IAC-AH-SC-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/32717/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 August 2015	**On 8 September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MR SHARMARKE YUSSUF
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms C Robinson, Counsel instructed by Haringey Migrant Support Centre
For the Respondent: Mr P Duffy, Specialist Appeals Team

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge P-J S White sitting at Richmond on 23 December 2014) dismissing his appeal against the decision of the Secretary of State to revoke his indefinite leave to remain pursuant to Section 76 of the Nationality, Immigration and Asylum Act 2002. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the appellant requires to be accorded anonymity for these proceedings in the Upper Tribunal.

The Grant of Permission

2. On 10 June 2015 Judge Cox granted the appellant permission to appeal for the following reasons:

> "1. The Appellant (A) is a citizen of Somalia. He seeks permission to appeal, two days out of time, against a decision of First-tier Tribunal Judge White whereby he dismissed his appeal against the Respondent's (R's) decision to revoke his indefinite leave to remain pursuant to section 76 of the 2002 Act. In light of the explanation given and representations made at Part B of the application form, I extend time in the interests of justice.
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> 2. I have carefully considered the decision in relation to the grounds, settled by Counsel acting *pro bono*. The grounds in essence contend that the Judge erred in law by taking the view that he could not interfere with R's exercise of discretion and had no power to review the exercise of a statutory discretion. Counsel for A points to section 83(3) of the 2002 Act in support of her contentions and distinguishes *Ukus* on the facts.
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> 3. On consideration, I find the grounds to be arguable in the terms in which they are set forth. Had the Judge accepted he had jurisdiction to review the exercise of statutory discretion, the outcome of the appeal might have been different and therefore the arguable error, if it was such, was material.
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> 4. The grounds disclose an arguable material error of law in the decision and permission is granted."

The Factual Background

3. The appellant's date of birth is 1 January 1982. He entered the United Kingdom on 21 January 2004 and claimed asylum two days later. The asylum claim was initially refused, but the appellant was granted refugee status following a successful appeal. In accordance with the policy and practice at the time, his recognition as a refugee was coupled with a grant of ILR on 13 October 2004.

4. On 14 September 2010 he was convicted of an offence of attempted wounding and sentenced to two years' imprisonment. On 28 March 2011 he was served the notice of intention to deport him. He made no representations in response to that. On 4 May 2011 he was served the notice of intention to revoke his refugee status, and notice of that intent was served on the UNHCR on 9 June 2011. On 22 April 2014 the respondent informed the appellant that she was not pursuing the revocation of his refugee status, but was proposing to revoke his ILR, pursuant to Section 76(1) of the 2002 Act. On 22 July 2014, no response having been received, the appellant's ILR was revoked.

5. The letter of 22 April 2014 rehearsed the appellant's immigration history, including the fact that on 28 March 2011 he had been served with a notice of liability to automatic deportation which included a Section 72 warning. He was liable to deportation, but could not be deported for legal reasons.

So the Home Office was proposing to revoke his ILR in view of the fact that Section 76(1) of the 2002 Act applied.

6. This was reiterated in the letter dated 22 July 2014 explaining the reasons for revoking the appellant's ILR. In the same letter it was said that the appellant had been convicted of a crime which the respondent believed to be sufficiently serious to warrant his deportation. While he could not be deported for legal reasons this did not mean that his crime was not particularly serious. Reference was made to Section 72(2) of the 2002 Act, and the respondent quoted from the judge's sentencing remarks. In light of the above, the Home Office was satisfied that, subsequent to him obtaining ILR, his conduct had been so serious that it warranted the revocation of his ILR status.

The Hearing Before, the Decision of, the First-tier Tribunal

7. The appellant was not represented before the First-tier Tribunal, but had the assistance of a McKenzie friend.

8. The appellant gave evidence that he was being good now, attending school and college and happy with his life. He had given up alcohol and he was a different man. Miss Ryan, who worked at the hostel where the appellant lives (and who was operating as the appellant's McKenzie friend) told the judge that the appellant had been at her hostel since 2012. Living in hostels could be challenging, but he was coping generally. He could eventually go on to independent living, and he could eventually get a job with the help of their employment team.

