Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08731/2018

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**

On 28 January 2020 **On 21 February 2020**

Before

THE HON. MR JUSTICE CHAMBERLAIN
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
and
UPPER TRIBUNAL JUDGE BLUM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BIRJU GOVINDBHAI TRIVIDI

Respondent

Representation:

For the Appellant: Mr C. Avery, Senior Home Office Presenting Officer
For the Respondent: Mr Trividi in person

DECISION AND REASONS

1. This is an appeal from a decision of Judge Rai ('the judge') sitting in the First-tier Tribunal. In the decision, promulgated on 20 August 2019, the judge allowed Mr Trividi's appeal against a decision of the Secretary of State dated 26 March 2018 refusing his application for further leave to remain and refusing to revoke a deportation order.

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Background

2. Mr Trividi is a national of India. He was born on 29 April 1973. He claimed asylum in the UK on 6 November 1998. The claim was refused on 3 July 1999. On 2 February 2004, he was convicted at Lewes Crown Court of possession of a false instrument. On 8 March 2004, he was sentenced to 8 months' imprisonment and recommended for deportation. He was served with notice of a decision to deport him on 12 May 2004. He appealed. His appeal was dismissed by an adjudicator on 26 November 2004. His appeal rights were exhausted on 3 March 2005. A deportation order was signed on 23 March 2007 and served on 14 January 2010. He made further representations raising asylum grounds, which were refused and certified as clearly unfounded on 14 April 2010. Yet further representations were lodged on 21 March 2012. These were rejected as not amounting to a fresh claim pursuant to paragraph 353 of the Immigration Rules on 3 May 2016.

3. On 24 July 2016, Mr Trividi submitted an application for Further Leave to Remain. He prayed in aid his length of residence (then 18 years), his strong social ties to the UK and the absence of any support network in India. He pointed out that he was fluent in English, was financially independent and had not reoffended since 2004.

4. In a decision served on 26 March 2018, the Secretary of State said that deportation was still conducive to the public good, bearing in mind that he had chosen to remain illegally and was wilfully avoiding deportation. It was acknowledged that Mr Trividi was not a persistent offender and his offence had not caused serious harm, so paragraph 398 of the Immigration Rules was not engaged. It was said that deportation would not breach his Article 8 rights. Reliance was placed on the findings of the adjudicator in November 2004 to that effect. It was acknowledged that the interference with Mr Trividi's Article 8 rights would be greater now than it was then, but it was said that that interference would not be disproportionate. The matter was considered under paragraph 391A of the Immigration Rules and the decision taken that the representations did not amount to a material change of circumstances. It was accepted on this occasion that Mr Trividi's submissions amounted to a fresh claim under paragraph 353 of the Immigration Rules.

Decision of the First-tier Tribunal

5. The judge's decision proceeded in the following stages.

6. At [22], she noted that Mr Trividi had accepted that he had not applied for a birth certificate or passport himself, because he did not want to return to India. At [27], however, she found that Mr Trividi had not wilfully obstructed the Secretary of State's efforts to procure an emergency travel document ('ETD') by providing false information in answer to questions about this address and the school he attended. Mr Trividi was 'not required

to obtain the documentation himself, but to engage in the ETD process' by answering questions truthfully. This he had done. The delay was attributable to the Indian authorities, who had not responded to a request sent by the Secretary of State in 2011.

7. At [29], the judge identified the question she thought she had to ask: 'whether there are any exceptional circumstances to justify revocation of the deportation order under para. 390'. She noted that the Secretary of State accepted that paragraph 398 of the Immigration Rules was not engaged. At [30], she accepted that Mr Trividi did not meet the requirements for Exception 1 and 2 under the Rules. This was apparently a reference to paragraphs 399 and 399A of the Immigration Rules respectively. She found that, as Mr Trividi was educated in India and speaks Hindi and a little Punjabi and Gujarati, and given the versatility he has shown in building a life in the UK, there would not be significant obstacles to his reintegration in India (albeit this would be 'difficult' after more than 20 years here). At [31], she noted that Mr Trividi had been in the UK for over 20 years and that, 'by the mere passage of time,' Article 8(1) was engaged.

8. At [32], the judge noted that the most compelling factors in Mr Trividi's favour were the fact that he had received only one short sentence of 8 months, having committed an offence which did not cause serious harm, and that he had not (on her own findings) been uncooperative with attempts to deport him. At [33], she accepted that the public interest in deportation had not diminished, but noted that Mr Trividi had developed a private life while in the UK and that he had raised money for various charities and undertaken voluntary work to help those in need of support. She reminded herself of 'the context in which it was done' (presumably a reference to the fact that Mr Trividi's private life in the UK had been established and developed while here illegally) and for that reason considered that 'little weight' was to be attributed to his private life.

