Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/02117/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
Oral judgment given at hearing On 11 July 2014	**On 26 August 2014**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

REDA LEGHMIZI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Khubber, Counsel instructed by J D Spicer Zeb Solicitors
For the Respondent: Ms A Everett, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Algeria who was born on 18 December 1971. He claims to have arrived in the UK in November 2000 although the First-tier Tribunal whose decision I refer to below found that in fact he arrived in 2004.

2. On 16 July 2004, in the Crown Court at Lewes, the appellant was convicted of an offence that is described as assisting illegal immigration. He pleaded guilty to that offence and received a sentence of eighteen months'

imprisonment. He was released from the custodial sentence on 5 April 2005.

3. A claim for asylum was made on 10 September 2004 but it seems that the appellant was un-cooperative in prosecuting the claim for asylum in terms of completing relevant forms and it is said that he further failed to comply with the process later on in September 2004. He was apparently sent a letter later in 2004, in November, stating that his asylum claim would be refused on non-compliance grounds if he refused to comply with the process. Ultimately, his claim for asylum was refused in 2005. As already indicated, he was released from his sentence of imprisonment on 5 April 2005.

4. It may be, although it is not clear from the chronology, that there was an appeal against the refusal of the asylum claim but for present purposes that is not an issue that is particularly relevant.

5. Between 2005 and 2010 the appellant was classed as an absconder, having failed to comply with restrictions on his immigration status. He next made himself known to immigration authorities in April 2010 through a letter from his representatives submitting further, or new, representations.

6. The response from the Home Office was in February 2011 stating that he had no further basis of stay in the United Kingdom. There was a judicial review which I understand was in relation to 'legacy' issues, or at least a threatened judicial review, which ultimately seems to have been settled by consent.

7. On 30 July 2013 he was served with a notice of liability to deportation and that process resulted in a decision dated 7 October 2013 being a decision to make a deportation order on the basis that his removal from the UK was conducive to the public good. His appeal against that decision came before the First-tier Tribunal on 28 April 2014, the panel consisting of First-tier Tribunal Judge Herbert and Mr J. O. De Barros, a non-legal member. The Tribunal dismissed the appellant's appeal on all grounds.

8. In the determination the panel set out the appellant's immigration history, recorded the oral evidence given by him, and the stance taken by the respondent in relation to his removal. In their findings it is clear that they did not accept that the appellant had given a credible account in terms of the asylum ground of appeal which they dismissed. No complaint is made in the grounds before the Upper Tribunal in relation to the dismissal of that aspect of the appeal.

9. It is however contended that the First-tier Tribunal erred in its assessment of the deportation issue. The matter that was most forcefully put before me in oral submissions is in relation to the question of whether the appellant was liable to deportation and in that respect the decision of the Upper Tribunal in Bah (EO (Turkey)) – liability to deport) [2012] UKUT

00196 (IAC) is relied on. In that case the Upper Tribunal considered the question of liability to deportation. It was decided that in a deportation appeal that was not an automatic deportation under Section 32 of the UK Borders Act 2007, the sequence of decision-making set out in EO (deportation appeals: scope and process) Turkey [2007] UKAIT 62 still applies but the first step (in that decision) was to be expanded to the following effect:

> "(i) Consider whether the person is liable to be deported on the grounds set out by the Secretary of State. This will normally involve the judge examining:
>
> a. Whether the material facts alleged by the Secretary of State are accepted and if not whether they are made out to the civil standard flexibly applied;
>
> b. Whether on the facts established viewed as a whole the conduct character or associations reach such a level of seriousness as to justify a decision to deport;
>
> c. In considering b), the judge will take account of any lawful policy of the Secretary of State relevant to the exercise of the discretion to deport and whether the discretion has been exercised in accordance with that policy;"

10. Mr Khubber referred to various aspects of the decision in Bah in support of the proposition that the first task of the Tribunal in this case in relation to the deportation issue was to consider the liability to deportation and the exercise of discretion that is inherent in it.

11. I was also referred to the detailed skeleton argument that was put before the First-tier Tribunal in which this issue is flagged up in terms of whether the decision is in accordance with the law. That appears effectively as the first issue at [3a] of the skeleton argument, where it is dealt with comprehensively. It is submitted that contrary to the correct approach set out in Bah the First-tier Tribunal did not turn its mind to that first and important issue until later on in the determination at [76] whereby it stated that the deportation of the appellant is conducive to the public good notwithstanding that he has not committed any further offences for a period of nine years and the fact there is little or no obvious risk of re-offending. That conclusion was foreshadowed in the previous paragraph, [75], where the decision in Bah is referred to.

12. It is submitted on behalf of the appellant that this is not an argument simply about a technical or structural approach to the appeal but is an argument that has underlying substance. In that regard I was referred to the detailed chronology which includes instances, of which I think four were cited, whereby up until 2011 and certainly between 2004 and 2005, the Secretary of State had opportunities to make a decision that the appellant should be deported. No such decision was made until after the 'legacy' issue was resolved, if resolved is the right word.

13. The proposition contended for plainly involves the question of delay. The First-tier Tribunal did deal with delay at [65] of the determination. There it is stated that that period of delay had benefited the appellant because, if a decision had been taken at the relevant time, it is almost certain that it would have been a decision that would have been effected, that is his removal would have been effected.

14. At [57] the Tribunal stated that "There has clearly been an inordinate delay in relation to the decision by the Respondent to deport the Appellant". Again it is there stated that he had benefited from that delay because he had "enjoyed life" in the United Kingdom instead of being removed and that if the deportation proceedings had commenced much earlier his removal would have happened by now.

15. I am in due course going to refer to the other grounds of appeal but it is as well to deal with this one first because it was the one that was most forcefully relied on in oral submissions and it perhaps is the most significant ground of appeal.

16. It is clear that there are deficiencies in this determination and I shall refer in a few moments to some of them. There was a structural deficiency in the way that the Tribunal approached the question of liability to deportation and indeed other issues. I am however, satisfied that the Tribunal did consider the question of the appellant's liability to deportation for itself and did not accept it as a 'given' as Bah has said is no longer to be done.

17. At [75], in relation to Bah, the Tribunal stated as follows:

> "We recognise the authority set out in paragraph 26 and 31 of **Bah (EO (Turkey) – liability to deport) [2012] UKUT 00196 (IAC)** that the Appellate body has jurisdiction to consider the exercise of discretion to make a deportation order, and in doing so can consider for itself whether the individual's deportation is conducive to the public good."

At [76] it was concluded that the deportation of the appellant is conducive to the public good, with the remainder of the paragraph as previously quoted.

18. Whilst it would undoubtedly have been better for this issue to have been considered as a first issue as clearly indicated in the decision in Bah, I am not satisfied that the manner in which the issue was considered amounts to an error of law, or if it does, that it is an error of law that requires the decision to be set aside. The Tribunal did have in mind the period of the delay which was accepted as being an inordinate period of delay. Whilst its reasons for concluding that that period was not significant in terms of the appellant having had the "benefit" of the delay the panel could equally have referred to the fact that the appellant had absconded for five years between 2005 and 2010 and also the fact that he had no right to be in the United Kingdom. It seems to me that those matters would have weighed

against the appellant in the assessment of whether he was liable to deportation.

19. So far as the other grounds are concerned, reference is made to [58] of the determination whereby the panel stated that "there were no exceptional circumstances which meant that the burden of removing the presumption in favour of deportation was overturned." It was noted that the appellant has no children or partner in the United Kingdom.

20. The grounds understandably contend that it is not clear what the Tribunal was referring to in that paragraph in that it was not clear where the presumption referred to is, or where the exceptional circumstances requirement lies. However, it seems to me to be reasonably apparent that what the Tribunal was referring to there was the Immigration Rules in relation to deportation and the requirement for exceptional circumstances.

21. The overall thrust of the grounds of appeal as supplemented by the submissions to me today was in relation, effectively, to the 'structure' of the determination, the grounds starting with the contention that the Tribunal failed to adopt a structured approach to the legal issues in the appeal. I mention that not to minimise the arguments but to indicate that that was the overarching contention on behalf of the appellant. Of course, underlying that contention are arguments about alleged significant failures in the determination in relation to its approach.

22. I do agree that this determination is structurally deficient. It is also the case that at times there is a conflation of legal principles, for example at [64] where it is said that the appellant's removal cannot be said to be disproportionate to the maintenance of immigration control "given the fact that he has been convicted of quite a serious offence in 2004". This is an obvious conflation of issues, albeit one that is not complained about in submissions, the skeleton argument or in the grounds before me.

23. There is also a lack of logical reasoning in terms of the reasoning process. The determination in this respect for example deals with the Immigration Rules, at least by implication, at [58], then moves on at [59] and [60] to deal with Articles 8 and 3 in terms of medical conditions. The determination then returns to the Immigration Rules at [61] (misquoting paragraph 399A and writing it as 339A). Then of course there is the question of whether the appellant's deportation is conducive to the public good which was considered towards, if not at the end of, the determination.

24. It is plain then, that there are deficiencies in the panel's determination, but it is necessary to take a step back from those deficiencies and look at the substance of the determination and the underlying facts. The appellant was convicted of a serious offence in relation to the system of immigration control. He is someone who has a very poor immigration history which is relevant to the question of delay. It is possible to see from the determination, although I do not say without any effort, what

conclusions the panel came to and what legal principles were applied. There is more that could have been said against the appellant in terms of the public interest.

25. In conclusion, even if an error or errors of law in the First-tier Tribunal's determination can be identified, it or they, do not require the decision to be set aside. Notwithstanding the clear and helpful submissions made on behalf of the appellant, the decision of the First-tier Tribunal to dismiss the appeal on all grounds stands.

Upper Tribunal Judge Kopieczek 26/08/14