9. In his subsequent decision, the judge noted that the appellant had not offended again since the index offence which had triggered the decision to revoke his ILR. He continued:

> "13. The letters he produced are from a Key Skills tutor and project worker at St Mungo's. Both indicate that the appellant has made progress while there, and the project worker in particular notes that his previous problematic behaviour was made worse by his level of alcohol use, a point clearly made in the sentencing remarks. She noted that over the last several months (her letter is dated 28th October 2014) the appellant has not been seen drinking or under the influence of alcohol during the day, and his alcohol use is no longer a problem.
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> 14. I note from the sentencing remarks that the offence took place in a hostel for prisoners on licence, and that it was not the appellant's first offence, or indeed his first offence of violence. In 2007 he had been sentenced to 2 years imprisonment for another wounding offence, that being a glassing, and again committed when drunk. It seems clear that the appellant has a significant history of offending, and problems with alcohol, against which the improvement noted at St Mungo's is clearly to his credit.
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> 15. The scope of this appeal is, however, very limited. Section 76 of the 2002 Act provides that indefinite leave may be revoked where a person is liable to deportation but cannot, for legal reasons, be deported. The

appellant is still a Somali national. He has a conviction for which he was sentenced to 2 years imprisonment, which is over the threshold for automatic deportation set by section 32 of the Borders Act 2007, but he retains refugee status. He is thus shown to be within the parameters set by section 76.

16. Section 76 is clearly a discretionary power, and the decision letter makes clear that the respondent appreciated that and considered her discretion, concluding that the seriousness of the offence justified the decision to revoke. There might be scope for an argument that, certainly by the time the decision was finally taken, the appellant had changed so that overall discretion could or should have been exercised in his favour, although given the nature of the offence and the statutory presumption in section 72(2) it may be doubted whether that argument would succeed. This Tribunal has, however, no power to review the exercise of that statutory discretion. The grounds on which the Tribunal can act are set out in section 84 of the 2002 Act, and are that the decision is not according to law (from various sources, including Immigration Rules, or otherwise) or that the decision maker should have exercised differently a discretion conferred by immigration rules. The expression "immigration rules" is defined in section 113 as meaning rules made under section 1(4) of the Immigration Act 1971, and clearly does not extend to other statutes.

17. I am satisfied that the respondent has shown that the power to revoke indefinite leave existed in this case, and that she was aware that the power was discretionary and gave consideration to the exercise of that discretion. I am further satisfied that I have no power, even if I were of the view that it was wrong, and for the avoidance of doubt I am not of that view, to review the way the discretion was in fact exercised. Accordingly the appeal must fail."

The Hearing in the Upper Tribunal

10. At the hearing before me, Ms Robinson developed the grounds of appeal for which permission had been granted. With Mr Duffy's consent, she also raised a fresh ground of appeal based on the decision in **Ali (Section 6 – liable to deportation) Pakistan [2011] UKUT 00250 (IAC)**. She submitted that the ratio of **Ali** was that it was not sufficient for an individual to meet the definition of a foreign criminal under the Borders Act 2007. It was also necessary for the Secretary of State to *deem* the individual's deportation conducive to the public good pursuant to Section 3(5)(a) of the Immigration Act 1971, or there needed to have been a court recommendation for the person's deportation pursuant to Section 3(6) of the 1971 Act. Having considered the documents contained in the respondent's bundle, she submitted that the present case was all fours with **Ali**. While there was a notice of liability to deportation dated 28 March 2011, this did not amount to the Secretary of State deeming the appellant's deportation being conducive to the public good. Moreover, there was no court recommendation for the appellant's deportation. Accordingly the purported revocation of the appellant's ILR was unlawful, and the appellant's appeal should have been allowed on this ground.