9. At [34]-[35], the judge said this:

> '34… At some point, the respondent needs to obtain the ETD and remove the appellant or, there comes a point where the passage of time becomes a disproportionate interference with his private life, on the basis that the respondent has to accept that there is no reasonable prospect of removing the appellant in pursuance of a deportation order. The appellant challenged the deportation decision as soon as he was taken into immigration detention following the release from his 8-month sentence. His appeal against the decision to deport was dismissed and his appeal rights exhausted in 2005. The appellant engaged with the ETT process in 2006 and has continued to do so. He has largely kept in contact with the respondent and signed on when required to do so. He has not committed any further offences since being in the UK. Even if his removal would have been entirely

> proportionate if it had taken place at any time from 2005 onwards, the passage of time alone, where it is not the appellant obstructing the ETD process, has reached a point where there is no alternative to accepting the reality, which is that all efforts to get an ETD have stalled.
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> 35. The respondent has not had a response from the Indian authorities for eight years regarding the appellants nationality. I was not provided with any further plans by the respondent to resolve this issue, save for the appellant should contact the Indian High Commission to assist with the process. The appellant indicated that the High Commission have told him to go to the Home Office or a solicitor. Having considered the evidence in the round, I am not satisfied that the respondent has any means of resolving ETD issue and I weigh that up against the length of time since the deportation order was made.'

10. At [36]-[37], the judge found that there were exceptional circumstances under paragraph 390A of the Immigration Rules and allowed the appeal.

Discussion: material error of law

11. The judge thought that this was a case to which paragraph 390A applied. But paragraph 390A applies only where paragraph 398 does. As she noted at [29] of her decision, the Secretary of State had conceded that paragraph 398 had no application in this case. The concession was correct, because the sentence imposed in 2004 was one of less than 12 months and the Secretary of State had not found that the offending had given rise to serious harm or that Mr Trividi was a persistent offender. So, paragraph 390A did not apply. Paragraph 391 applies only '[i]n the case of a person who has been deported'. On their natural meaning, the opening words of paragraph 391A ('[i]n other cases') indicate that that paragraph applies to cases other than those covered by the immediately preceding paragraphs 390A and 391. We note that this accords with the view to which the Court of Appeal inclined in **ZP (India) v Secretary of State for the Home Department** [2015] EWCA Civ 1197, [2016] 4 WLR 35, at [26] (Underhill LJ).

12. Under paragraph 391A, the question was not whether there were 'exceptional circumstances,' but whether 'the situation has been materially altered, either by a change of circumstances since the [deportation] order was made, or by fresh information coming to light which was not before the appellate authorities or the Secretary of State'. The last sentence of the paragraph is directed to the case where deportation has taken place. It does not on its face apply here. But this does not matter, because we consider it clear that the passage of time could in principle clearly give rise to a change in circumstances that is material for the purposes of paragraph 391A, and for the purposes of the

Article 8 balancing exercise, even in a case where deportation has not occurred.

13. Three categories of cases where the passage of time might be relevant to the Article 8 balancing exercise when removing failed asylum seekers were identified by Lord Bingham in the House of Lords in **EB (Kosovo) v Secretary of State for the Home Department** [2009] 1 AC 1159, [14]-[16]: first, those where it enables the appellant to establish deeper ties to the community in this country; second, those where it prevents the Secretary of State from relying on the impermanence of a relationship entered into knowing that one's immigration status is precarious; third, where the delay is the fault of the Secretary of State, delay may diminish the weight to be given to the state's interest in immigration control. Caution must be exercised in applying what is said there to the deportation context, where there is an additional and important public interest in play: the public interest in deporting those who have been recommended for deportation by a court or whose deportation the Secretary of State has determined is conducive to the public good. Lord Bingham's analysis serves, however, to show that the questions whether and if so to what extent the passage of time affects the Article 8 balancing exercise is intensely fact-specific.

14. Because the judge did not appreciate that the applicable test was that contained in paragraph 391A, she did not focus on the question whether there had been a material change in circumstances. This was an error of law. The error had the effect that the judge went on to apply the test set out in paragraph 390A, namely whether there were 'exceptional circumstances' – a more stringent test than the one she should have applied. She found that even this test was satisfied. If her reasons for doing so were not vitiated by any error of law, we could not say that the error was material, because those reasons would also have led her to find that there had been a material change of circumstances within paragraph 391A. It is therefore necessary to focus on the judge's reasons for concluding that Mr Trividi's circumstances were exceptional.

15. The crux of the judge's reasoning was that Mr Trividi had done all that he was required to do. This, she said, extended to answering honestly questions asked of him, but did not extend to applying directly to the Indian authorities for a birth certificate or passport. So, the judge found, he could not be blamed for the delay in deporting him. We must consider whether that finding disclosed a material error of law.

16. We start with an analysis of the statutory framework. Section 3(5) of the Immigration Act 1971 ('the 1971 Act') provides that a person whose deportation is deemed by the Secretary of State to be conducive to the public good is 'liable to deportation'. Section 3(6) makes the same provision for a person whose deportation is recommended by a court. A person liable to deportation may, by s. 5(1), be made the subject of a deportation order, which is '*an order requiring him to leave* and prohibiting

him from entering the United Kingdom' (emphasis added). The deportation order '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'.

