Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/09149/2019**

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On the 9 March 2022	**On the 13 April 2022**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SK

(Anonymity direction made)

Respondent

Representation:
For the Appellant: Ms Young, a Senior Home Office Presenting Officer.
For the Respondent: Ms Soltani of Irish Law Firm (Gateshead)

DECISION AND REASONS

1. The Secretary of State appeals with permission a decision of First-tier Tribunal Judge Fisher ('the Judge') promulgated on 28 July 2021 in which the Judge allowed SK's appeal against the refusal by the Secretary of State to revoke a deportation order made on 21st August 2006, on human rights grounds, dated 8 May 2019.

2. The Secretary of State was granted permission as another judge of the First-tier Tribunal thought it arguable that the Judge erred in placing too much weight, as the main factor when considering compelling

circumstances, upon the delay of the Secretary of State in failing to remove SK when employing the Deportation Order of August 2006.

3. The application is opposed by SK who is a citizen of Liberia born on the 10 January 1987.

4. It is not disputed that SK is subject to the deportation order. His Immigration history shows that he entered the UK with his mother on a visit visa on about 2 June 1994. His mother claimed asylum with SK as a named dependent. Her asylum claim was refused on 15 June 2000 although both SK and his mother were granted Exceptional Leave to Remain valid to 15 June 2004. An application for Indefinite Leave to Remain was granted on 13 September 2005.

5. Between 2000 and 2006, SK was convicted on 10 occasions for committing a total of 41 offences and served with a notice of intention to make a deportation order on 2 June 2006. On the same day SK signed a disclaimer waiving his right to an appeal. The deportation order was signed on 21 August 2006 and served on 23 August 2006.

6. SK subsequently withdrew the disclaimer and lodged an appeal against the decision to deport which was dismissed on 18 May 2007. After further unsuccessful challenges he became appeal rights exhausted on 21 June 2007.

7. On 8 October 2015, after further information came to light SK was issued a letter advising that his previous decision to deport and the refusal to revoke his deportation application had been withdrawn because he was considered a Guinea national and the withdrawn decision listed him as a Liberian national. A new decision was issued certified under section 94B of the Nationality, Immigration and Asylum Act 2002.

8. Following the decision of the Supreme Court in Kiarie & Byndloss [2017] UKSC 42 a number of further representations were made on behalf of SK resulting in the Home Office withdrawing the decision of 8 October 2018 and the Section 94B certification, leaving SK the subject of the deportation order.

9. Mr G Lee of Garden Court Chambers, who represented SK before the Judge, did not dispute the above chronology but questioned whether SK is a ‘foreign criminal’ as per the definition in section 117D of the Nationality, Immigration and Asylum Act 2002.

10. It is noted in Mr Lee’s skeleton argument that SK claims that his human rights will be breached if he is deported from the United Kingdom, that it is accepted he has a genuine and subsisting relationship with his British children, that he has a genuine subsisting relationship with his British partner, that he is culturally and socially integrated into the UK, and that the decision has been taken on the basis he is a Liberian national.

11. It is clear the Judge considered the evidence with the required degree of anxious scrutiny in what is a very detailed and considered determination.

12. The Judge concludes that SK is a persistent offender as a result of his craving for illicit substances.

13. In relation to the issue of delay, for which the Judge is particularly criticised in the grounds seeking permission to appeal, the Judge writes:

> 41. However, the main factor in the Appellant's favour when assessing very compelling circumstances, in my judgement, is that of delay. The Deportation Order was signed in August 2006. Although I accept that some efforts have been made towards removal, as set out in the defence document served by Mr Stainthorpe, and that the Appellant may not have assisted greatly in the process, I find that the Respondent's efforts to remove the Appellant have been woefully inadequate for a government department of the size and resources of the Home Office. Contrary to Mr Stainthorpe's submission , I find that the Appellant has been in a state of some uncertainty or in "limbo". At one stage, it was being asserted that the Appellant may be Guinean National, adding to the delay, but that allegation was not pursued before me. Since the Order was signed by the date of the hearing. In **SSHD v MN-T [2016] EWCA Civ 893,** the Court of Appeal identified the public interest factors in deportation as the inability to reoffend in the UK, the deterrence of others and the expression of society's displeasure, all of which could be weakened through the passage of time. In my judgement, a failure to remove a foreign criminal foremost 15 years after a deportation order is made is of no deterrence whatsoever to others. In this particular case, the failure to act on the Order did not place the Appellant in a situation in which he could not reoffend. Furthermore, there is no reflection of displeasure or revulsion when deportation is not effected in almost 15 years.

