



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/09675/2012

THE IMMIGRATION ACTS

Heard at Birmingham
on 23rd May 2013 and on 26th June 2013
(without attendance)

Determination Promulgated
on 31st July 2013

Before

UPPER TRIBUNAL JUDGE HANSON

Between

ABDALLAH MOHAMED OMAR

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Blackwood of One Immigration (Leicester)

For the Respondent: Mr Smart - Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Colyer, promulgated on the 20th November 2012, following a hearing at Nottingham Magistrate Court on the 5th November 2012, in which he dismissed the appellant's appeal against the refusal of the respondent to revoke a deportation order made against him as a result of a commission of a crime of violence.

2. On 11th January 2012 the Secretary of State made a deportation decision/order in accordance with the provisions to be found in Regulation 24(3) Immigration (European Economic Area) Regulations 2006.
3. Mr Omar was removed on 16th March 2012.
4. On 19th March 2012 One Immigration wrote to the respondent which was treated as an application for revocation of the deportation order.
5. Permission to appeal was sought on a number of grounds one of which is that the Judge heard arguments on a preliminary issue as noted in paragraphs 10 – 19 of the determination. The First-tier Judge found he could not consider a challenge to the lawfulness of the original deportation order. It is said this failed to address the Immigration (Notices) Regulations 2003 which mandates that a notice must be accompanied by a statement of reasons. The relevance of this issue is said to be that the time in which a person can appeal a decision does not begin to run if such a notice is defective. As such the comment by the Judge that the appellant became 'appeal rights exhausted on or about 19th July 2012' is perverse.
6. This is an important issue which the Tribunal indicated it would consider first for if it was to find in favour of Mr Omar it may be that there had been no valid service of the notice in relation to the original deportation decision. As such the time in which Mr Omar had to appeal against the decision has not yet began to run. As such, although the deportation order was signed, it should not have been enforced if there was an outstanding right of appeal. If this is the case the removal of Mr Omar may have been unlawful, although claims for mandatory or quashing orders or claims for damages are not for this Tribunal as it does not possess the necessary jurisdiction at this time.
7. An initial hearing took place before me on the 23rd May 2013. As a result of a letter containing additional submissions being filed by One Immigration on 7th June 2013 and a response being received from the Secretary of State, all without leave, the case was relisted without attendance on 26th June 2013 to allow the submission to be admitted.

Background

8. Mr Omar was born on the 7th October 1981 and is a citizen of Sweden. The Tribunal has been provided with a very helpful chronology of events by Kim Abbott, a caseworker employed by the Home Office within the Criminal Casework team, who had responsibility for Mr Omar's case in the following terms:

	It is not known when Mr Omar arrived in the United Kingdom. As an EEA national, he would have had the right to free movement as of 1 January 1995.
6 December 2002	Mr Omar first came to the adverse attention of the authorities.
26 November 2004	Mr Omar came to the adverse attention of the authorities again.
11 July 2005	Mr Omar came to the adverse attention of the authorities again.
18 January 2007	Mr Omar came to the adverse attention of the authorities again.
1 August 2008	Mr Omar came to the adverse attention of the authorities again.
20 May 2010	Mr Omar came to the adverse attention of the authorities again.
28 September 2010	Mr Omar came to the adverse attention of the authorities again, when he was convicted at Leicester Magistrates Court of destroying or damaging property (value of damage £5000 or less), for which he received a community order on 27 September 2011. However, the order was revoked on 3 June 2011 (community order) at Leicester Crown Court (due to a period of imprisonment given at a later date).
30 April 2010	Mr Omar came to the adverse attention of the authorities in relation to his most recent offence when he robbed his victim of his phone and smoking materials.
22 March 2011	Mr Omar was convicted at Leicester Crown Court of robbery, failing to surrender to custody at an appointed time and with conviction of an offence whilst a community order was in force.
3 June 2011	Mr Omar was sentenced to a total of 15 months imprisonment for the most recent offence. He did not appeal against conviction or sentence.
30 June 2011	Mr Omar was advised of his liability to deportation when UK Borders Agency sent him an ICD.0350-EEA.
27 July 2011	Mr Omar was served with the ICD.0350-EEA, but failed to respond.
15 December 2011	The UK Borders Agency were advised that Mr Omar was seen during a surgery at HPM Ranby 8 December 2011, and had advised staff there that he had been asked to provide information and that he would do so as soon as possible. However, Mr Omar failed to respond.
16 December 2011	Mr Omar was served with the UK Border Agency's letter dated 16 December 2011, requesting this information within 10 working days (as previously requests for information had failed to prompt a response). However, Mr Omar failed to respond.
9 January 2012	Mr Omar was made the subject of a notice of decision to make a

