**Upper Tribunal**
**(Immigration and Asylum Chamber)**

Yussuf (meaning of "liable to deportation") [2018] UKUT 00117 (IAC)

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 23 January and 5 March 2018** | |
| | …… |

**Before**

**THE HON. MR JUSTICE LANE, PRESIDENT**
**UPPER TRIBUNAL JUDGE HANSON**

**Between**

**SHARMARKE YUSSUF**
(ANONYMITY DIRECTION NOT MADE)

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr B Bundock, Counsel, instructed by Messrs Lupins Solicitors
For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

*Section 32 of the UK Borders Act 2007 impliedly amends section 3(5)(a) of the Immigration Act 1971 by (a) removing the function of the Secretary of State of deeming a person's deportation to be conducive to the public good, in the case of a foreign criminal within the meaning of the 2007 Act; and (b) substituting an automatic "deeming" provision in such a case. The judgments of the Supreme Court in Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60 make this plain. To that extent Ali (section 6 – liable to deportation) Pakistan [2011] UKUT 00250 (IAC) is wrongly decided.*

**DECISION AND REASONS**

***A. Introduction***

1. The appellant, born on 1 January 1982, is a citizen of Somalia. He entered the United Kingdom in January 2004 and claimed asylum. An adjudicator allowed the appellant's appeal against the respondent's decision to refuse his claim. As a result of the adjudicator's decision, the appellant was granted refugee status, and also leave to remain, on 13 October 2004.

2. The appellant committed a number of criminal offences in the United Kingdom, culminating in 2010, when he was convicted of attempted wounding and sentenced to two years' imprisonment.

3. The respondent considered whether to revoke the appellant's refugee status, in the light of this conviction, but ultimately decided not to do so. On 22 April 2014, however, the respondent informed the appellant that she was proposing to revoke his indefinite leave to remain in the United Kingdom, pursuant to section 76(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). This provides as follows:-

> "**76. Revocation of leave to enter or remain**
>
> (1) The Secretary of State may revoke a person's indefinite leave to enter or remain in the United Kingdom if the person -
>
> (a) is liable to deportation, but
>
> (b) cannot be deported for legal reasons."

## *B. Appeal to the First-tier Tribunal*

4. The appellant appealed against that decision to the First-tier Tribunal. His appeal was heard at Richmond on 23 December 2014 by a Judge of the First-tier Tribunal. The Judge heard evidence from the appellant and from Ms Ryan, who worked at St Mungo's Hostel, where the appellant had been living.

5. The Judge observed that the offence for which the appellant had been sentenced to two years' imprisonment was not the first of its kind. In 2007 the appellant had received a custodial sentence for another wounding offence. The appellant's offending history appeared to be linked to problems he had with alcohol. Ms Ryan, however, confirmed the appellant's evidence that his behaviour had significantly improved since he had been living at the hostel and that he had not subsequently offended.

6. None of this, however, had any material bearing, insofar as the Judge was concerned:-

> "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."

## *C. Appeal to the Upper Tribunal*

7. The appellant appealed against the First-tier Tribunal Judge's decision. His appeal was heard in the Upper Tribunal on 27 August 2015 by a Deputy Upper Tribunal Judge. The Deputy Judge considered the decision of the Upper Tribunal in Ukus (discretion: when reviewable) [2012] UKUT 00307 (IAC). With the aid of that case, the Deputy Judge analysed the position as follows:-

> "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;
>
> (ii) the decision maker has lawfully exercised his discretion and the Tribunal has no jurisdiction to intervene;
>
> (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)."

***D. Was the appellant liable to deportation?***

8. The Deputy Judge had, however, been presented with the following additional argument from the appellant. Relying on the decision of the Upper Tribunal in Ali (section 6 – liable to deportation) Pakistan [2011] UKUT 00250 (IAC), the appellant contended that, since the Secretary of State had not specifically deemed his deportation to be conducive to the public good, he was not "liable to deportation" within the meaning of section 76 of the 2002 Act. Accordingly, the Secretary of State had no power under section 76(1) to deprive the appellant of his indefinite leave to remain.