14. The Secretary of State's argument is that although it is accepted that the public interest may be reduced, it was erroneously reduced by the Judge in that there was no legal requirement for the Secretary of State to deport or remove a person from the UK. The Secretary of State's grounds argue SK knew he had lost his appeals against deportation yet remained in the UK, that the Home Office made efforts to re-document him but that he had shown no intent to return by using different dates of birth and different nationality documents.

15. The Secretary of State argues the Judge erred in finding there are very compelling circumstances in this case which are said to be material in light of the Judge's finding that SK succeeded only by a narrow margin.

16. This is not a decision made by the Judge solely on the basis of delay. The Judge's findings start from [22] of the decision. The Judge considers the applicable immigration rules, case law, and the evidence relied upon by both parties. It is not made out the Judge excluded any aspect of SK's offending behaviour and made findings in favour of the Secretary of State, for example at [31] that SK could not bring himself within paragraph 399 of the Immigration Rules on the basis of his relationship with his partner.

17. The Judge carefully consider whether deportation would be unduly harsh upon the UK-based children but, again, found in the Secretary of State's favour when finding the evidence did not establish it will be unduly harsh for the children to remain in the UK without SK.

18. The Judge noted SK has been in the United Kingdom for approximately 24 years and was socially and culturally integrated, but not be lawfully

resident for most of his life, and so could not meet the private life exception to deportation.

19. The Judge found that the public interest in this appeal would only be outweighed by the factors where there were very compelling circumstances over and above those in paragraph 399 and 399A of the Immigration Rules. It is the analysis of that element from [38] that led to the appeal being allowed.

20. It is not made out there was anything illogical or irrational in the Judge finding that in the circumstances of this case the weight to be given to the public interest was very considerably "diluted". The Judge properly examined the statutory provisions [43], noted the evidence that had been provided relating to the issues, and noted the evidence had been provided regarding SK's qualifications, intention to work if permitted to remain, independent social workers report, and psychiatric report including reference to SK's mental health issues.

21. The Judge's finding that the risk of reoffending had been reduced has not been shown to be a finding contrary to the evidence.

22. The Rule 24 reply filed on behalf of SK makes the following points (referring to the status of the parties as they appeared before the Judge):

> 3. The Appellant resists the application for Permission to Appeal on the basis that there is no material error of law in the determination as pleaded or otherwise and the grounds are not made out, in particular:
>
>   a. In so far as the grounds proceed on the basis that this was an automatic deportation appeal (see e.g. Grounds 2 and 7) they are legally erroneous. This was not an automatic deportation appeal - sections 32 and 33 of the 2007 [Act] which imposes a duty upon the Respondent to deport was not in force when this Deportation Order was made in August 2006. This matter has been canvassed before the FTTJ during the numerous CMR's and the Respondent conceded the point in their response to the skeleton argument.
>   b. The Respondent's contention that the Appellant ought to have deported himself and his failure to do so weakens his reliance on the Respondent's delay is irrational. The Respondent's position is that, despite 15 ½ years passing since the Deportation Order was made, the public interest in this case continues to require his Deportation. That position is no rational bedfellow with the Respondent's failure to take any steps for approximately 10 years in respect of the Appellants deportation, and to rely on there being no legal duty upon the Respondent to deport a foreign criminal is fundamentally at odds with the deportation, current statutory framework which the Respondent themselves seeks to rely on.
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> 4. Arguments regarding the Appellant's compliance with steps - the most recent of which was over 12 years ago -to affect his re-documentation, age and nationality, were dealt with in depth during the First Tier appeal. Not only is the respondent reasserting arguments which have already been, made and determined in the Appellant's favour, but is also reasserting facts they have already conceded. The facts asserted by the Respondent in their grounds of appeal are incorrect and do not represent the accurate factual position or history of this matter. As observed by the Tribunal, the Respondent resiled from their position that the Appellant had a different nationality; the Appellant has not presented any different nationality documents; the Appellant has attended all interviews with Embassies requested of him and provided as much