17. It follows that the primary legal consequence of a deportation order is to impose an obligation on the person subject to it to leave the UK. The 1971 Act goes on, in s. 5(5) and Sch. 3, to confer powers on the Secretary of State to remove those subject to deportation orders and to detain them for that purpose. Parliament did not, however, impose any duty on the Secretary of State to effect the removal of those liable to deportation.

18. This feature of the statutory regime governing deportation is replicated in the regime governing removal of overstayers, which was considered by the Supreme Court in **Patel v Secretary of State for the Home Department** [2013] UKSC 72, [2014] AC 651. At [27], Lord Carnwath (with whom Lord Kerr, Lord Reed and Lord Hughes agreed) noted that that regime conferred powers of removal and could not be 'read as imposing an obligation to make a [removal] direction in any particular case, still less as providing any link between failure to do so and the validity of a previous immigration decision'. Hence the conclusion at [29] that:

> 'The Secretary of State does not "thwart the policy of the Act" if she proceeds in the first instance on the basis that unlawful overstayers should be allowed to leave of their own volition (as on the evidence the great majority do).'

19. That reasoning seems to us to apply *a fortiori* to those subject to deportation orders, who have engaged in conduct that is sufficient to warrant a deportation decision by the Secretary of State or a recommendation for deportation by a court.

20. Once it is appreciated that the legal effect of the deportation order in Mr Trividi's case was to require him to leave the UK, it must follow that he was obliged to take reasonable steps to enable that to happen. Proactively applying to the Indian authorities for the necessary documents seem to us to fall squarely within the kind of steps that it would have been reasonable to take. It follows that, in our judgment, the judge erred at [27] of her decision in concluding that he was not required to take such steps. The fact that, on the judge's findings, he had given honest answers to questions posed by the Secretary of State's officials, and so had not sought to obstruct the Secretary of State's efforts to remove him, did not exhaust his legal obligations.

21. Reading the judge's decision as a whole, we consider that the conclusion that Mr Trividi has done all that was legally required of him played a significant part in the reasoning. This error of law was therefore material in the sense that it might have affected the outcome of the appeal.

Re-making the decision

22. There has, however, been no challenge to the judge's primary findings of fact, and there has been no application to adduce further evidence by either party. We therefore proceed to remake the decision based on the facts found by the judge.

23. Looking at the matter through the prism of paragraph 391A of the Immigration Rules, the question we have to answer is whether the situation has been materially altered by a change of circumstances since the making of the order. The circumstances in question are those relevant to the balancing exercise required by Article 8.

24. Mr Trividi is not a 'foreign criminal' as that term is defined in s. 117D(2) of the Immigration Act 2014 ('the 2014 Act'), so as to engage the provisions of s. 117C of that Act. That does not mean, however, that his deportation is not in the public interest. We start from the proposition that there is *always* a public interest in deportation when there is a deportation order in force based on a valid decision by the Secretary of State that deportation is conducive to the public good or a recommendation for deportation by a court.

25. In assessing the weight to be given to the public interest in deportation, we bear in mind three matters. First, the offence merited a relatively short custodial sentence in 2004. Second, as he emphasised in submissions to us, Mr Trividi has not re-offended since then. Third, however, although subject since 2010 to a legal duty to leave the UK (see paragraphs 16-20 above), Mr Trividi has not taken reasonable steps to comply with that obligation and has instead remained unlawfully, making a series of unsuccessful applications. Overall, there remains, in our view, a significant (though, we accept, not great) public interest in deporting him.

26. Against that must be weighed Mr Trividi's private life, which he has built up over more than 20 years in the UK. There is no doubt that such a period of residence (even if unlawful) generates an interest protected in principle by Article 8. We note in this regard that, outside the context of deportation, an applicant with 20 years' residence (whether lawful or not) is eligible to apply for limited leave to remain on the grounds of private life under paragraphs 276ADE-276CE. However, as the judge correctly noted at [33] of her decision, this private life must be given 'little weight' in the Article 8 balancing exercise, given that it was built up over a period when Mr Trividi was here unlawfully. This is not just a matter of common sense. It is mandated by s. 117B(4) of the 2014 Act.

27. There are two further matters relevant to our assessment of the strength of Mr Trividi's Article 8 interest. First, Mr Trividi has no children, is currently single and did not seek to rely on any other personal relationship giving rise to family (as distinct from private) life. Second, as the judge found and Mr Trividi confirmed to us, he speaks Hindi and some Punjabi and Gujarati. This, together with the fact that he was educated in India,

amply justifies the judge’s finding, at [30] of her decision, that there are no significant obstacles to his reintegration in India. It was not suggested that his type 2 diabetes could not be adequately managed in India.

28. Overall, we consider that the Secretary of State has clearly established that the public interest in deporting Mr Trividi continues to outweigh his interest in respect for his private life, notwithstanding that he has been in the UK for over 20 years. It follows that, in terms of paragraph 391A, there has not been a material changes of circumstances since the making of the deportation order.

29. We therefore dismiss Mr Trividi’s human rights appeal.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law and requires the decision to be set aside.

We remake the decision by dismissing Mr Trividi’s Article 8 human rights appeal.

Martin Chamberlain
The Hon. Mr Justice Chamberlain

18 February 2020