Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00339/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 2 December 2014	**On 11 December 2014**

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MR S U
(Anonymity Direction Made)

Respondent

Representation:
For the Appellant: Mr S Walker a Senior Home Office Presenting Officer
For the Respondent: Mr C Yeo of counsel instructed by Renaissance Solicitors

DETERMINATION AND REASONS

1. The appellant is the Secretary of State for the Home Department ("the Secretary of State"). The respondent is a citizen of Pakistan who was born on 29 May 1959 ("the claimant"). The Secretary of State has been given permission to appeal the determination of First-Tier Tribunal Judge Warren L Grant ("the FTTJ") who allowed the claimant's appeal against

the Secretary of State's decision of 5 February 2014 to refuse to revoke the deportation order made against him on 17 February 1998.

2. The claimant entered the UK illegally on 17 March 1994. On 24 March 1994 he claimed asylum but then did not pursue the claim. On 17 October 1995 he married MPP at Newham Registry Office. On 19 March 1996 he was granted leave to remain as a spouse for a period expiring on 17 October 1995. On 18 September 1996 he was convicted at Wood Green Crown Court on an indictment containing two counts of conspiracy to defraud. On 27 September 1996 he was sentenced to a total of three years and six months imprisonment and recommended for deportation.

3. On 22 November 1997 the claimant's asylum claim was refused. On 17 February 1998 a deportation order was made against him. Further representations were submitted but on 16 March 1998 the Secretary of State refused to revoke the deportation order. The claimant's appeal against the decision was heard on 5 June 1998. The claimant said that he was a Christian and claimed to fear persecution from extremists in Pakistan who had accused him of blasphemy. His evidence about this was not accepted and his appeal was dismissed. His application for permission to appeal was rejected and on 13 August 1998 his appeal rights were exhausted. On 8 October 1998 he was deported to Pakistan.

4. Sometime in 2000 the claimant re-entered the UK clandestinely. On 18 January 2002 his marriage to MPP was dissolved. On 24 June 2003 he lodged an application for leave to remain as the spouse of JU. She was and is a British citizen having been granted leave to remain on account of her marriage to another man on 5 May 1990 which was dissolved on 17 April 2001.

5. The claimant's application for leave to remain was acknowledged to his then solicitors on 1 July 2003. On 28 November 2005 the claimant applied for leave to remain as part of the "family exercise". On 10 December 2013 the Secretary of State wrote to his current solicitors requesting further information. This was supplied on 19 December 2013 and at the same time the solicitors claimed that the claimant's offence was "spent".

6. In her refusal letter the Secretary of State treated the letter of 19 December 2013 as a fresh claim on human rights grounds. This claim was refused and the Secretary of State also refused to revoke the deportation order. In a letter dated 12 September 2013 the Secretary of State explained that she was not able to decide the marriage application, which was being treated as an application to revoke the deportation order, until a decision had been made whether or not to revoke the deportation order itself.

7. The claimant appealed and the FTTJ heard the appeal 7 August 2013. Both parties were represented, the claimant by Mr Yeo, who appeared before me. The FTTJ heard evidence from the appellant and his wife.

8. The claimant continued to claim that he would be at risk of persecution in Pakistan because of his Christian faith and allegations of blasphemy made against him. The FTTJ rejected that claim and there is now no appeal against that decision.

9. Having heard evidence from his wife the FTTJ accepted that the claimant had not been fully frank with her about his criminal conviction or deportation and she had not been aware of the reason for his lack of immigration status until some 10 years after they married. Since 2005 she had been self-employed running an Internet cafe. The income from this business supported both of them. The claimant's wife had a daughter born in 1992 before she met the claimant who lived with them. The claimant's wife and daughter had visited Pakistan but because of his lack of immigration status the claimant was not able to go with them.

10. The claimant argued that his application for revocation of the deportation order should be considered under paragraph 390 of the Immigration Rules and that, despite having been convicted and sentenced for a serious criminal offence, deportation would be disproportionate to his entitlement to enjoy an Article 8 private and family life in the UK.

11. The FTTJ found that the pressing public interest in deportation outweighed any Article 8 human rights claim as these were set out in the Immigration Rules. Deportation would mean a period of separation from the claimant's ties in the UK and the length of that period of separation would depend on the success or otherwise of any application for entry clearance which he made from outside the country. It would not be subject to a 10 year bar but would take into account his adverse immigration history.

12. The FTTJ went on to conclude that a time lag of 10 years was capable of being an exceptional circumstance permitting him to consider the human rights grounds outside the Immigration Rules. Applying Razgar, R (on the Application of) v. Secretary of State for the Home Department [2004] UKHL 27 principles and taking into account the provisions of the Immigration Act 2014 the FTTJ found that the claimant enjoyed a private and family life with his wife and daughter and a private life in his church and community. His removal would interfere with that private and family life to such an extent as to engage the Convention. The Secretary of State delayed nine years before dealing with his claim and this delay needed to be viewed in the light of EB (Kosovo) v SSHD [2008] UK HL 41. The FTTJ concluded that, taking into account this delay on the part of

the Secretary of State which was not in any way attributable to the claimant, the conviction related to an offence committed almost 20 years ago and there had been no suggestion of any criminal behaviour on the part of the claimant since he returned to the UK to remove him would be a disproportionate interference with his Article 8 human rights.

13. The FTTJ dismissed the appeal under the Immigration Rules but allowed it on Article 8 human rights grounds. He made an anonymity direction to protect members of the claimant's family.

14. The Secretary of State applied for and was granted permission to appeal. The grounds argue that the FTTJ erred in law by failing to consider the Article 8 deportation provisions in the Immigration Act 2014; failing to give proper regard to the Government's view as to what were exceptional circumstances; failing to take into account the fact that whilst that was admitted delay on the part of the Secretary of State which was regrettable this was not determinative; failing to address correctly the effects of delay under EB Kosovo principles; failing to take into account that the claimant's wife could relocate with him or that they could keep in touch through modern methods of communication; failing to conclude that the claimant's circumstances were not exceptional; failing to give adequate consideration to the Secretary of State's public interest policies and the strong public interest in favour of his deportation.

15. I have a skeleton argument from Mr Yeo.

16. Mr Walker relied on the grounds of appeal and took me through the chronology. He accepted that there had been delay on the part of the Secretary of State. I pointed out the reference to paragraph 391 of the Rules in paragraph 24 of the determination. Paragraph 391 provides;

> "391. In the case of a person who has been deported following conviction for a criminal offence, the continuation of a deportation order against that person will be the proper course:
>
> (a) in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of less than 4 years, unless 10 years have elapsed since the making of the deportation order when, if an application for revocation is received, consideration will be given on a case by case basis to whether the deportation order should be maintained, or
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> (b) in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of at least 4 years, at any time,

Unless, in either case, the continuation would be contrary to the Human Rights Convention or the Convention and Protocol Relating to the Status of Refugees, or there are other exceptional circumstances that mean the continuation is outweighed by compelling factors."

17. I asked Mr Walker to address me on the question of whether, as the appellant had been sentenced to a period of imprisonment of less than four years and ten years had elapsed since the making of the deportation order, the continuation of the deportation order was the proper course. Mr Walker said that he could not argue that it was the proper course. As a result it appeared that the appeal should succeed under the Immigration Rules. However, he submitted that if this was the case it was not the end of the story as the appellant would need to apply for leave to enter or remain. It would not serve to determine his application for leave to remain as a spouse of a British citizen made on 24 June 2003. Mr Walker accepted that it was difficult for the Secretary of State to continue to advance a public interest argument where she was not entitled to refuse to revoke the deportation order. He indicated that he did not wish to make any further submissions.

18. Mr Yeo submitted that the FTTJ had done a perfectly good job. There were no errors of law in the determination. The Secretary of State's grounds of appeal were formulaic and in essence did no more than offer alternative conclusions to those properly reached by the FTTJ. He tentatively advanced, but did not press, an application for costs. He accepted that as yet there were no directions from the President of the Upper Tribunal as to the circumstances in which costs might be awarded. I was asked to dismiss the Secretary of State's appeal and to uphold the decision of the FTTJ.

19. I reserved my determination.

20. The Secretary of State's grounds of appeal are broadly drawn, formulaic and do little to identify any clear error of law. I find that the determination is lengthy, detailed and addresses all the matters touched on in the grounds of appeal. It is not suggested that any of the findings of fact are flawed or that any material evidence has been left out of account.

21. I find that under paragraph 391 of the Rules and because the claimant was sentenced to less than four years imprisonment and more than 10 years had elapsed since the making of the deportation order the Secretary of State had failed to establish that the continuation of the deportation order against him was the proper course. In the reasons for refusal letter dated 5 February 2014 at paragraph 6 as part of her consideration of paragraph 391 the Secretary of State referred only to the claimant's

"continued exclusion until 10 years have elapsed since the making of the Deportation Order would normally be the proper course". I find that what should have been addressed under paragraph 391 was not the period during which the appellant had been outside or within the UK but the total period of time since the deportation order was made, which was more than 10 years.

22. This conclusion on its own does not mean that the claimant is entitle to succeed under the revocation of deportation provisions in the Rules but it does lead to the conclusion that consideration must "be given on a case by case basis to whether the deportation order should be maintained" and that continuation of the deportation order is not likely to be the proper course.

23. I find that this feeds into and supports the FTTJ's reasoning as to the weight to be given to the public interest in the Article 8 proportionality balancing exercise outside the Rules. Even without this I would have found that in this respect the FTTJ reached a conclusion open to him on all the evidence.

24. The FTTJ made an anonymity direction to protect the interests of members of the claimant's family. Whilst I have not been asked to do so I find that it is necessary to make such an order for the same reason. I make an order under rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the claimant or any member of his family

25. I find that the FTTJ did not err in law. I dismiss the Secretary of State's appeal and uphold the determination of the First-Tier Tribunal.

Signed:..... Date: 8 December 2014

Upper Tribunal Judge Moulden