of the Secretary of State whether she considers an offence to have caused serious harm.
>
> An offence that has caused 'serious harm' means an offence that has caused serious physical or psychological harm to a victim or victims, or that has contributed to a widespread problem that causes serious harm to a community or to society in general.
>
> The foreign criminal does not have to have been convicted in relation to any serious harm which followed from their offence. For example, they may fit within this provision if they are convicted of a lesser offence because it cannot be proved beyond reasonable doubt that they were guilty of a separate offence in relation to the serious harm which resulted from their actions.
>
> Where a person has been convicted of one or more violent, drugs or sex offences, they will usually be considered to have been convicted of an offence that has caused serious harm."

15. The nature of the appellant's offence is helpfully set out in the course of the sentencing remarks by the Judge on 7th August 2015 to be found at pages 148 onwards in the Tribunal bundle. It is to be noted that the sentence which would otherwise have been imposed was reduced because of a guilty plea.

16. The appellant was in the street with some twenty wraps of cannabis (27.2 gms) in his possession. He was in the course of selling one wrap to a purchaser in the street. He had two mobile phones in his possession, a bladed lock knife with a five inch blade and £600 in cash. His explanation for the knife was that it was for his defence. It was the view of the Judge that this was plainly street dealing and as such a commercial activity to be regarded within category 3 of the guidelines. It was found that the appellant was playing a mid-role, which was a significant role, because he was motivated by financial gain and had an operational function within the chain in terms of final sale to an end user. The £600 was obviously a float and receipts from previous deals of what would seem to have been a tolerably profitable activity. No other source of income had been suggested to explain his survival without proper lawful employment.
17. The Judge considered whether the sentence should be suspended but noted that drug dealing was a serious matter, such that a sentence of imprisonment was inevitable. That which was to be imposed was reduced because of his guilty plea. As to the knife, the Judge took a serious view of that, rejecting the submissions that it was in his pocket accidentally and imposed a custodial sentence in respect of that.

18. My attention has been drawn to the decision of **LT (Kosovo) and DC (Jamaica) [2016] EWCA Civ 1246** as promulgated by the Court of Appeal on 28th June 2016.

19. The two appeals raised a common question, namely "Should an offence of supplying a class A drug fall to be treated as causing 'serious harm' within the meaning of paragraph 398(c) of the Immigration Rules, regardless of the particular circumstances of offending?".

20. In the case of LT he was convicted of supplying cocaine by way of a single deal to a friend in a small quantity. He was sentenced to fifteen months' imprisonment which was subsequently reduced to ten months.

21. DC was convicted of a single supply of a class A drug and sentenced to 42 weeks' imprisonment.

22. The primary argument addressed to the Court of Appeal was that paragraph 398(c) of the Rules requires the decision maker to arrive at a judgment informed by the particular facts of the case. It should not be assumed that every single incidence of supplying class A drugs as a matter of fact causes serious harm.

23. The Court of Appeal noted that serious harm is not one that is defined in the Rules but noted the policy.

24. It was the argument advanced on behalf of the Secretary of State that substantial weight should be accorded by the Tribunals to her view as to what offences cause serious harm. Attention was drawn to the court's recognition in **N (Kenya) [2004] EWCA Civ 1094** that the Secretary of State is best placed to consider whether deportation is conducive to the public good. The Court considered that the Secretary of State was entitled to regard class A drug trafficking offences as very serious and ones which are particularly serious and harmful to society. Clearly Tribunals are not bound by that opinion, but are required to treat the view of the Secretary of State as an important relevant factor. Comment was made in paragraph 21 of the judgment that this approach would also be applied in relation to Section 117C and D of the 2002 Act.

25. The comment was made in paragraph 24 of the judgment as follows:-

> "As to that, I can well see that the proposition that all drugs offences are by their nature serious may be questionable, but what matters here is the Secretary of State's undoubted view that supplying Class A drugs causes serious harm. In my judgment, that is a perfectly reasonable view, though Mr Sedon would not have it so. He submitted today that the Secretary of State would have to provide narrative reasons for taking such a view; reasons which would demonstrate a particular expertise. I do not agree. It is a matter of social and moral judgement. The Secretary of State with her constitutional responsibilities is entitled to take the overall view she did and express it as she has. She was entitled to take that view in both of these cases. Her doing so was not repugnant to her extant policy."

26. In the event the Court of Appeal upheld the Tribunal decision in both cases and dismissed the appeals of LT and DC.

27. As Mr Eaton submits, this of course is a case involving class B drugs. However this is not simply a supply of drugs to a friend but was, in the findings of the sentencing judge, a commercial enterprise for gain supplying a considerable amount of drugs and no doubt having supplied others for gain previously. The amount of money was reflective of the degree of trade. The presence of a knife was also a serious matter. It is difficult to conceive of commercial dealings of drugs of whatever category in the street as not contributing to drug use and drug abuse in the community. Insofar as the knife was concerned, it has been an increasing problem of knife crime in UK cities, such that the tariff of sentencing has increased in order to deter and to punish. It is difficult, when considering the definition of serious harm set out in the policy, to conclude otherwise than it applies, particularly in the circumstances of the applicant. As was made clear by the Court of Appeal in **LT** that considerable weight should be afforded to the view of the Secretary of State who is charged with maintaining order and control.

28. Mr Eaton also relies upon a decision of Upper Tribunal Judge Finch of 3rd July 2017 in the matter of **Wondeyohannes (JR/9392/2016**). It seems to me that in that decision the Judge says little more than was dealt with by the Court of Appeal, simply stressing that it was not sufficient for the respondent simply to rely on a criminal Judge's sentencing remarks. There is no indication that that was the case here.

29. The final case was that of **Chege [2016] UKUT 187 (IAC)**. That was a decision as to whether an appellant constituted a persistent offender with the significance of a "spent" offence. For my part I find it of little assistance in the current circumstance. There is possibly an argument to be advanced that the appellant was also a persistent offender, but that is not what is relied upon in the circumstances of this appeal.

30. Clearly the class of drug is a relevant consideration in considering the serious nature of the offence and the harm which it causes. That must of course be dependent upon the nature of the dealing of the commercial exploitation. As I have indicated, it is not simply somebody supplying a wrap of drug to a friend, but is part of a much wider commercial organisation.

31. The issue in this appeal is a simple one – whether or not the Judge would have upheld the contention made by the Secretary of State that the offence was one causing serious harm, in which case the appellant would remain a foreign criminal. I have no doubt, that had the Judge applied the correct principles to the consideration of the offence, he would have upheld the Secretary of State in her view. In that event the appellant would have remained classed as a "foreign criminal" for the purposes of the further human rights analysis. It has not been suggested that the analysis itself is flawed on such a basis.

32. In those circumstances I do not find that the error of law is material to the outcome of the decision.

33. In the alternative, had there been any doubt as to the Judge's approach, the decision would have been set aside for me to remake and I would have held that indeed the appellant was a foreign criminal and applied the principles accordingly.

Notice of Decision

34. In all the circumstances therefore the appeal before the Upper Tribunal is dismissed. The decision of the First-tier Tribunal shall stand, namely that the appellant's appeal in respect of asylum, deportation and human rights stand to be 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 Date 8 November 2017

Upper Tribunal Judge King TD