



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

Appeal Number: DA/02364/2013

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 17<sup>th</sup> June 2014**

**Determination**

**Promulgated**

**On 25<sup>th</sup> July 2014**

**Before**

**UPPER TRIBUNAL JUDGE KING TD**

**Between**

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

Appellant

**and**

**MR GREGORY DWAYNE WHILBY**

Respondent/Claimant

**Representation:**

For the Appellant: Mr T Wilding, Senior Home Office Presenting officer  
For the Respondent/Claimant: Mr I Lourdes, Counsel, instructed by Edward  
Marshall solicitors

**DETERMINATION AND REASONS**

1. The claimant is a citizen of Jamaica born on 4<sup>th</sup> September 1978.
2. On 27<sup>th</sup> January 2002 he arrived in the United Kingdom and was given six months' leave to enter as a visitor. On 4<sup>th</sup> July 2002 an application was submitted on his behalf for indefinite leave to remain in the United Kingdom as a dependent relative of a person present and settled in the United Kingdom. That application was refused because by then the appellant was over 18 years of age. An appeal was lodged against that refusal but later withdrawn on 15<sup>th</sup> December 2004.

3. On 2<sup>nd</sup> November 2004 the claimant applied for leave to remain in the United Kingdom as a spouse of a British citizen. That was refused on 25<sup>th</sup> February 2005. Subsequent appeals were lodged against that decision with appeal rights being exhausted on 19<sup>th</sup> May 2006.
4. Thereafter three further applications were made for leave to remain in the United Kingdom as the spouse of a person present and settled all of which were rejected. On 27<sup>th</sup> February 2007, however, the claimant was granted three years' discretionary leave outside the Immigration Rules valid until 29<sup>th</sup> September 2011. A further three years' discretionary leave was granted until 12<sup>th</sup> December 2014.
5. On 23<sup>rd</sup> May 2013 at the Harrow Crown Court the Claimant was convicted of possession with intent to supply a controlled drug. He was sentenced to 51 weeks imprisonment.
6. In the light of that conviction he was served with notice of his liability to deportation on 31<sup>st</sup> July 2013. He responded raising Article 8 of the ECHR, contending that a decision to deport him from the United Kingdom would be in breach of his human rights.
7. On 13<sup>th</sup> November 2013 the Secretary of State for the Home Department set out detailed reasons why it had been decided to proceed with his deportation. His immigration history was set out, together with the sentencing remarks of the Judge. It was made abundantly clear in those remarks and set out in italics within the written reasons that the Judge did not make a deportation order at the time of sentence so as not to tie the hands of the authorities.
8. It was made entirely clear in the reasons that it was considered that the claimant's deportation was conducive to the public good because, in the view of the Secretary of State, the offending had caused serious harm. It was said that the claimant was a persistent offender who showed a particular disregard for the law of the United Kingdom having amassed three convictions in his background. Paragraph 398 of the Immigration Rules was cited and in particular 398(c) that:

"The deportation of a person from the United Kingdom is conducive to the public good because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law."

It was considered that that particular Section applied in the case of the appellant.

10. Thereafter followed the notice of decision to make a deportation order of the same date namely 13<sup>th</sup> November 2013. It is this decision which gives rise to the appeal.

11. What was set out in that decision was as follows:-

“The Secretary of State has considered the court’s recommendation and has concluded that deportation would be appropriate in your case. Having determined that you are liable to deportation action by virtue of Section 3(6) of the Immigration Act 1971, the Secretary of State has decided to make such an order against you under Section 5(1) of the Immigration Act 1971.”

12. The appellant appealed against that decision. The matter was next considered by First-tier Tribunal Judge Pullig on what seems to have been a prehearing review as scheduled.
13. The Judge noted that no recommendation for deportation had been made and hence the reliance upon Section 3(6) of the Immigration Act 1971 would seem to be misplaced and indeed inaccurate.
14. On 20<sup>th</sup> March 2014 he issued a notice pursuant to Rule 15(3) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 being an indication that he intended to deal with the appeal without a hearing. He said that representations were to be received by the Tribunal no later than 28<sup>th</sup> March 2014.
15. In the event of no representations being made the Judge determined the matter on the papers of 3<sup>rd</sup> April 2014.
16. He found that the decision was not in accordance with the law and therefore that the appeal was allowed on a limited basis.
17. The Secretary of State for the Home Department sought to appeal against that decision on the basis that no trace of the notice had been received and therefore the Secretary of State had not had the opportunity to deal with the matter.
18. Permission to appeal was granted, however, on the basis that it was questionable why the Judge proceeded to determine the appeal on the papers and in any event there seemed to be a lack of reasoning as to why the decision was found not to be in accordance with the law.
19. Mr Wilding represents the Secretary of State. He accepts that the decision was made under the incorrect sub- Section of the Act.
20. He invites my attention to Section 3(5) of the Immigration Act 1971 which provides that a person who is not a British citizen is liable to deportation of the United Kingdom if the Secretary of State deems his deportation to be conducive to the public good.

21. He submits that it was abundantly clear from the reasons, which accompanied the decision, that that was the thrust of the reasoning by the Secretary of State. It was a mistake in all the circumstances for the decision to have failed to refer to the appropriate sub-Section but it was clear from reading the reasons what was truly intended.
22. He submits, however, that notwithstanding the error the decision is and remains a valid and lawful decision because of Section 86(4) of the Nationality, Immigration and Asylum Act 2002. That provides as follows:-

“For the purposes of subsection (3) a decision that a person should be removed from the United Kingdom under a provision shall not be regarded as unlawful if it could have been lawfully made by reference to removal under another provision.”

23. Section 86(3) provides:

“The Tribunal must allow the appeal in so far as it thinks that:

- (a) a decision against which the appeal is brought or is treated as being brought was not in accordance with the law (including immigration rules), or
- (b) a discretion exercised in making a decision against which the appeal is brought or is treated as being brought should have been exercised differently.”

24. Thus he submits that providing the decision could have been made by virtue of Section 3(5) of the Immigration Act , the fact that it was misstated as 3(6) although unfortunate and inaccurate does not invalidate the decision itself.
25. He reinforces the argument by reference to the case of **VM (Chicago Convention s 86(4)) Iran [2010] UKUT 303 (IAC)**. The headnote reads:

“Removal stated in a reasons for refusal letter as under the provisions of the Chicago Convention but which would be lawful under paras 8-10 of Schedule 2 to the 1971 Act cannot be regarded as unlawful by reference either to that Convention or the relevant IDIs, because of the mandatory provisions of s.86(4) of the 2002 Act.”

26. The argument advanced was that a removal for the stated reason of the Chicago Convention was unlawful. It was held the direction for removal could have been made in the same terms under the 1971 Act. The court concluded that the Immigration Judge in that case erred in law failing to deal with Section 86(4).

27. Mr Lourdes, who represents the claimant, invited me to find that the decision of Judge Pullig was entirely correct. The decision had been made on the wrong basis and it was entirely proper for the Judge to expect the decision to be remade in its correct form.
28. It seems to me that were the decision to stand in its own right, then that would be an argument with merit, but in the light of Section 86(4) it is clear that the Judge should also have looked at the reasons for that decision having been made. It would have been apparent that there was another obvious ground for removal that could have been applied. The Judge gives no reason at all why he finds that the decision is not in accordance with the law other than that the Sentencing Judge did not make the recommendation. A complaint was also made that the quality of the papers as presented in the appeal were such that the Judge felt driven to reject them.
29. I find , contrary to the findings of the First-tier Immigration Judge, that Section 86(4) should operate in this case to render the decision not unlawful as an alternative basis was apparent on the papers. I find that in failing to take that matter into account the Judge has fallen into a material error of law. I therefore set aside the decision of Judge Pullig. That in effect leaves the appeal to be listed and heard before the First-tier Tribunal. Having considered the Senior President's practice direction and having noted the number of potential witnesses, I consider that the proper forum for the rehearing ins the First tier Tribunal.
30. Mr Wilding indicated and I requested that he would ensure that the decision notice although valid would be corrected to reflect the correct Section and the sub-Section of the 1971 Act. That did not prevent the progress of the appeal.
31. Mr Lourdes indicated that he was to some extent taken by surprise with the alternative ground. I can find little reason for his doing so given the detailed way in which the matter is dealt with in the reasons for decision. There were many people attending the hearing before me and I anticipate that there will be a significant number of witnesses to give evidence for on behalf of the appellant.
32. No doubt the First-tier Tribunal may consider that prehearing review might be sensible in order to determine the number of witnesses at the time to be allocated. That is a matter however for the administration of the First-tier Tribunal and not for me.
33. While subject to the proper amendment of the decision I see no impediment why the claimant's appeal should not be properly considered in the usual course of events. Although he is on bail, it is a matter which I deem to be in the interests of justice to be determined without undue delay, so that he and his family should know the position as to his future and status in the United Kingdom. Although it was not possible for various

administrative reasons to obtain a date following the hearing it was my hope that the matter can be expedited as far as is possible in the scenario of listing.

Signed

Date

Upper Tribunal Judge King TD