9. In order to appreciate this aspect of the appellant's case, it is necessary to examine the legislative scheme.

10. Section 3(5) and (6) of the Immigration Act 1971 provides as follows:-

> "(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; or
>
> (b) another person to whose family he belongs is or has been ordered to be deported.
>
> (6) Without prejudice to the operation of subsection (5) above, a person who is not a British citizen shall also be liable to deportation from the United

Kingdom if, after he has attained the age of seventeen, he is convicted of an offence for which he is punishable with imprisonment and on his conviction is recommended for deportation by a court empowered by this Act to do so."

11. The UK Borders Act 2007 effected major changes in the deportation regime. Sections 32 and 33 provide as follows:-

"**32. Automatic deportation**

(1) In this section "*foreign criminal*" means a person—

(a) who is not a British citizen,

(b) who is convicted in the United Kingdom of an offence, and

(c) to whom Condition 1 or 2 applies.

(2) Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months.

(3) Condition 2 is that -

(a) the offence is specified by order of the Secretary of State under section 72(4)(a) of the Nationality, Immigration and Asylum Act 2002 (c. 41) (serious criminal), and

(b) the person is sentenced to a period of imprisonment.

(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.

(7) Subsection (5) does not create a private right of action in respect of consequences of non-compliance by the Secretary of State.

**33. Exceptions**

(1) Section 32(4) and (5)—

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

(b) are subject to sections 7 and 8 of the Immigration Act 1971 (Commonwealth citizens, Irish citizens, crew and other exemptions).

(2) Exception 1 is where 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.

(3) Exception 2 is where the Secretary of State thinks that the foreign criminal was under the age of 18 on the date of conviction.

(4) Exception 3 is where the removal of the foreign criminal from the United Kingdom in pursuance of a deportation order would breach rights of the foreign criminal under the EU treaties.

(5) Exception 4 is where the foreign criminal—

(a) is the subject of a certificate under section 2 or 70 of the Extradition Act 2003 (c. 41),

(b) is in custody pursuant to arrest under section 5 of that Act,

(c) is the subject of a provisional warrant under section 73 of that Act,

(d) is the subject of an authority to proceed under section 7 of the Extradition Act 1989 (c. 33) or an order under paragraph 4(2) of Schedule 1 to that Act, or

(e) is the subject of a provisional warrant under section 8 of that Act or of a warrant under paragraph 5(1)(b) of Schedule 1 to that Act.

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

(a) a hospital order or guardianship order under section 37 of the Mental Health Act 1983 (c. 20),

(b) a hospital direction under section 45A of that Act,

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

(d) a compulsion order under section 57A of the Criminal Procedure (Scotland) Act 1995 (c. 46),

(e) a guardianship order under section 58 of that Act,

(f) a hospital direction under section 59A of that Act,

(g) a transfer for treatment direction under section 136 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13), or

(h) an order or direction under a provision which corresponds to a provision specified in paragraphs (a) to (g) and which has effect in relation to Northern Ireland.

(6A) Exception 6 is where the Secretary of State thinks that the application of section 32(4) and (5) would contravene the United Kingdom's obligations under the Council of Europe Convention on Action against Trafficking in Human Beings (done at Warsaw on 16th May 2005).]

(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."

12. In MK (deportation – foreign criminal – public interest) Gambia [2010] UKUT 281 (IAC), the Upper Tribunal (Sedley LJ; Upper Tribunal Judges Latter and Ward) analysed the provisions of the 2007 Act:-

"21. … the provisions of s.32-34 of the 2007 Act now provide for the automatic deportation of foreign criminals as defined in s.32(1). A foreign criminal is a person who is not a British citizen, who has been convicted in the UK of an offence and to whom either Condition 1 or 2 applies as defined in s.32(2) and (3). Condition 1 is that the person has been sentenced to a period of imprisonment of at least 12 months. There is no dispute in the present appeal that the appellant is a foreign criminal within the meaning of s.32(1).

22. The consequences are set out in s.32(4) and (5) which provide as follows:

"4. For the purpose of s.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)."

