Crime brief

David Walbank KC examines what a 'foreign criminal' can be expected to do to escape homophobic violence following deportation

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IN BRIEF

- Persecution of the LGBQT community in foreign states.
- Deportation of 'foreign criminals'.
- Relevance of criminal convictions in the UK.

The World Cup in Qatar has put the whole issue of LGBQT rights under the spotlight and has forcefully reminded us that the liberal approach of the Western democracies is by no means mirrored across the globe, even in those states that wish to gain acceptance among the family of nations. The treatment of those who identify as gay, lesbian, bisexual, transgender or non-binary arises with increasing frequency in the criminal courts, not least when it comes to the rights of individuals whom the government wishes to deport to their countries of origin. It recently came before the Supreme Court in *SC (Jamaica) v Secretary of State for the Home Department* [2022] UKSC 15, [2022] All ER (D) 38 (Jun).

Fleeing Jamaica

SC was born in Jamaica in 1991. His mother worked as a go-go dancer in the capital, Kingston. She was a lesbian and had been in relationships with a number of women. In Jamaica LGBQT individuals are harassed and persecuted and its notorious criminal gangs often mete out extreme violence against those who are openly homosexual or non-binary and against members of their families. SC's mother, her girlfriends, SC himself and other family members were all subjected to a campaign of horrific and life-threatening violence and abuse. The mother was beaten, stabbed and raped, often in front of her young son. Her mother was physically and verbally abused and her sister was threatened. Her brothers were shot but survived. Gang members even attempted to rape SC himself, and at one point he was abducted. Eventually, by 1999 and in fear of her life, SC's mother felt she had no choice but to flee Jamaica for the UK. SC, who by then was eight years old, was left behind in Kingston in the care of his maternal grandmother. Two years later, now aged ten years, he joined his mother in the United Kingdom. The year after that, in 2002, his mother applied for and was ultimately granted asylum here, and she and her son were granted indefinite leave to remain as refugees.

The UK had provided a safe haven to SC and his mother, distancing them from the cycle of violence and facilitating their escape from a twilight existence marred by fear, harassment, persecution, and almost constant threats to life and limb. The problem, though, was that SC had not responded in kind. Instead, he had gone on to commit a string of violent offences including robbery, assault, knife crimes and using threatening, abusive or insulting words or behaviour. Eventually, in 2012—so 11 years after he first came to the UK—he was convicted of actual bodily harm (ABH), having a bladed article and breaching an anti-social behaviour order (ASBO).

As a Jamaican national, he fell within the definition of a 'foreign criminal' for the purposes of the Nationality, Immigration and Asylum Act 2002 and the UK Borders Act 2007. That meant that the then home secretary, Theresa May MP, was under a duty to deport him ***unless*** his removal back to his country of origin would breach his rights under the European Convention on Human Rights (ECHR) or the Refugee Convention. So it was that the Home Office made what its officials described as an 'automatic' deportation order.

The findings of the courts

The First-tier Tribunal (FTT) allowed SC's appeal, finding that, were he deported to the capital, Kingston, there was, owing to his mother's sexuality, a real risk that he would be subjected to torture or to inhuman or degrading treatment, and holding that he could not be expected to mitigate that risk by relocating within Jamaica to one of the more rural areas. The Upper Tribunal agreed.

However, on a further appeal by the secretary of state, the Court of Appeal held that both tribunals had been wrong to leave out of account SC's criminal convictions. On a further appeal to the Supreme Court, Lord Stephens encapsulated the issue thus:

> 'The first issue in this appeal is whether SC's criminal conduct in the UK is a factor relevant in determining if he could reasonably be expected to stay in a rural area of Jamaica, so that, for instance his criminality may turn internal relocation from what would otherwise be unreasonable into what is reasonable based on a value judgement of what is "due" to him as a criminal. Accordingly, does internal relocation in Jamaica, which is unreasonable apart from SC's criminal conduct in the UK, become reasonable because he has committed serious offences in the UK?'

In addressing that question, Lord Stephens then reasoned as follows. What was needed was a holistic approach, taking into account all the circumstances, including past persecution or fear of persecution, the deportee's health and psychological condition, their social situation and family circumstances and, ultimately, their capacity for survival. Neither their criminal history nor a value judgement that deportation was 'their due as a convicted criminal' had any bearing on whether internal relocation would be unduly harsh or unreasonable.

The FTT's finding to the effect that it would be unreasonable for SC to have to relocate to a rural part of Jamaica was unanswerable, given that he had not been back to Jamaica for over 20 years or had any contact with anyone there, he had no family or personal connections, he was unfamiliar with any of the country outside the capital, and he had for a long time been entirely separated from Jamaican society and culture. Accordingly, the home secretary's deportation decision had been incompatible with SC's rights under Art 3 of the ECHR and unlawful. **NLJ**

David Walbank KC is a member of Red Lion Chambers and the founder of the updating website *www.crimecast.law* on which he presents video case reviews of recent judgments. The site currently hosts more than 200 free-to-view videos.