	<p>deportation order (dated 9 January 2012). Authorisation was also obtained to detain him under immigration powers at the end of his custodial sentence (on 17 January 2012).</p> <p>Consequently, on 9 January 2012, I prepared the following papers for Mr Omar:</p> <ul style="list-style-type: none"> • Notice of decision to make a deportation order (ICD.1070) (dated 9 January 2012) • Appeals paperwork (ICD.1041) • Disclaimer (ICD.3066) • Authority to detain (ICD.02570, dated 9 January 2012) • Reasons for detention letter (ICD.1913, dated 9 January 2012) <p>NOTE: at the time of drafting the notice of decision to deport (ICD.1070) dated 9 January 2012, a full reasons for deportation letter (ICD.1914) could not be provided as I was still awaiting information from Mr Omar regarding his length of residence etc. Additionally, I was also awaiting information from the Probation Service. I also considered it necessary to obtain that information before issuing full reasons for deportation. However, on the basis of his conviction dated 22 March 2011, at Leicester Crown Court for robbery, failing to surrender to custody at an appointed time and with conviction of an offence whilst a community order was in force, for which he was sentenced to 15 month imprisonment, he met the criteria for deportation of EEA nationals. Furthermore, the notice of a decision to deport (ICD.1070) dated 9 January 2012), clearly outlined our initial reasons for deportation.</p>
11 January 2012	<p>I e-mailed HMP Ranby to the effect that I was about to fax over the deportation and detention paperwork for Mr Omar (at 13:34).</p> <p>I faxed the above detailed documents to HMP Ranby. Those documents, including the fax cover sheet, amounting to 36 pages, which I faxed to fax number 01777 863020. I received a fax confirmation which timed the sending as 13:34 hours. I produce a copy of those documents into evidence (Reference KA 1).</p> <p>At 14:05, HMP Ranby e-mailed me back (copy produced Reference KA 2) and confirmed that they had received all the paperwork (all dated 9 January 2012), which was served the same day. (as I later confirmed when I rang the prison on 9 February 2012 and updated the Home Office database to this effect.</p> <p>5 days were provided for Mr Omar to appeal from the date of service.</p>

	<p>(One Immigration's letter to Keith Vaz MP dated 17 April 2012, also referred to my letter dated 9 January 2012, which was later forwarded to the Home Office for a response).</p>
17 January 2012	<p>I prepared a draft reasons for deportation letter (ICD.1914) for my Senior caseworker for checking and in my accompanying minute to the Senior Case Worker, I stated that Mr Abdallah Mohammed Omar had indicated that he intended appealing against deportation (I am unsure where I obtained this information, but I was in direct telephone contact with the prison at that time and it is not unusual to telephone to confirm information/facts).</p> <p>My letter outlined the full reasons for Mr Omar's deportation, on the basis of all the previous information that we had. In that letter, it referred to the previous letters issue to Mr Omar, requesting information and his lack of a response, and at the end of that letter, in the "Human Rights and Proportionality" part of that letter, it was repeated to the effect that as Mr Omar had not responded to requests for information on 30 June 2011 and again in 16 December 2011, that we had no further information to consider. Mr Omar's attention was again drawn to the fact that he was advised of his appeal rights in the notice of a decision to make a deportation order dated 9 January 2012.</p> <p>NOTE: MONTHLY DETENTION REVIEWS AFTER THIS DATE ALSO REPEATED THE DATE OF SERVICE OF THE NOTICE OF A DECISION TO MAKE A DEPORTATION ORDER AND THE FACT THAT NO APPEAL HAD BEEN LODGED.</p>
19 January 2012	<p>I noted the Home Office database to the effect that I had amended the reason for deportation letter (ICD.19140) and had faxed it to the prison and was just awaiting for the legal appeal to be lodged.</p>
9 February 2012	<p>I received confirmation that Mr Omar had been moved from HMP Ranby to HMP Lincoln on 3 February 2012 (I noted the Home Office database to this effect). I also confirmed verbally that the deportation and detention paperwork had been served on 11 January 2012. I also noted on the same date that Mr Abdallah Mohammed Omar had apparently refused to comply with the documentation process by providing bio-data, but that I had sufficient information to enable me to obtain an EU letter for removal purposes. I further stated that Mr Abdallah Mohammed Omar had not appealed against deportation, as claimed. As such, I proceeded to take steps to obtain the signed Deportation Order as he had effectively become "appeal rights</p>