23. Parliament has therefore provided that if the relevant conditions in s.32(1)-(3) are met, the respondent has no discretion but must, subject to s.33, make a deportation order and that the deportation of the foreign criminal is conducive to the public good. Thus, as it seems to us, legislative policy has occupied what was formerly the field of executive policy.

24. S.33 then sets out a number of exceptions to the making of an automatic deportation order. These include as exception 1 in s.33(2)a where the removal of a foreign criminal in pursuance of the deportation order would breach that person's Convention rights. This too now represents legislative policy. None of the other exceptions are relevant to the present appeal. It follows in the light of these statutory provisions that it is not open to the appellant to argue that his deportation is not conducive to the public good; nor is it necessary for the respondent to argue that it is. But the appellant may resist it on the basis that it would nevertheless be in breach of article 8."

13. In Ali, the Upper Tribunal examined the meaning of "liable to deportation" in section 76(1) of the 2002 Act. The Upper Tribunal held that the expression refers only to those whom section 3 of 1971 Act says are liable to deportation. In order to be able to exercise her power in section 76(1) of the 2002 Act to revoke a person's of indefinite leave to remain, the Tribunal held that the Secretary of State had specifically to deem the deportation of that person to be conducive to the public good. This was so, the Tribunal held, despite sections 32 and 33 of the 2007 Act:-

"18. As we remarked at the hearing, it seems odd to describe a person who cannot be deported as "liable to deportation". It is, however, clear that the statutory provisions rule out a conclusion based on that simple meaning given by subsections (5) and (6) of s.3 of the 1971 Act. It would appear to follow from that that liability to deportation for the purposes of s.76 can arise in three ways. They are the ways set out in those subsections, and are, first, the deeming by the Secretary of State that the person's deportation is conducive to the public good (s.3(5)(a)); secondly, the making of a deportation order against another person to whose family the person in question belongs (s.3(5)(b)); and thirdly, the recommendation of the person's deportation by a court under s.3(6).

19. None of those has happened in this case. Mrs Cantrell was clear in her acceptance that the Secretary of State has not indicated that she deems this appellant's deportation to be conducive to the public good; there is no scope for the application of s.3(5)(b); and, although the appellant has been convicted of an offence in relation to which the court could have recommended his deportation, it did not do so.

20. So far, therefore, the appellant is not "liable to deportation" within the meaning of s.76. The question, then, is whether ss 32 and 33 of the 2007 Act make any difference.

21. As we have said, there can be no doubt that the appellant is a "foreign criminal" within the meaning of s.32. But s.32(5), requiring the Secretary of State to make a deportation order, is subject to s.33, and it is clear that the Secretary of State took

the view (which is, of course, not contested) that the appellant's removal would breach rights under the European Convention on Human Rights. Exception 1 in s.33(2), therefore applies to this appellant. The clear consequence of that is that s.32(5) does not apply to him: there is no obligation to make a deportation order against him. The position in relation to s.32(4) is a little more obscure. Section 33(1) says that it does not apply, but that is subject to subsection (7). And subsection (7) provides that s.32(4) does, after all, apply "despite the application of Exception 1 or 4". The provision of subsection (7)(b), leaving open the question of whether deportation is conducive to the public good, therefore applies only to the other Exceptions.

22. Thus the journey through s.33 takes us back to where we started, which is at s.32(4). For the purpose of s.3(5)(a) of the 1971 Act, the deportation of the appellant "is conducive to the public good".

23. That provision is clearly relevant to liability to deportation under s.3(5)(a), but it is not the whole story. Liability to deportation under s.3(5)(a), but is not the whole story. Liability under s.3(5)(a) arises only if the Secretary of State deems that person's deportation to be conducive to the public good. The effect of s.32(4) of the 2007 Act 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 1971 Act, the decision of the Secretary of State (or an officer) is a crucial requirement. That paragraph cannot possibly be read as if it provided merely that a person is liable to deportation if his deportation is conducive to the public good.