11. Mr Duffy accepted that the appellant had a right of appeal against the revocation decision on the ground that the decision was not in accordance with the law. But in order to bring a successful appeal on that ground, the appellant needed to have identified a failure to follow or apply some underlying policy, and no such failure had been identified. There was nothing in the Act itself which said that the Secretary of State had to take into account the time which had elapsed since the index offence, and the fact that the appellant had not reoffended during this period. So the approach of the First-tier Tribunal Judge was correct and/or did not disclose a material error of law. With regard to Ms Robinson's second ground of appeal, he accepted that the ratio of **Ali** was as stated by her. But he submitted that **Ali** was wrongly decided, and I should follow the subsequent decision of a Presidential panel in **Bah (EO (Turkey) – liability to deport) [2012] UKUT 00196 (IAC)** where the Tribunal held as follows at paragraph [19]:

> "The present appeal does not concern automatic deportation cases under Section 32 of the UK Borders Act 2007 ('the 2007 Act'). If a person is a 'foreign criminal' as defined in Section 32(1), the effect of Section 32 is that the deportation of the individual *is* conducive to the public good for the purposes of Section 3(5)(a) of the 1971 Act (see **MK (deportation – foreign criminal – public interest) Gambia [2010] UKUT 281 (IAC)**). Accordingly, in automatic deportation cases, no question can arise as to whether the individual is liable to deportation and/or the lawfulness of the Secretary of State's decision to make a deportation order against him."

12. Alternatively and in any event the appellant was recommended for deportation following his conviction and sentencing for an earlier offence in 2007. Mr Duffy produced the sentencing remarks of His Honour Judge Lyons sitting in the Crown Court at Wood Green on 15th November 2007 which showed this.

13. In reply, Ms Robinson submitted that the Secretary of State could not reach back to the earlier conviction of 2007, and the consequential recommendation for deportation, to circumvent the decision in **Ali**, which was directly in point, whereas the remarks relied on in **Bah** were *obiter dicta*. On the question of whether there was a published policy relating to revocation under Section 76, she asked for permission to research the internet, and to hand in the fruits of her research later in the day. Mr Duffy did not object to this proposal, and I subsequently received a copy of the Home Office Asylum Policy Instruction on Revocation of Indefinite Leave Version 3.0 dated 10th June 2013.

Discussion

14. **Ali** was a decision of Vice President Ockleton sitting with Designated Immigration Judge McCarthy. Ali had obtained indefinite leave to remain in 2006. In November 2008 he was convicted of robbery and handling stolen goods and sentenced to 21 months' detention in a young offenders' institution. The court did not recommend deportation. But the appellant fell within the definition of foreign criminal for the purposes of the

automatic deportation provisions in Section 32 of the UK Borders Act 2007. Ali was invited to submit reasons as to why he should not be subject to automatic deportation. He gave written reasons and attended an interview conducted by a representative of the Home Office. He said he had been in the UK for nearly fifteen years, that he had ILR, and that his siblings were British citizens.

15. The Secretary of State sent a letter dated 1 October 2009 in which he said he took a serious view about his conduct and in the light of his conviction he had given careful consideration to his immigration status and the question of his liability to deportation. In the particular circumstances, he had decided not to take any action against him on this occasion. However, notwithstanding the fact that there were no conditions attached to his stay here, the provisions of the Immigration Act 1971 as amended by the Immigration and Asylum Act 1999 relating to deportation continued to apply to him:

> 'Under these provisions a person who does not have the right of abode is liable to deportation if the Secretary of State deems his deportation to be conducive to the public good or if he is convicted of an offence and recommended for deportation by a court.'

16. The Secretary of State went on to give the appellant a warning that if he should come to adverse notice in the future, the Secretary of State would be obliged to give further consideration to the question of whether he should be deported. If he committed a further offence, the Secretary of State would also need to consider the automatic deportation provisions of the UK Border Act 2007.

17. Although Ali did not commit a further offence, in November 2009 the Secretary of State informed him of the decision to revoke his ILR pursuant to Section 76(1) and to replace it with a limited period of discretionary leave.

18. At the appeal hearing in the Upper Tribunal, Mrs Cantrell on behalf of the Secretary of State conceded that the Secretary of State had not indicated that she deemed Ali's deportation to be conducive to the public good. Consequentially, the Tribunal held, there was no scope for the application of Section 3(5)(b) of the 1971 Act.