documentation as he could. The background is set out in the Chronology submitted to the FTT. Further, for the avoidance of doubt, with regards to the appellant's identify (sic) and nationality, the Home Office currently possesses:

i. The appellant's original expired Liberian passport
ii. the appellant's mother's expired Liberian passport
iii. a copy of the appellant's mother's birth certificate
iv. a copy of the appellant's mother's British passport, (having issued it in the first instance)
v. a copy of the appellant's mother's Visa application from (sic)
vi. a copy of the appellant's mother's application for asylum in 2004
vii. a copy of the appellant's mother's application for British citizenship
viii. a copy of the appellant's father's passport evidencing his place of birth as Monrovia (Liberia)
ix. a copy of the appellant's application for ILR
x. biodata forms for both Liberia and Guinea
xi. letters from Liberian Embassy confirming the issuing of the appellant's mother's new Liberian passport.

Half of these the Respondent has possessed for circa 15 years and the remainder are largely documents they have themselves issued.

b. The Tribunal was entitled to take into account the probation officers report with regards to the risk of reoffending; there is no error in the Tribunal's approach to it and the low risk was not the singular or overriding the foundation of the Tribunal's decision.
c. The grounds ignore the wealth of case law before the Tribunal contained within the Appellant's bundle and further case leave law referred to in the Appellants Skeleton Argument, which supported the conclusion reached by the Tribunal and which address the issue of delay. The Respondent in their grounds relies on case law suggesting that egregious delays are likely to tip the balance in favour of an appellant, but that case law is not on all fours with the facts in the present appeal:

i. the court's judgement on the matter relates to cases where the public interest in deportation is potent and pressing - that cannot tangibly be argued in this particular case; and
ii. there is more applicable case law (which is before the Tribunal) which provides for the opposite.

d. The FTTJ's determination is through (sic) and well reasoned. The grounds amount to no more than an attempt to relitigate and reargue the issues in the case which were canvassed before the FTTJ, and in respect of which he took a different view to that of the Respondent. The findings were open to the FTTJ, and are supported by case law which establishes that the facts plainly are capable of meeting the threshold is set down by law and summarised in Counsel's Skeleton Argument provided to the FTTJ.

Error of law

23. It is clear from reading the decision that the Judge took all relevant aspects of the appeal into account including submissions made by both advocates before him and relevant case law.

24. It is clear the Judge carefully balanced those competing factors and arguments as evidenced by the comment in the final paragraph that this is a finely balanced determination. It has not been shown that the

Judge placed undue weight upon any factor or failed to undertake the required balancing exercise required to arrive at a decision compatible with article 8 ECHR, when weighing the public interest against the compelling circumstances relied upon by SK.

25. The Court of Appeal have reminded appellate judges, including themselves, in a number of cases recently that they should not interfere with a decision unless a genuine error of law has been identified that is material to the decision under challenge. While some judges may not have made the decision this judge did a number of others may well have followed his line of argument and allowed the appeal. That is not, however, the required test. The key question is whether having undertaken the necessary assessment of the evidence the decision of the Judge in allowing the appeal is within the range of findings reasonably open to him.

26. I find that whilst the Secretary of State disagrees with the outcome, she has failed to establish the Judges conclusion is outside the range of those reasonably open to the Judge on the evidence or is infected by legal error material to the decision to allow the appeal. On that basis this application must fail.

Decision

27. There is no material error of law in the Immigration Judge's decision. The determination shall stand.

Anonymity.

28. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed……
Upper Tribunal Judge Hanson

Dated 16 March 2022