24. As we have said, the Presenting Officer before us accepted that the Secretary of State has reached no such conclusion in the present case. It follows that, although the effect of the statutory provisions is that his deportation is conducive to the public good, he is not "liable to deportation" because the Secretary of State has not deemed his deportation to be conducive to the public good. She is presumably at liberty to do so: but, until she does so the provisions of s.3(5)(a) of the 1971 Act do not apply to him, and, in consequence, those of s.76 of the 2002 Act do not either."

14. In Bah (EO (Turkey) – Liability to deport) [2012] UKUT 00196 (IAC), the Upper Tribunal (Blake J; Upper Tribunal Judges Southern and Gill) considered the correct approach in deportation appeals that did not fall within section 32 of the 2007 Act. In the course of its decision, the Upper Tribunal said:-

"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."

15. In the present case, the Deputy Upper Tribunal Judge distinguished the appellant's case from that in Ali, as follows:-

> "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."

16. In summary, therefore, the Deputy Upper Tribunal Judge's findings were that:-

    (a) the power to revoke indefinite leave to remain conferred by section 76(1) of the 2002 Act exists, notwithstanding that the respondent has not expressly deemed the appellant's deportation to be conducive to the public good; and

    (b) the First-tier Tribunal could not allow the appellant's appeal by exercising its discretion differently from that of the respondent.

17. The Upper Tribunal, therefore, dismissed the appellant's appeal against the decision of the First-tier Tribunal.

***E. Appeal to the Court of Appeal and remittal to the Upper Tribunal***

18. Permission to appeal to the Court of Appeal was granted to the appellant and on 14 February 2017 the appeal was allowed by consent, to the extent that the matter was

remitted to a differently constituted panel of the Upper Tribunal. The associated statement of reasons said this:-

> "The parties are in agreement that the Upper Tribunal determination is flawed to the extent that it erred in its approach to the determination in the case of *Ali*. The parties also agree that the UT erred in its approach to the respondent's discretion under section 76 of the 2002 Act."

19. At the hearing on 23 January 2018, Mr Wilding, for the respondent, submitted that Ali was wrongly decided. He did, however, concede that the Deputy Upper Tribunal Judge had been wrong on the issue of discretion. The Tribunal directed the parties to file written submissions concerning the correctness or otherwise of Ali. Both Mr Bundock and Mr Wilding have done so with admirable detail and clarity. The Upper Tribunal is grateful for their work.

### *F. "Liable to deportation": interpreting the relevant enactments*

20. Mr Bundock submitted that, as a matter of statutory construction, the 2007 Act could not be taken to have removed the need for the Secretary of State to deem a person's deportation to be conducive to the public good, in order for that person to be liable to deportation. It would, said Mr Bundock, have been perfectly possible for the legislature to have drafted section 32(4) of the 2007 Act along the following lines:-

> "For the purpose of section 3(5)(a) of the Immigration Act 1971 (c.77), the Secretary of State is to be taken to have deemed the deportation of any foreign criminal to be conducive to the public good."

21. There is some force in this submission. The drafting of sections 32 and 33 of the 2007 is not pellucid. In particular, it has caused the Supreme Court some difficulty in Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60: see paragraphs 12, 68 and 128.

22. The consequence if Ali is correct is, however, intensely problematic. Unless the Secretary of State takes the step of saying what Parliament has already said; namely, that the deportation of a foreign criminal is conducive to the public good, then the person concerned would not be liable to deportation, even though Parliament requires the Secretary of State to make a deportation order in respect of that person. The hypothetical man and woman in the street might reasonably ask how a person who is subject to a deportation order cannot be liable to deportation. Such, though, would be the position, where there is no section 33 exception in play.

23. Even where an exception applies, section 33(7) makes plain that Exceptions 1 and 4 do not prevent a person who is the subject of the deportation order from being treated by operation of section 32(4) as a person whose deportation is conducive to the public good.

24. There is, we consider, considerable significance in the opening words of section 32(4): "For the purpose of section 3(5)(a) … the deportation of a foreign criminal is

conducive to the public good". It is, in our view, impossible to resist the conclusion that those opening words impliedly amend section 3(5)(a) by removing the "deeming" function of the Secretary of State under that provision, in the case of a foreign criminal within the meaning of the 2007 Act, and substituting an automatic deeming provision.