19. The Tribunal went on to consider the significance of Section 32(4) of the UK Borders Act 2007 at paragraph [23]:

> "The effect of s.32(4) of the UK Borders Act 2007 is that, by statute, his deportation *is* conducive to the public good; so that, if the Secretary of State does (also) deem it to be conducive to the public good, there can be no argument about the basis for the Secretary of State's conclusion. But, as we see it, under s.3(5)(a) of the Immigration Act 1971, the decision of the Secretary of State (or an officer) is a crucial requirement. That paragraph cannot possibly read as if it provided merely that the person is liable to deportation if his deportation is conducive to the public good."

20. The Tribunal went on to hold that although the effect of the statutory provisions was that Ali's deportation was conducive to the public good, he was not liable to deportation because the Secretary of State had not deemed his deportation to be conducive to the public good. She was presumably at liberty to do so but, until she did so, the provisions of Section 3(5)(a) of the Immigration Act 1971 did not apply to him, and, in consequence, those of Section 76 of the 2002 Act did not apply to him either.

21. On the particular facts of Ali's case, the Secretary of State had in effect communicated to Ali that he was not liable to deportation for the index offence, and that he would only become potentially liable to deportation if he reoffended. No equivalent representation has been made to the appellant in this case. Another potential distinguishing feature is the concession by the Presenting Officer before the Upper Tribunal that the Secretary of State had not indicated that she deemed Ali's deportation to be conducive to the public good. This was clearly the right concession to make in the light of the wording of the letter dated 1 October 2009 which was quoted extensively by the Tribunal at paragraph [12] of the decision. But I question whether the notice of liability to deportation which set the process in motion did not, at least constructively, communicate to Ali that the Secretary of State deemed his deportation to be conducive to the public good by making reference to Section 32 of the 2007 Act, and quite possibly specific reference to Section 32(4). The same question arises in the present case in respect of the notice of liability to deportation served on the appellant in 2011 (this notice is not in the core bundle, so its precise wording is a matter of conjecture).

22. In any event, I prefer the statement of the law by the Presidential panel in **Bah** to the statement of the law in **Ali**, although I recognise that the statement of the law in **Bah** is *obiter dicta*. I consider that the effect of Section 32(4) is to remove discretion from the Secretary of State to deem, or not to deem, that the deportation of the person concerned is conducive to the public good where the person meets the definition of a foreign criminal. Since (a) by statute the person's deportation is conducive to the public good, and (b) the Secretary of State's discretion is fettered by statute, the Secretary of State must *ipso facto* deem that the person's deportation is conducive to the public good – and a separate declaration to that effect is not necessary to trigger a person's liability to deportation.

23. Under Section 33(1), Section 32(4) does not apply where, inter alia, Exception 1 applies which is where the removal of the foreign criminal in pursuance of the deportation order would breach –

    (a) a person's Convention rights, or

    (b) the United Kingdom's obligations under the Refugee Convention.

24. At the stage that a person is first notified of his liability to automatic deportation as a foreign criminal, the question of whether he or she can bring themselves within, inter alia, Exception 1 lies in the future. Further,

it is clear from the contents of Section 33(7) that the application of an Exception does not mean that the deportation of the person concerned is *no longer* conducive to the public good.

25. In this case, the Secretary of State also has another string to her bow, which is the earlier recommendation for the appellant's deportation. I do not consider there is any bar to the Secretary of State "reaching back" to this recommendation as underpinning the appellant's continuing liability to deportation.

26. In **Ukus (discretion: when reviewable) [2012] UKUT 00307 (IAC)** the panel chaired by Vice President Ockleton held that where a decision maker in the purported exercise of a discretion vested in him noted his function and what was required to be done in fulfilling it and then proceeded to reach a decision on that basis, the decision is a lawful one and the Tribunal cannot intervene in the absence of a statutory power to decide that the discretion should have been exercised differently (see s.86(3)(b) of the Nationality, Immigration and Asylum Act 2002).

27. It is common ground between the parties that this appellant had a right of appeal against the revocation decision on the ground that the decision was not in accordance with the law. The parties diverge on the next stage of the process, which is the extent to which the First-tier Tribunal could review the purported exercise of the Secretary of State's discretion under Section 76, and the basis upon which the First-tier Tribunal could allow the appeal.

28. In **Ukus**, the Tribunal held at paragraph [22]:

> "There are thus four possible situations where the Tribunal is considering an appeal arising from the exercise of a discretionary power:
>
> (i) the decision maker has failed to make a lawful decision in the purported exercise of the discretionary power vested in him and a lawful decision is required;
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> (ii) the decision maker has lawfully exercised his discretion and the Tribunal has no jurisdiction to intervene;
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> (iii) the decision maker has lawfully exercised his discretion and the Tribunal upholds the exercise of his discretion;
>
> (iv) the decision maker has lawfully exercised his discretion and the Tribunal reaches its decision exercising its discretion differently."

29. As I understood Mr Duffy, his submission is that the appeal falls into category (i), and thus it would in theory have been open to the First-tier Tribunal to find that the Secretary of State had failed to make a lawful decision because, for example, she had failed to follow her own published policy when purportedly exercising her discretionary power.

30. Ms Robinson's submission is that the judge could have allowed the appeal in accordance with Section 86(3)(b). Section 86(3)(b) provided:

> 'The Tribunal must allow the appeal insofar as it thinks that –

(b) A discretion exercised in making a decision against which the appeal is brought ... should have been exercised differently.'

31. I consider that Ms Robinson is wrong in her submission that this is a category (iv) case. Section 84(1)(f) of the 2002 Act gave a right of appeal on the ground that the person taking the decision should have exercised differently a discretion *conferred by Immigration Rules*. It did not provide a right of appeal against a discretion *conferred by statute*. I consider that Section 86(3)(b) only applied where the appellant had a valid ground of appeal under Section 84(1)(f). It did not apply where the appeal was against the exercise of discretion conferred on the Secretary of State by statute, and where the sole ground of appeal was (and is) that the decision is not in accordance with the law.

32. So, turning to the decision of the First-tier Tribunal, I find that the judge did not err in law in treating himself as being unable to substitute his own discretion for that exercised by the Secretary of State. The judge was right not to treat the appeal as falling into category (iv).

33. The judge treated the appeal as falling into category (ii). Apart from not explicitly acknowledging the potential for judicial intervention if the decision was shown not to be in accordance with the law (and hence falling into category (i) rather than category (ii)), I can find no fault whatsoever in his assessment. While he acknowledged the argument that the appellant had so changed for the better that overall discretion could or should have been exercised in his favour, he rightly treated this argument as being appropriate to a category (iv) type case, and not one which could trigger a judicial intervention in the type of case that was before him. The argument, even if valid, did not render the exercise of discretion one which was "not in accordance with the law".

34. The judge was not provided with the policy document which has been produced to me, and so he cannot be said to have erred by failing to take its contents into account. But since the appellant was unrepresented before Judge White, I have reviewed the contents of the policy document *de bene esse*.

35. Section 4 sets out reasons for not revoking indefinite leave, and these reasons are: 4(1) passage of time, 4(2) genuine mistakes/errors, 4(3) previously overlooked or unconsidered material, and 4(4) compelling and compassionate circumstances.

36. The appellant did not make any representations against the revocation of his ILR. On the topic of the passage of time, it is expressly stated that, for cases under Section 76(1), length of time spent in the UK will <u>not</u> constitute a bar to revocation of indefinite leave because it, and any other Article 8 considerations, will have been taken into account in deciding whether the person should be deported. Accordingly, I find that the Asylum Policy Instruction on Revocation of Indefinite Leave does not disclose some egregious error or omission in the Secretary of State's

stated reasons for revoking this appellant's ILR such as to render her decision an unlawful one.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. The appellant's appeal to the Upper Tribunal is dismissed.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Monson