Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01481/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 19 October 2015	**On 21 October 2015**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

SHEILA AUXILIA CHIKWARE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J. Walsh, Counsel instructed by Universe Solicitors
For the Respondent: Ms A. Fijiwala, Home Office Presenting Officer

DECISION AND REASONS

Background

1. The appellant appealed against the respondent's decision dated 16 July 2014 to deport her from the UK following her conviction for a number of criminal offences involving the use of false instruments and in making false representations for gain. She was sentenced to a combined total of 21 months imprisonment for offences that took place during the period

2007-2013. First-tier Tribunal Judge Ross dismissed her appeal in a decision promulgated on 24 April 2015.

2. The appellant seeks to challenge the First-tier Tribunal decision on the following grounds:

   (i) The First-tier Tribunal Judge erred in failing to find that the notice of decision was not in accordance with the law. The notice of decision purported to deport the appellant under section 3(5)(a) of the Immigration Act 1971 but no power to deport arose from that section nor a right of appeal.

   (ii) The First-tier Tribunal Judge's finding that the appellant was a "persistent offender" for the purpose of paragraph 398(c) of the immigration rules and section 117D(2)(c)(iii) of the Nationality, Immigration and Asylum Act 2002 ("the NIAA 2002") was perverse because the evidence showed that she was at low risk of reoffending.

3. The matter comes before the Upper Tribunal to determine whether the First-tier Tribunal decision involved the making of an error on a point of law.

4. I heard submissions from both parties, which have been noted in my record of proceedings and where relevant are incorporated into my findings.

Decision and reasons

5. After having considered the grounds of appeal and oral arguments I am not satisfied that the First-tier Tribunal decision involved the making of an error on a point of law.

6. Mr Walsh argued that there was confusion as to whether the respondent had applied the correct statutory framework to the case. In earlier correspondence dated 08 October 2013, inviting the appellant to make representations in relation to proposed deportation, the respondent wrongly stated that the appellant would be deported under the provisions of the UK Borders Act 2007. Although the appellant was sentenced to a total period of 21 months imprisonment none of the individual convictions amounted to a 12 months sentence and she was not therefore liable to automatic deportation.

7. The respondent subsequently made a decision to make a deportation order on 04 April 2014 on the ground that her presence in the United Kingdom was not conducive to the public good. The decision was withdrawn after the appellant became unwell and required treatment. A fresh decision was made on 16 July 2014. That decision is the subject of this appeal. The notice of decision is headed "Decision to make a deportation order". It stated that the respondent deemed it to be conducive to the public good to make a deportation order "by virtue of section 3(5)(a) of the Immigration Act 1971". It went on to state that "this

order requires you to leave the United Kingdom and prohibits you from re-entering while the order is in force".

8. The relevant statutory framework for deportation on the ground that it is conducive to the public good is contained in sections 3(5)(a) and 5(1) of the Immigration Act 1971.

> 3(5) A person who is not a British citizen is liable to deportation from the United Kingdom if:
>
> > (a) the Secretary of state deems his deportation to be conducive to the public good.
>
> ...
>
> 5(1) Where a person is under section 3(5) or (6) above liable to deportation, then subject to the following provisions of this Act the Secretary of state may make a deportation order against him, that is to say an order requiring him to leave and prohibiting him from entering the United Kingdom; and a deportation order against a person shall invalidate any leave to enter or remain in the United Kingdom given him before the order is made or while it is in force.

9. Where a person is not liable to automatic deportation under the UK Borders Act 2007 the respondent can still make a decision to deport using the combined powers contained in sections 3(5)(a) and 5(1) of the Immigration Act 1971. Unlike automatic deportation a deportation order is not signed when the initial decision is made but a "Decision to make a deportation order" is made. It serves as a notice of intention to deport. This decision attracts a right of appeal under section 82(1)(j) of the Nationality, Immigration and Asylum Act 2002 (as applicable at the relevant date of decision). The operative immigration decision for the purpose of this part of the 2002 Act is "a decision to make a deportation order under section 5(1) of that Act".

10. Mr Walsh struggled to identify the exact error that was said to undermine the lawfulness of the decision. In the end it was expressed as little more than "confusion over the statutory framework". While it is clear that notice of decision failed to mention, as would normally be the case, that the decision to make a deportation order was made under section 5(1) with reference to section 3(5)(a) there can be no doubt that the respondent had made a decision that the appellant's deportation following conviction for a number of criminal offences was conducive to the public good. Having decided that the appellant was liable to deportation under section 3(5)(a) the respondent quite clearly had a power to make a "Decision to make a deportation order" under section 5(1) even if it was not expressly stated in the notice of decision. Mr Walsh accepted that the mere fact that section 5(1) was not mentioned did not undermine the lawfulness of the decision. The fact that the decision then purported to state that it was an order that required the appellant to leave the United Kingdom was merely an error in the drafting. The decision quite properly confirmed that the appellant had a right of appeal under section 82(1) of the NIAA 2002.

11. While the "Decision to make a deportation order" was not drafted as accurately as it could and should have been that does not lead to the conclusion that the decision was not in accordance with the law. The appellant had been convicted of a number of criminal offences and the respondent was entitled to conclude that her deportation was conducive to the public good. As such the power to decide to make a deportation order arose under section 5(1) of the Immigration Act 1971 and the "Decision to make a deportation order" was an appealable decision under section 82(1)(j) of the NIAA 2002. The First-tier Tribunal Judge quite clearly took into account the arguments put forward in the appellant's skeleton argument but could not be criticised for concluding that the decision was lawful because it was quite clear that the respondent had power to make a deportation order under section 5(1) [19 & 34]. For the reasons outlined above there is no error in the First-tier Tribunal Judge's reasoning in relation to the lawfulness of the "Decision to make a deportation order" dated 16 July 2014.

12. The second ground of appeal relates to the First-tier Tribunal Judge's finding that the appellant was "a persistent offender" for the purpose of paragraph 398(c) and section 117D(2)(c)(iii) of the NIAA 2002. Mr Walsh argued that there was evidence to show that the appellant was assessed to be a low risk of reoffending and that this should have been taken into account in assessing whether she is a persistent offender. While the risk of reoffending can be relevant to an overall assessment of proportionality the appellant's history of offending behaviour must be central to the assessment of whether a person is "a persistent offender".

13. In this case the appellant was convicted of four counts of using a copy of a false instrument and three counts of dishonestly making false representations for gain. While the convictions and sentencing were all dealt with together in August 2013, and it is true to say that there is no evidence of previous convictions before that date, it is quite clear from the judge's sentencing remarks that the appellant's offending behaviour took place over a long period of time. She used false instruments to work without permission and to obtain a bursary. She also sought accommodation and falsely claimed that she had three children by using false birth certificates. She sought allowances for accommodation that she was not entitled to. The pre-sentence report stated that the offences were carried out repeatedly and over a period of time and that she sought to deceive a number of different government departments [pg.90 appellant's bundle].

14. While the First-tier Tribunal Judge did not give detailed reasons for concluding that the appellant was "a persistent offender" for the purpose of the definitions contained in the immigration rules and the NIAA 2002 I find that this discloses no material error of law [26]. The First-tier Tribunal Judge clearly set out the nature of the offences and the long period of time over which they were committed [7-8]. It was self-evident from the evidence that the appellant could properly be described as a "persistent offender" because she had a number of convictions for various different

dishonesty offences that were carried out over a period of time. It cannot be said that the First-tier Tribunal Judge's findings were outside the range of reasonable responses in relation to the ordinary interpretation of the word "persistent" i.e. continuing to occur over a long period.

15. Even if I am wrong in concluding that the First-tier Tribunal Judge did not err in his assessment of whether the appellant is "a persistent offender" it is difficult to see how this could have been material to the outcome of the appeal. It seems that the appellant did not seek to argue that she came within any of the exceptions to deportation outlined in paragraphs 399 or 399A of the immigration rules or section 177C(4)-(5) of the NIAA 2002 and could only seek to resist deportation on the ground of "very compelling circumstances". Whether she was a "persistent offender" or not the respondent still had a power to make a decision to deport by virtue of section 5(1) of the Immigration Act 1971, which would only be limited by the principle of proportionality. Following the Court of Appeal decision in *MF (Nigeria) v SSHD* [2013] EWCA Civ 1192 the terms of the immigration rules, and in particular paragraph 398, are deemed to be sufficient to encompass a full proportionality assessment. The First-tier Tribunal Judge followed this approach and his findings cannot be criticised.

16. It is quite clear from the scheme of rules and statutory provisions relating to deportation, and a number of recent authorities, that great weight should be placed on the public interest in deportation. No specific challenge has been made to the First-tier Tribunal Judge's findings relating to the proportionality of the decision to deport, which were open to him on the law and evidence. For the reasons given above I conclude that the decision discloses no errors of law that would have made any material difference to the outcome of the appeal. It is understandable that the appellant disagrees with the decision but the respondent's decision to deport her arose directly as a result of her own actions.

17. I conclude that the First-tier Tribunal decision did not involve the making of an error on a point of law and that the decision shall stand.

DECISION

The First-tier Tribunal decision did not involve the making of an error on a point of law

The First-tier Tribunal shall stand

The appeal to the Upper Tribunal is dismissed

Signed  Date 21 October 2015

Upper Tribunal Judge Canavan