25. That is effectively what the Upper Tribunal found in MK, as long ago as 2010 (see above). Paragraphs (1) and (2) of the italicised words in the reported version of the case are, in our view, a correct expostulation of the law:-

> *"(1) In automatic deportations made under s.32(5) of the UK Borders Act 2007 the respondent's executive responsibility for the public interest in determining whether deportation is conducive to the public good has been superseded by Parliament's assessment of where the public interest lies in relation to those deemed to be foreign criminals within s.32(1)-(3). In consequence the respondent's view of the public interest has no relevance to an automatic deportation.*
>
> *(2) In such cases by virtue of s32(4) it is not open to an appellant to argue that his deportation is not conducive to the public good nor is it necessary for the respondent to argue that it is."*

26. The matter has, we find, been put beyond doubt by the judgments of the Supreme Court in Hesham Ali. Lord Reed held as follows:-

> "10. Section 32(4) of the 2007 Act provides that, for the purposes of section 3(5)(a) of the 1971 Act, "the deportation of a foreign criminal is conducive to the public good". **The liability of "foreign criminals" to deportation, under section 3(5)(a) of the 1971 Act, does not therefore depend on any assessment by the Secretary of State: it is automatic.** The expression "foreign criminal" is defined by section 32(1) of the 2007 Act as meaning a person who is not a British citizen, who is convicted in the United Kingdom of an offence, and to whom one of the conditions in section 32(2) and (3) applies. The first of those conditions is that the person is sentenced to a period of imprisonment of at least 12 months. The second is that the offence is specified by an order made by the Secretary of State, and the person is sentenced to a period of imprisonment. No such order has yet been made."

27. Lord Wilson had this to say:-

> "67. A person is a "foreign criminal" under section 32(1) and (2) of the 2007 Act only if, not being a British citizen, he was convicted in the UK of an offence for which he was sentenced to imprisonment for at least 12 months. So the misleadingly entitled "automatic" deportation, for which the section provides, applies in effect only to a serious offence. **Subsection (4) provides that the deportation of a foreign criminal is conducive to the public good for the purpose of section 3(5)(a) of the 1971 Act, in other words with the result that he should be liable to deportation. So it is only the liability to deportation, not the deportation itself, which the section makes automatic.**
>
> …

69. In para 14 above Lord Reed suggests that sections 32 and 33 of the 2007 Act were enacted in response to public concern about, in particular, the procedures for the deportation of foreign offenders. But it is clear to me that there was equal, if not greater, dissatisfaction with the decisions themselves, in particular when they rejected deportation. **Why, in particular, did the people of the UK, by their elected representatives, take the unusual step of pre-empting the minister's decision whether a deportation was conducive to the public good by making a formal resolution in section 32(4) that the deportation of a foreign criminal was conducive to it?**

… "

28. Finally, Lord Kerr (albeit dissenting as to the result):

> "126. As noted above, (at para 98) foreign criminals are defined in section 32(1)-(3) of the Act. **By section 32(4) the deportation of those coming within that category is stated to be conducive to the public good. Effectively, therefore, this provision removes from the Secretary of State the function of deciding whether the deportation of someone who meets the criteria for designation as a foreign criminal conduces to the public good. But it goes further than that. The terms of the provision, that the deportation of a foreign criminal *is* conducive to the public good, purport to foreclose any legal debate as to whether the deportation of *anyone* who comes within that category can be other than conducive to the public good.** Thus, the deportation of a person convicted of a criminal offence and sentenced to more than 12 months' imprisonment is to be considered as immutably in the public good, irrespective of, for instance, any philanthropy or other worthy endeavours in which he may have engaged since his incarceration." (our emphases)

29. Before us, Mr Bundock submitted that these passages – which he readily acknowledged support the respondent's position on Ali – were *obiter dicta*. Even if they were, we should accord them very significant weight. As it happens, we do not consider that they can be so categorised.

