Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00391/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 December 2015	**On 29 December 2015**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR ANDRE ALROY REID
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr Kandola, Senior Home Office Presenting Officer
For the Respondent: Mr Haywood, Counsel

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
No anonymity order was made by the First-tier Tribunal. I find that no particular issues arise on the facts of this case that give rise to the need for a direction. For this reason no anonymity direction is made.

DECISION AND REASONS

Background

1. This is an appeal by the Secretary of State. For ease of reference, I refer below to the parties as they were in the First-Tier Tribunal albeit that the Secretary of State is technically the Appellant in this particular appeal. The Secretary of State appeals against a decision of First-Tier Tribunal Judge Traynor promulgated on 23 September 2015 ("the Decision") allowing the Appellant's appeal against the Secretary of State's decision dated 26 February 2014 that section 32 UK Borders Act 2007 applies and making a deportation order against him dated 20 February 2014.

2. The background immigration and offending history is largely irrelevant to the error of law which the Respondent asserts. However, since if I find an error of law, it is agreed that the appeal must be remitted to the First-Tier Tribunal for determination, it may assist if I record the salient facts. The Appellant is from Jamaica. He entered the UK in 1995 aged six years. He remained lawfully and was granted indefinite leave to remain in 1998. He was convicted in 2013 for possession with intent to supply Class A drugs and sentenced to two years and nine months imprisonment.

3. The primary factual focus for the issue before me relates to the Appellant's mental health. As recorded at [5] of the Decision, the appeal against the Respondent's decision was listed for a case management hearing on 3 April 2014. It was listed for a substantive hearing on 15 September 2014. It was adjourned due to deterioration in the Appellant's mental health. At the adjourned hearing on 10 November 2014, the Respondent acknowledged that the Secretary of State had approved a transfer direction under section 47 Mental Health Act 1983 on 13 October 2014. Mr Haywood told me that it was submitted at that hearing that the appeal should be allowed on the basis of that transfer order but the First-Tier Tribunal Judge declined to do so. Instead, the Judge adjourned the hearing again to a further case management hearing on 9 December 2014 to enable the Respondent to consider the effect of the transfer direction. Mr Kandola informed me that according to minutes on the Home Office file the case was sent to the Criminal Casework team for review on 3 November 2014 on the basis of the transfer order being in place. The file indicated that the case was looked at on 6, 13 and 19 November 2014 and was noted as waiting for a decision but he fairly accepted that nothing further was done and no further decision was ever made. Mr Haywood described that conduct as "unconscionable". There were subsequent case management hearings on 9 December 2014, 15 January, 2 February and 7 April 2015 before the appeal was eventually listed for a substantive hearing on 10 September 2015. Meanwhile, the section 47 transfer order had been discharged, I am told on 19 January 2015.

4. At the hearing on 10 September 2015, the Judge was invited to deal as a preliminary issue with whether the appeal should be allowed on the basis that the Respondent's decision was not in accordance with the

law. The Judge did so and concluded at [23] of the Decision with the following:-

> "I find that the Respondent's failure to consider whether one of the Exceptions in Section 33 applies, and thereafter the failure to consider the revocation of the Deportation Order under the provisions of Section 32(6) and to assess if it is conducive to the public good of the United Kingdom for the Appellant to be deported in accordance with the terms of Section 3(5)(a) of the Immigration Act 1971, that this does render the decision as one which is not in accordance with the law"

5. It is common ground that there was no section 47 transfer order in place either at the date of the Respondent's decision or at the date of the final hearing before the First-Tier Tribunal Judge on 10 September 2015. It is also common ground that if there had been a section 47 transfer order in place at the date of the Respondent's decision, exception 5 in section 33(6) of the UK Borders Act 2007 would operate to prevent the application of section 32(4) and section 32 (5) of that Act. It is also common ground that the effect of this is that the presumption of deportation does not apply. It is common ground that the impact of section 33(7) is that the invocation of exception 5 does not prevent the making of a deportation but results in it not being assumed either way that deportation is or is not conducive to the public good. The Respondent could still make a deportation order.

6. The issue is therefore a narrow one in relation to timing. The Respondent submits that the material error was in the Judge finding that the deportation order was not in accordance with the law when the transfer order was not in force at the date of the Respondent's decision and it was accepted that the section 47 order was no longer in force by the date of the substantive hearing. The Respondent also submitted that section 33(7) did not prevent the making of a deportation order in any event. Permission to appeal was granted on all grounds by Upper Tribunal Judge Martin on 16 October 2015.

The Law

UK Borders Act 2007

"**32 Automatic deportation**

...

(4) For the purpose of section 3(5)(a) of the Immigration Act 1971 (c. 77) the deportation of a foreign criminal is conducive to the public good.

(5) The Secretary of State must make a deportation order in respect of a foreign criminal (subject to section 33)

(6) The Secretary of State may not revoke a deportation order made in accordance with subsection (5) unless –

(a) he thinks that an exception under section 33 applies,

(b) the application for revocation is made while the foreign criminal is outside the United Kingdom, or

(c) section 34(4) applies

…

33 Exceptions

(1) Section 32(4) and (5) –

(a) do not apply where an exception in this section applies (subject to subsection (7) below) …

…

(6) Exception 5 is where any of the following has effect in respect of the foreign criminal-

…

(c) a transfer direction under section 47 of that Act

…

(7) The application of an exception –

(a) does not prevent the making of a deportation order;

(b) results in it being assumed neither that deportation of the person concerned is conducive to the public good nor that it is not conducive to the public good;

but section 32(4) applies despite the application of Exception 1 or 4.

34 Timing

(1) Section 32(5) requires a deportation order to be made at a time chosen by the Secretary of State

…

(4) The Secretary of State may withdraw a decision that section 32(5) applies, or revoke a deportation order made in accordance with section 32(5) for the purpose of –

(a) taking action under the Immigration Acts or rules made under section 3 of the Immigration Act 1971 (c77) (immigration rules) and

(b) subsequently taking a new decision that section 32(5) applies and making a deportation order in accordance with section 32(5)

…"

"Nationality Immigration and Asylum Act 2002

84 Grounds of appeal

(1) An appeal under section 82(1) against an immigration decision must be brought on one or more of the following grounds –

…

(e) that the decision is not otherwise in accordance with the law

…"

Submissions

7. Mr Kandola submitted on the facts of this case, it was not open to the Judge to allow the appeal on the basis that the decision is not in accordance with the law. The section 47 transfer order was not in place at either the date of the Respondent's decision or the date of the final appeal hearing. Sections 32 and 33 are phrased in the present tense namely whether an exception applies and whether the transfer order is in place not whether it has been. Mr Kandola also pointed out that the effect of the Decision and the fact that the exception no longer applied meant that the Respondent could simply make a further deportation order on precisely the same basis.

8. Mr Haywood submitted that the Respondent should not be permitted to avoid the effect of the statute by sitting on her hands. If she had reviewed the case when directed to do so, the transfer order would have been in place and the exception would have applied without any doubt. He submitted that the word "applies" in section 33(1) is open-ended. The exception did apply by the time of the first hearing because at that time the section 47 transfer order was in place. The automatic presumption in favour of deportation as contained in section 32 then ceased to have effect. He submitted also that once the threshold was triggered there was no discretion for the Respondent to do other than revoke or withdraw the deportation order on the basis that the exception applied. He did not accept that revocation required any application by the Appellant; the Respondent could revoke or withdraw of her own motion. He submitted that the exceptions are drafted flexibly so as to accommodate maters that may have existed at the date of the original deportation decision (e.g. the criminal's age at date of the conviction) or apply prospectively (e.g. whether removal would breach the ECHR) or matters which later obtain (e.g. that a person becomes liable for extradition). He submitted that the wording is not tied to the date when the deportation order is made deliberately to permit revocation or withdrawal of the deportation order precisely because, he submits, otherwise once a person falls within the definition of foreign criminal, the Secretary of State is mandated to deport. He submits that if an exception thereafter arises, the Secretary of State is not so mandated and should not deport (or at least not under the automatic deportation regime).

Error of Law Decision and reasons

9. As noted above, the issue is one of timing. On the Respondent's case, it is only if the exception applies at the date of the original decision to deport that she is precluded from reliance on section 32 of the UK Borders Act 2007. Mr Kandola was not inclined to accept that if the Appellant had been subject to a section 47 transfer order at the date

of hearing the Judge would have been entitled to do as he did. That is not however something which I need to decide if I accept the proposition that the relevant date is the date of the Respondent's decision.

10. Consideration of this issue requires attention not only to the provisions of the UK Borders Act 2007 but also to the provisions of the Nationality, Immigration and Asylum Act 2002 and the Tribunal's jurisdiction to allow an appeal on the basis that the decision "is not otherwise in accordance with the law". Both parties accepted that "the law" in this context encompasses the relevant provisions of the 2007 Act. The issue is again one of timing. Is the Tribunal considering the lawfulness of the decision as at the date it was made or as at the date of the hearing? Of course, in other contexts such as appeals on human rights grounds, the Tribunal is considering the issue at the date of the hearing but that is because it is for the Tribunal to decide the issue of whether removal would breach a person's human rights at that point in time. The position is not necessarily the same when the Tribunal is assessing the lawfulness of the decision which is under appeal.

11. The jurisdiction to allow an appeal on the basis that the decision is not in accordance with the law was considered by the Court of Appeal in the case of Secretary of State for the Home Department v D S Abdi [1995] EWCA Civ 27, a decision to which Mr Kandola referred. In that case, the Court compared the jurisdiction to that of judicial review. For that reason, the Court rejected a submission that the Secretary of State's decision could be held to be not in accordance with the law based on a policy which post-dated the decision in question. True it is that the relevant statutory provision at that time was couched in the past tense in terms of whether the decision under appeal was not in accordance with the law. However, section 84 makes clear that what is under consideration is the immigration decision made by the Secretary of State and the fact that the grounds are now couched in the present tense does not seem to me to affect the position as to the date when the legality of the decision falls to be assessed on this ground. Looking at the issue through the prism of judicial review leads to the inescapable conclusion that the relevant point in time is the date of the decision under appeal. Even if I am wrong in that, however, and the relevant point in time is the date of the hearing, that cannot assist the Appellant on the facts of this case. He did not fall within one of the exceptions at that time.

12. The position is not altered by the provisions of the 2007 Act itself. The 2007 Act is also couched in the present tense. As is clear from the wording of the statute, sections 32(4) and 32(5) do not apply if an exception "applies". Exception 5 applies when the transfer order "has effect". The issue is whether there is a transfer order in force currently not whether there has been one in the past. If Mr Haywood were right, then at any point when an exception came into play, the deportation order would become unlawful whether or not the

Secretary of State was aware of the existence of the exception and would remain unlawful thereafter for an undefined period thereby preventing the Secretary of State from relying on the presumptions in section 32. If that had been the intention of the statute, it would have been an easy matter to provide for the exception to apply if at any time there had been a transfer order in place.

13. That is though not the end of the matter. Mr Haywood submits that, once the exception applied, it was incumbent on the Respondent to consider the revocation or withdrawal of the deportation order. That was all the more so here because of her agreement to do that following the November 2014 case management hearing. She should not be entitled to benefit from her failure. I accept that the Respondent's conduct in this case and her failure to review the case at the relevant time is worthy of criticism but that does not mean that the statutory scheme should be rewritten to mark that disapproval. True it is that, having been aware of the transfer order and having been directed to review the case, if she had done so and the transfer order had been in place at the relevant time she would not have been able to rely on the presumptions in section 32. However, as Mr Kandola rightly pointed out, that would not have prevented the re-making of the deportation order. The position now is even more stark because, as Mr Kandola points out, if the Decision stands, it will be for the Secretary of State to reconsider the Appellant's case which will still fall within the provisions of the 2007 Act because the transfer order is no longer in place. The presumptions in section 32 will continue to apply. In that regard, the Judge has also erred in [24] of the Decision where he finds that, following the Decision, the Secretary of State is required to consider the case again under the Immigration Act 1971. The Judge appears to be under the misapprehension that if an exception has applied in the past, the Secretary of State can at no time in the future make a deportation order under the 2007 Act. On a plain reading of the statute and as noted at [12] above, that cannot be the position.

14. For the foregoing reasons, I am satisfied that the Decision does involve the making of a material error of law. Accordingly, I set aside the Decision. Both parties agreed that since the Decision was confined to a determination of the preliminary issue and had not considered the substantive merits of the appeal, the appeal should be remitted to the First-Tier Tribunal if I were to find an error of law as I have done.

DECISION

The First-tier Tribunal decision did involve the making of an error on a point of law.

I set aside the Decision. I remit the appeal to the First-Tier Tribunal for re-hearing. No findings are preserved.

Signed  Date 15 December 2015

Upper Tribunal Judge Smith