	exhausted" on 18 January 2012.
13 February 2012	Mr Omar, was inducted at HMP Morton Hall.
16 February 2012	As no evidence had been received to the effect that Mr Omar had appealed against deportation, a signed Deportation Order was obtained. This was also faxed to the prison on 16 February 2012.
26 February 2012	Mr Omar was served with the signed Deportation Order.
5 March 2012	Removal directions were set for this date but subsequently cancelled. The monthly detention review on this date included reference to the appellant having been served a letter outlining the reasons for deportation since the last review. I accept that this is a typing error, and was probably copied from a previous review. The document is on our system as a template, the last sentence is part of the standard wording of the template, and would be included whether the appellant was represented or not.
9 March 2012	Removal directions were set for this date, but were subsequently cancelled as Mr Omar refused to leave the Immigration Removal Centre.
12 March 2012	Removal directions were re-set for 16 March 2012.
16 March 2012	Mr Omar was deported. A faxed letter was received from One Immigration, after Mr Omar had been deported. The letter referred to a fax dated 14 th March 2012, sent to a fax number unknown to me and this letter has never been received to date. The letter dated 16 March 2012 was taken as an application to revoke a Deportation Order.
19 March 2012	I received a letter from One Immigration, after that they wanted their letter dated 16 March 2012 to be treated as an application for revocation of a Deportation Order. They also referred to their fax dated 14 March 2012, which I had no knowledge of. They stated that there was no consideration of Mr Abdallah Mohammed Omar's relationships in the UK, but I noted on the Home Office database that Mr Abdallah Mohammed Omar did not appeal against deportation and never responded to being advised of his liability for deportation, or the request for further information. Therefore, there was no information to consider in relation to family ties etc. However, I faxed a letter to One Immigration requesting written authority from Mr Omar confirming that they are acting on his behalf, following

	which I stated that I would respond to their letter.
19 March 2012	A faxed letter was received from One Immigration enclosing their client's authority. This was taken as an application to revoke the deportation order.
19 April 2012	I put a proposal to the Senior Caseworker in Team 7, Criminal Casework, refusing [to revoke] the Deportation Order.
11 May 2012	I faxed the reasons for refusing [to revoke] the Deportation Order to One immigration.
8 June 2012	The appeal against the decision to refuse to revoke the deportation order was received and is on-going.

Mr Omar's case

9. In his skeleton argument filed on behalf of Mr Omar Mr Blackwood records in paragraphs 1 to 4 the following:
 1. A is a Swedish national who resided in the UK continuously from 26.01.2002 to 16.03.2012 (i.e. for over 10 years). By letter dated 09.01.2012 R notified A of her decision to make a DO against A. A did not appeal at that time, apparently due to a lack of legal representation. A was deported from the UK on 16.03.12 further to the DO made by R on the 16.02.12.
 2. A had contacted his criminal solicitors with regard to his immigration matters when first contacted by R. It was not until January 2012 that he was informed that they were unable to assist him with his immigration matters. A then contacted legal aid representatives; the booked appointment was then cancelled as A was moved out of the area in which those representatives could accept instructions.
 3. A instructed his current representatives (OI) very late in the proceedings – on 14.03.2012. OI faxed R the same day and attempted to contact R by telephone, to no avail. OI faxed R again on 16.03.2012. R treated the OI faxes as a request for revocation of the DO.
10. The grounds of appeal submitted in challenge to the refusal raised a number of issues. Paragraph 12 of those grounds states:

12. Notwithstanding the matters raised in the first fax, R has provided no evidence that A was served with the Notice of decision dated 09.01.2012 and no evidence that A was served with the notice of his appeal rights.
11. In paragraph 28 of his skeleton argument Mr Blackwood sets out his submissions in relation to the issue of the source of Mr Omar's right to appeal against the deportation decision and submits that the time in which the appellant had to appeal the original deportation decision has yet to start to run [40 – 41]. He submits the Notice Regulations are relevant to EEA decisions and that a failure to serve in accordance with the Notice Regulations meant there had not been valid service of the notice and so time did not start to run.

The Secretary of State's case

12. On behalf of the Secretary of State Mr Smart's contends that the service of the notice was lawful, that the Upper Tribunal has no jurisdiction to re-open this issue, and that the decision of Judge Colyer is not infected by any material error of law.

Discussion

13. Mr Smart challenged the Tribunals ability to consider the lawfulness of the deportation decision. The Upper Tribunal has jurisdiction in relation to appeals on points of law arising from decisions made by the First-tier Tribunal other than excluded decisions. In addition there may be a situation in which there is no provision in statute or common law and so no jurisdiction. This latter may arise in a case when judicial review is the correct vehicle by which to seek a remedy. In relation to the Tribunal, an excluded decision includes a bail decision, ancillary proceedings and a decision on a preliminary issue. The grounds on which permissions to appeal is sought refer to the question of the lawfulness of the deportation as being a preliminary issue as did Judge Colyer. I do not find this to have been a preliminary issue in the strict sense in which this term is understood in legal circles, such as to make it an excluded decision, but rather a point considered as a preliminary point in the sense it was to be considered first as it may have been determinative of the remainder of the issues. I do not find the Tribunal jurisdiction to be excluded on this basis.
14. The advocates both refer to The Immigration (Notice) Regulations 2003 (as amended). The Immigration (Notices) Regulations 2003 only apply to a decision under the Immigration Act 1971, which is an immigration decision within the meaning of section 82 of the Nationality, Immigration and Asylum Act 2002. It is contended that the intention to deport Mr Omar is an immigration decision within the meaning of section 82 which was not challenged by Mr Smart.

15. Regulation 4 (1) provides that , subject to Regulation 6, the decision maker must give written notice to a person of an immigration decision or EEA decision taken in respect of him which is appealable. Regulation 6 is not applicable to this appeal.
16. Regulation 5 deals with the content of the notice given under Regulation 4(1) and states:
 - 5 (1) (a) it is to include or be accompanied by a statement of the reasons for the decision to which it relates.
 - 5 (3) ..the notice under regulation 4 shall also include or be accompanied by, a statement which advised the person of:
 - (a) His right of appeal
17. The regulations do not proscribe the format of the notice or how the information should be provided, just that it must be.
18. The 2006 Regulations incorporate into United Kingdom domestic law the provisions of Directive 2004/38/EC dated 29th April 2004 which sets out the rights of citizens of the Union and their family members to move and reside freely within the territory of Member States. Article 30 of the Directive states:

Article 30

 1. The persons concerned shall be notified in writing of any decisions taken under Article 27(1), in such a way that they are able to comprehend its content and the implications of them.
 2. The persons concerned shall be informed precisely and in full, of the public policy, public security or public health grounds on which the decisions taken in their case is based, unless this is contrary to the interests of State security.
19. This appears on the face of it to mirror the Notice Regulations but is also a matter considered in the recent case of ZZ v Secretary of State for the Home Department [2013] EUECJ C-300/11 (04 June 2013), to which the parties additional submissions related, in which the Grand Chamber gave their ruling in response to a request for a preliminary ruling concerning the interpretation of Article 30 (2). The case involved ZZ who the respondent sought to exclude from the United Kingdom on grounds of public security. In that case it was accepted that the Secretary of State did not inform ZZ of the precise and in full grounds that constituted the basis for the decision which was a decision appealed to SIAC.

20. The Court found:

- 46 Article 30(1) of Directive 2004/38 provides, so far as concerns the requisite content of, and statement of reasons for, a decision taken under Article 27 of that directive, such as the decision refusing entry at issue in the main proceedings, that the person concerned must be notified of the decision in writing and in such a way that he is able to comprehend its content and the implications for him. In addition, Article 30(2) provides that the person concerned must be informed, precisely and in full, of the public policy, public security or public health grounds which constitute the basis of such a decision, unless this is contrary to the interests of State security.
- 47 Article 31 of Directive 2004/38 obliges the Member States to lay down, in domestic law, the measures necessary to enable Union citizens and members of their families to have access to judicial and, where appropriate, administrative redress procedures to appeal against or seek review of any decision restricting their right to move and reside freely in the Member States on the grounds of public policy, public security or public health (see, to this effect, Case C-249/11 *Byankov* [2012] ECR I-0000, paragraph 53). In accordance with Article 31(3), the redress procedures must include an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based.
- 53 According to the Court's settled case-law, if the judicial review guaranteed by Article 47 of the Charter is to be effective, the person concerned must be able to ascertain the reasons upon which the decision taken in relation to him is based, either by reading the decision itself or by requesting and obtaining notification of those reasons, without prejudice to the power of the court with jurisdiction to require the authority concerned to provide that information (Joined Cases C-372/09 and C-373/09 *Peñarroja Fa* [2011] [ECR I-1785](#), paragraph 63, and Case C-430/10 *Gaydarov* [2011] ECR I-0000, paragraph 41), so as to make it possible for him to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court with jurisdiction, and in order to put the latter fully in a position in which it may carry out the review of the lawfulness of the national decision in question (see, to this effect, Case 222/86 *Heylens and Others* [1987] ECR 4097, paragraph 15, and Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakat International Foundation v Council and Commission* [2008] ECR I-6351, paragraph 337).
- 55 As regards judicial proceedings, the Court has already held that, having regard to the adversarial principle that forms part of the rights of the defence, which are referred to in Article 47 of the Charter, the parties to a case must have the right to examine all the documents or observations submitted to the court for the purpose of influencing its decision, and to comment on them (Case C-450/06 *Varec* [2008] ECR I-581, paragraph 45; Case C-89/08 P *Commission v Ireland and Others* [2009] [ECR I-11245](#), paragraph 52; and Case C-472/11 *Banif Plus Bank* [2013] ECR I-0000, paragraph 30; see also, as regards Article 6(1) of the European Convention

for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, the judgment of the European Court of Human Rights in *Ruiz-Mateos v. Spain*, 23 June 1993, § 63, Series A no. 262).

69 In the light of the foregoing considerations, the answer to the question referred is that Articles 30(2) and 31 of Directive 2004/38, read in the light of Article 47 of the Charter, must be interpreted as requiring the national court with jurisdiction to ensure that failure by the competent national authority to disclose to the person concerned, precisely and in full, the grounds on which a decision taken under Article 27 of that directive is based and to disclose the related evidence to him is limited to that which is strictly necessary, and that he is informed, in any event, of the essence of those grounds in a manner which takes due account of the necessary confidentiality of the evidence.

21. The decision to make a deportation order dated 9th January 2012 was served upon the appellant and contains the following text:

On 22nd March 2011 at Leicester Crown Court, you were convicted of robbery, failing to surrender to custody at an appointed time and convicted of an offence whilst a community order is in force. The Secretary of State has considered the offence of which you have been convicted and your conduct, in accordance with regulation 21 of the Immigration (European Economic Area) Regulations 2006. She is satisfied that you would pose a genuine, present and sufficiently serious threat to the interests of public policy if you were allowed to remain in the United Kingdom and that your deportation is justified under regulation 21. She has therefore decided under regulation 19 (3)(b) that you should be removed and an order made in accordance with regulation 24(3), requiring you to leave the United Kingdom and prohibiting you from re-entering while the order is in force. For the purposes of the order section 3(5)(a) of the Immigration Act 1971 will apply.

The Secretary of State proposes to give directions for your removal to Sweden, the country of which you are a national and where there are reasons to believe you will be admitted.

22. A notice of the right of appeal under regulation 26 is also included in the notice.
23. I am satisfied the appellant received this notice as there is reference in the chronology of Kim Abbott to a letter from One Immigration to the local MP dated 17th April 2012 referring to the letter of 9th January 2012 and Mr Blackwood's own chronology acknowledges such receipt. It is stated that the appellant did not appeal at that time "apparently due to a lack of legal representation". He had contacted his criminal solicitors when made aware of the intention to deport who advised him they were unable to assist him in January 2012, as a result of which he endeavoured to instruct another solicitor. I also note the confirmation that the appellant was served by the prison on 11th January 2012.

24. It is permissible for the notice of decision to include or be accompanied by a statement of reasons for the decision. In this case Mr Smart argues the reasons were included in the above notice. It is accepted that a person subject to a decision of this nature must be able to ascertain the reasons upon which the decision taken in relation to him is based, either by reading the decision itself or by requesting and obtaining notification of those reasons (see ZZ above). The reasons why the decision to deport was made is set out in this document.

25. There was no further communication from the appellant regarding the notice of decision to deport him, no indication he was seeking legal advice, no notice he had been prevented from keeping an arranged appointment as a result of his move within the prison service and so on 18th January 2012 it was said he was 'appeal rights exhausted' by the case worker. On 16th February 2012 a signed deportation order was made which I find remains a valid order notwithstanding Mr Blackwood's challenge which can only be to the legality of the removal on the basis of a claimed extant in-country right of appeal. On 26th February it is said the appellant was served with this signed order. There is also a letter dated 17th January 2012 headed 'Reasons for Deportation' referring to the conviction, the appellants conduct in further detail, the assessment of the risk he posed, his history of offending, and the proportionality of the decision by reference to the 2006 Regulations and Article 8 ECHR. It is accepted that the letter was not served at the same time as the decision to deport. The requirement is for a person to be informed precisely and in full, of the public policy, public security or public health grounds on which the decision is made (Article 30 (2)) which raises the question whether this to be read as each and every reason or just sufficient to enable him to understand the case against him in relation to the ground being relied upon - i.e. to know the case he is required to respond to? It is arguable that the latter proposition is supported by the decision in ZZ. In this appeal the letter of 17th January 2012 contains more detail than the information contained in the reasons for deportation decision as it is based upon a further analysis of the appellants own conduct and criminality, of which he is aware. I find the appellant was therefore informed of the reasons for the deportation decision notwithstanding the existence of the more detailed second document dated 17th January 2012. This is of course a fact specific finding as there may be cases in which one document specifies a reason but a later more detailed document contains fuller alternative reasoning. In such a case there may be an argument that the requirements of the regulations have not been complied with as a result of which time in which to appeal has yet to begin to run. I find the assessment must be based upon consideration of the substance of the information provided and not just form having considered the judgment in ZZ.

26. I also note with interest the letter from One Immigration to Keith Vaz MP dated 17th April 2012 in which they did not raise the matter they now seek to rely upon in relation to the requirement of the Notice Regulations by reference to 'full reasons' but claim he was not served with appeal forms in relation to the

decision to deport. The decision set out the right of appeal and all the information required by regulation 5 (3) of the Notice Regulations.

27. In the alternative, if the fact the letter is more detailed than the notice of decision justified a finding there had not been compliance with the requirements of the Notice Regulations, and therefore time in which to appeal against the decision to deport the appellant had not yet began to run, what is the effect? At no time has an appeal against the decision to deport been lodged and so Mr Blackwood argues there cannot be said to have been waiver in the sense of the acceptance of a defective notice by an appeal against the decision on this basis. The chronology indicates that One Immigration were only instructed on 14th March 2012, notwithstanding the appellant being aware of attempts to remove him being cancelled before this date and that his removal was imminent. A fax was sent to UKBA on 14th March to a fax number One Immigration obtained from a form informing the appellant he was the subject of a deportation order and was to be removed to Sweden on 16th March 2012. There was no response and so they sent a second letter to a different fax number on 16th March 2012. A letter from Kim Abbott, the caseworker, to One Immigration dated 19th March 2012 states that she did not receive the fax of 14th March 2012 and sought the appellant's authority confirming that One Immigration were acting on his behalf after which she was willing to provide information relating to the appellant's immigration status. One Immigration responded on 19th March 2012 with the signed authority but claim in the letter to Keith Vaz not to have received a reply. Notwithstanding the imminent deportation there was no application for an injunction to prevent removal made to the High Court or any other proceedings such as an application for leave to appeal out of time lodged.
28. On the 10th May 2012 Kim Abbott replied to One Immigration advising them that the letters dated 16th and 19th March had been taken as an application to revoke the deportation order, which was refused, and a notice explaining the decision and reasons served. One Immigration lodged an appeal against that decision on the proscribed form which can be taken as an acceptance by them that the decision to refuse to revoke was a lawful decision, as indeed it was. The Grounds of Appeal refer to One Immigration's second fax specifically asking for it to be treated as an application for revocation of the deportation order.
29. The law relating to a revocation of a deportation order made against an EEA national is to be found in Regulation 24A of the 2006 Regulations which states:
 - 24A. (1) A deportation or exclusion order shall remain in force unless it is revoked by the Secretary of State under this regulation.
 - (2) A person who is subject to a deportation or exclusion order may apply to the Secretary of State to have it revoked if the person considered there has been a material change in the circumstances that justified the making of the order.

- (3) An application under paragraph (2) shall set out the material change in circumstances relied upon by the appellant and may only be made whilst the applicant is outside the United Kingdom.
- (4) On receipt of an application under paragraph (2), the Secretary of State shall revoke the order if the Secretary of State considers that the criteria for making such an order are no longer satisfied.
- (5) The Secretary of State shall take a decision on an application under paragraph (2) no later than six months after the date on which the application is received.

- 30. Paragraph 24A (4) was inserted from 16th July 2012
- 31. The request by One immigration for the deportation order to be revoked was refused by the respondent in part because it had not been established that there was any material change in the circumstances that existed at the time the decision to deport the appellant was made. The reasons for deportation letter dated 17th January 2012 set out the reason why the appellant was to be deported by reference to his time in the UK, personal conduct, and assessment of risk. It was noted in the NOMS 1 report that he was assessed as posing a medium risk of harm to the public and a medium risk of re-offending. This demonstrated that a fundamental element of the legal test was considered, namely the appellants personal conduct (reg.21 (5)(b)) and the fact that such personal conduct must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society (Reg. 21 (5)(b)).
- 32. Regulation 21(6), relating to the proportionality of the decision, was considered in the refusal notice in which the appellant's personal circumstances are noted. In this regard it is recorded that the appellant was contacted on two occasions on 30th June and 16th December 2011 but failed to respond and there was no further information available to the Secretary of State for her to consider. The respondent accepted there may be private life per se with his mother and sibling based upon the Offender Managers report but did not find it proved that Article 8 ECHR was engaged on this basis. The burden of proving this to be the case rested upon the appellant in any event.
- 33. It was also noted that although the appellant first came to the attention of the authorities on 6th December 2002 there was no evidence he was exercising treaty rights in the UK and there was no evidence of any degree of integration either, or that he had developed a private life. The letter states that even if a private life had been developed the threat the appellant posed to the public, when all issues were weighed in the balance would make the decision proportionate.

34. In the respondent's letter dated 8th May 2012 the reasons for the refusal to revoke the deportation order were given. The letter refers to correspondence from One Immigration dated 16th March 2012 in which there is reference to the appellant having a partner and child in the UK and that the appellant's mother and two siblings also reside here. One Immigration asserted that no consideration had been given to his relationships in the United Kingdom and nor had the best interests of the child been considered. The respondents view is that as these matters existed at the time of the decision to deport it is not accepted they amount to a material change in circumstances.
35. I also note in this regard there is no challenge to the fact the appellant was given the opportunity to respond and provide additional information to the case worker yet failed to do so. If the existence of these persons was known to the appellant, but he failed to inform the Secretary of State, she cannot be criticised for failing to take them into account at the time of the original decision. The appellant must be responsible for any failings that may have occurred as a result of his lack of co-operation.
36. The assessment of threat and risk to the public was considered in the revocation letter and it is noted in paragraph 22 of that letter that:

"Your offender manager considered that the underlying factors relating to your recent aggressive and threatening behaviour are linked to limited victim awareness, peer group influences, high risk taking behaviour and a lack of consequential thinking"
37. The appellant's failure to accept responsibility for his actions and to attempt to blame others is noted, including the appellant denying using intimidating behaviour. He had not undertaken offender focused work as a result. It was found there remained a very real risk of his acting similarly again and that any future offences could be of a similar or more serious nature.
38. Judge Colyer set out his reasoning in relation to the existence of a change in circumstances in paragraph 84 of the determination and found there had been, in his opinion, no material change to the risk posed by the appellant. This is strong justification for the deportation order remaining in force and shows that the criteria on which the order is based, he need to protect the public from the consequences a further threat to a fundamental interest (protection of the public from crimes of violence) continues to be satisfied.
39. Evidence of the family dynamics and the existence of a child was made available to Judge Colyer who found evidence of a limited parental relationship between the appellant and his child. In paragraph 88 of the determination he found:

- 88 I recognise that a significant issue in this case is the weight to be given to the best interests of child who was affected by the decision to deport one parent from this country and to refuse to revoke that order. With in this, however, is a much more specific question: in what circumstances is it permissible to remove a non-citizen parent where the effect will be that a child who is a citizen of the United Kingdom will also have to leave?
40. Judge Colyer answered this question, in part, by reference to the fact that the appellant's removal did not require the child to leave the United Kingdom as he remains in the care of his mother. The emotional wellbeing of the child was considered [91] but it noted there were no reports from specialists and no evidence of detrimental effect or adverse educational achievement on the child to date [91].
41. Judge Colyer found the best interests of the child not be determinative [92].
42. The issue of rehabilitation was raised by Mr Blackwood and in this regard we now have the guidance from the Upper Tribunal in the case of *In Essa (EEA: rehabilitation/integration)* [2013] UKUT 00316 (IAC) it was found:
3. *For those who at the time of determination are or remain a present threat to public policy but where the factors relevant to integration suggest that there are reasonable prospects of rehabilitation, those prospects can be a substantial relevant factor in the proportionality balance as to whether deportation is justified. If the claimant cannot constitute a present threat when rehabilitated, and is well-advanced in rehabilitation in a host state where there is a substantial degree of integration, it may well very well be disproportionate to proceed to deportation.*
 4. *At the other end of the scale, if there are no reasonable prospects of rehabilitation, the claimant is a present threat and is likely to remain so for the indefinite future, it cannot be seen how the prospects of rehabilitation could constitute a significant factor in the balance. Thus, recidivist offenders, career criminals, adult offenders who have failed to engage with treatment programmes, claimants with propensity to commit sexual or violent offences and the like may well fall into this category.*
 5. *What is likely to be valuable to a judge in the immigration jurisdiction who is considering risk factors is the extent of any progress made by a person during the sentence and licence period, and any material shift in OASys assessment of that person.*
43. This is a case in which it has been found Mr Omar remains a present threat to public policy. The issue of rehabilitation could not be considered at the time the original decision was made and removal as the appellant failed to engage with the Secretary of State. There are probation services in Sweden and although

there is family in the United Kingdom it has not been shown that his rehabilitation needs, if any, require him to remain in this country. Indeed if the appellant has remained out of trouble since his removal to Sweden he must have progressed with his rehabilitation there. The issue of rehabilitation is also only one of the relevant factors to be considered and not the determinative factor. In this case the risk posed by the appellant and the fact he had not proved that he needed to remain in the United Kingdom to rehabilitate mean no material error was made on this point.

44. Having considered the evidence provided and findings made with the degree of care required in an appeal of this nature I find the conclusions of Judge Colyer in relation to the refusal to revoke the deportation order were properly open to him on the evidence.
45. Mr Blackwood's submissions there can only be one appeal at a time, suggesting that until an appeal is heard in relation to the original decision there cannot be an appeal against a subsequent decision to refuse to revoke the order, is not correct. I do not find that failure to serve documents in accordance with the relevant regulations renders the deportation order invalid or unlawful, as that has not been proved to be so in law. As stated above, the deportation order is a valid order, the issue being whether the respondent was entitled to enforce that order if there were extant appeal rights. The application to revoke the order must be taken as an acknowledgment of this fact as the appeal against the refusal was a valid appeal that needed to be considered on its merits. In SS and Others [2006] UKAIT 00074 it was found that the requirements of the Notice regulations can be waived in their entirety by proper service of the notice of appeal. It may be argued that even though there was no appeal against the original decision to deport, the proper service of the notice of appeal against the refusal to revoke amounts to such a waiver in relation to the validity/lawfulness of the order that the refusal relates to.
46. In summary- I do not accept that the events of 2012 in relation to the service of the decision to deport the appellant and the notice of reasons renders the deportations decision invalid or the subsequent refusal to revoke unlawful. I do not find it proved that Judge Colyer erred in law in dismissing the appeal against the refusal as he was entitled to do so, on the evidence. If the act of removal was unlawful the appellant may have a remedy in another jurisdiction, which, if this is the case, is something that he perhaps should have considered exercising some time ago (if he considers a claim for damages or declaration of legality/quashing order is justified).

Decision

47. **There is no material error of law in the First-tier Tribunal Judge's decision. The determination shall stand.**

Anonymity.

48. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order as there was no application for the same and no justification for such an order proved.

Signed.....
Upper Tribunal Judge Hanson

Dated the 30th July 2013