30. The issue in Hesham Ali concerned the operation of paragraphs 396 to 399A of the immigration rules, as they then were. Those rules are set out at paragraph 23 of Lord Reed's judgment. Paragraph 396 read as follows:-

> "396. Where a person is liable to deportation the presumption shall be that the public interest requires deportation. … "

31. There is, as far as we are aware, no indication that the Secretary of State in Hesham Ali had expressly stated, pursuant to section 3(5)(a), that the appellant's deportation was conducive to the public good. Accordingly, if Ali were correct, then paragraph 396 would have had no application to the appellant in Hesham Ali. Furthermore, the structure of paragraphs 396 to 399A strongly indicates that paragraphs 397 *et seq* were, likewise, predicated on the assumption that the person concerned "is liable to deportation".

32. This is made express in the immigration rules, as substituted on 28 July 2014. There, under the heading "Deportation and Article 8" paragraph A398 provides:-

"**A398**. These rules apply where:

(a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention;

… "

33. As a result, if Ali were correct, the ramifications would not be confined to section 76 of the 2002 Act. They would extend to the operation of the immigration rules relating to deportation.

34. A similar point arises in relation to section 117B(6) of the 2002 Act. This provides:-

"(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where -

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom."

35. Here too there would be obvious difficulties.

36. Before us, there was debate as to the status of Ali, as a decision of the Upper Tribunal, which had not been "starred" (see Practice Direction 12.1). A "starred" decision of the Immigration and Asylum Chamber of the Upper Tribunal binds not only the First-tier Tribunal but also the Upper Tribunal. A non-starred reported decision of the Upper Tribunal, however, is generally to be followed by judges of the Upper Tribunal, unless the judge is satisfied that the decision in question is wrong.

37. For the reasons we have given and in the light of the judgments in Hesham Ali, we are satisfied that Ali was incorrectly decided.

### *G. Exercising discretion differently: former sections 84 and 86 of the 2002 Act*

38. The second issue can be disposed of more rapidly. Mr Wilding informed us that, in this respect, the respondent continued to adopt the stance she had taken in the Court of Appeal, which was that the Deputy Upper Tribunal Judge had been wrong to conclude that the First-tier Tribunal was unable to substitute its own discretion for that of the respondent.

39. The Deputy Upper Tribunal Judge considered that former section 84(1)(f) of the 2002 Act, which provided that one of the grounds of appeal was that "the person taking the decision should have exercised differently a discretion conferred by immigration rules" circumscribed section 86(3)(b) of that Act. Section 86(3)(b) provided that the Tribunal "must allow the appeal insofar as it thinks that … a discretion exercised in making a decision against which the appeal is brought or is treated as being brought

should have been exercised differently". These provisions have subsequently been repealed by the Immigration Act 2014.

40. It is trite law that clear wording is required in order for the legislature to be found to have limited or restricted a right of appeal. No such clear wording existed in the present situation. On its face, section 86(3)(b) was expressed in general terms. The absence of any reference in it to the immigration rules was, accordingly, significant. Indeed, far from reading down section 86(3)(b) by reference to section 84(1)(f), it seems to us that the opposite ought to apply; that is to say, in order to give effect to the duty of the Tribunal under section 86(3), section 84 fell to be read as permitting the inclusion of a ground of appeal, to the effect that a statutory discretionary decision ought to have been exercised differently. Otherwise, a wholly unjustified distinction would have arisen between discretions under the immigration rules and those under primary and secondary legislation.

### *H. Outcome and next steps*

41. At the hearing on 5 March, we announced we had concluded that the respondent did have power under section 76 of the 2002 Act to revoke the appellant's indefinite leave to remain and that the First-tier Tribunal Judge had erred in law in holding that he could not substitute his discretion for that of the respondent. Accordingly, the decision in the appeal fell to be re-made.

42. Having heard submissions from Mr Bundock and Mr Wilding, we further concluded that, given the passage of time since the hearing in December 2014, up-to-date evidence concerning the appellant would be required. The Tribunal accordingly adjourned the re-making of the decision (to be taken in the Upper Tribunal), having made case management directions.

## Decision

The decision of the First-tier Tribunal contains an error on a point of law. The decision is, accordingly, set aside and the matter will be re-made in the Upper Tribunal.

Signed Dated: 9 March 2018

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber