



IAC-FH-AR-V1

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

Appeal Number: DA/01691/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 5 November 2015**

**Decision & Reasons Promulgated  
On 25 November 2015**

**Before**

**THE HONOURABLE MR JUSTICE COLLINS  
DEPUTY UPPER TRIBUNAL JUDGE PICKUP**

**Between**

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

Appellant

**and**

**JAYESH PATEL  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr T Melvin, Home Office Presenting Officer

For the Respondent: Miss S Iqbal, Counsel, instructed by Wilson Barca LLP

**DECISION AND REASONS**

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Robinson whereby she allowed the respondent's appeal against what was regarded by the Secretary of State and was dealt with before her as a refusal to revoke a deportation order which had been made against him pursuant to Section 5(2) of the Immigration Act 1971.
2. That was made as a result of his conviction back in 2001 for using a false passport in order to attempt to travel to New York. He said then that he had arrived in this country in December 1999 but later in interview

appeared to accept that it was not in fact until March or April 2001 that he entered this country by using a false passport.

3. He appeared before Uxbridge Magistrates Court charged with two offences, one of obtaining services by deception and the other for possessing a false instrument and he was sentenced to concurrent sentences of six months' imprisonment and he was then recommended for deportation. The then Secretary of State signed a deportation order on 9 November 2001 but it seems that that order was never served upon the respondent. In any event he applied for asylum. That application was refused in December 2003 and his appeal against that was dismissed in May and he became appeal rights exhausted on 17 May 2004.
4. However nothing was done to remove him despite the deportation order following his conviction. It seems that he met his present partner when she came to this country on a visit visa in November 2007. She overstayed but she and the respondent were married in August 2008 in a Hindu ceremony, but there has not been a formal marriage in this country. However it is accepted that she is his partner and indeed they have a daughter who was born in September 2009.
5. In 2010 his then legal representatives made an application for leave to remain including his partner and child as dependents. That was under the legacy arrangement but that application was rejected in February 2011 and in April of that year the family was served with an IS151A.
6. The solicitors said that they had had no response to their application for ILR although it appears there had been. However, in June 2013 the Older Live Cases Unit requested the respondent to provide any recent or new information for consideration as part of his claim for ILR. That was produced but in 2014 there was a lengthy refusal letter which indicated that there was no basis in the view of the Secretary of State whereby the respondent and his dependants should be able to remain here.
7. However, the matter was dealt with on the basis that it was an application to revoke the deportation order and that decision was made over a year ago now, on 12 August 2014.
8. The decision considered in some detail the Article 8 claim made by the respondent insofar as also it affected his wife and child. Of course Section 55 was material in relation to the child. But it was said that the presumption was that the public interest favoured deportation in accordance with paragraph 396 of the Immigration Rules and to an extent the foundation of the decision rested on the conviction and the deportation that was regarded as desirable and in the public interest as a result of such a conviction.
9. Judge Robinson in considering the question whether the refusal to revoke was in accordance with the Rules took into account the fact that under the Rehabilitation of Offenders Act the conviction for which six months in total

had been imposed would have been subject to rehabilitation after five years, thus in August 2006.

10. Furthermore, by now ten years have elapsed and there is a general approach by the Secretary of State where that is the situation and the sentence was under four years, it can be taken into account as a reason in itself for possibly revoking a deportation order. It is a matter that is to be taken into account, it is not automatic in these cases.
11. The grounds of appeal and the leave to appeal were based on two matters. First it was said to be arguable that the immigration decision by the Secretary of State was exempt from the Rehabilitation of Offenders Act 1974. It was also said that the judge was wrong to consider the Article 8 claim by reference to the Immigration Rules as they were at the date of the refusal, that is August 2014. We will come to the question of Article 8 in due course but we concentrate for the moment on the Rules in relation to deportation.
12. Rule 390 of the Immigration Rules deals generally with revocation of a deportation order and it provides :-

“390. An application for revocation of a deportation order will be reconsidered in the light of all the circumstances including the following:

  - (i) the grounds on which the order was made;
  - (ii) any representations made in support of revocation;
  - (iii) the interests of the community, including the maintenance of effective immigration control; and
  - (iv) the interests of the applicant including any compassionate circumstances.”
13. In relation to rights of appeal against a decision not to revoke a deportation order Rules starting with 396 are material. Rule 396 provides

“Where a person is liable to deportation the presumption shall be that the public interest requires deportation. It is in the public interest to deport where the Secretary of State must make a deportation order in accordance with Section 32 of the UK Borders Act 2007.”
14. This particular deportation order following the conviction in 2001 was not covered by Section 32 of the Borders Act and it was not a question of automatic deportation.
15. Rule 397 says that a deportation order will not be made if removal pursuant to the order will be contrary to the Human Rights Convention but if it would not be contrary to those obligations it would only be in exceptional circumstances that the public interest in deportation is outweighed.
16. It is to be noted that in dealing with deportation and Article 8 Rule 398 only covers cases where there has been a sentence of imprisonment of at

least twelve months. It is not necessary for us to go into full detail, the Rules can if necessary be referred to. Accordingly Rule 399 onwards do not apply but 396 and 397 are material.

17. The whole purpose behind the deportation of one who has committed a criminal offence is that deportation should take place as soon as reasonably possible. Delays such as have occurred in this case are little short of scandalous. We have offences which were serious enough but there is no suggestion that the respondent has committed any further criminal offences apart from staying here when he should not, and certainly there is nothing against him in respect of any reasons to believe that it would be conducive to the public interest that he be the subject of a deportation order save only one based upon the original conviction.
18. The sooner it is appreciated that these delays are unacceptable the better. However in the circumstances of this case there is no question but that having regard to the Rehabilitation of Offenders Act which was material then, and the fact that now ten years have elapsed, indeed had elapsed by the time the application was made even in 2013, the Secretary of State should consider whether the deportation order is still required.
19. We should perhaps refer to the 2012 Act provisions. It is Section 140 which provides no rehabilitation for certain immigration or nationality purposes and provides that the relevant sections of the Rehabilitation of Offenders Act do not apply in relation to any proceedings in respect of a relevant immigration decision or a relevant nationality decision or otherwise for the purposes of or in connection with any such decision. The transitional provisions in Section 141 of the Act provide by subsection 9B that Section 140 does not affect any applications for immigration or nationality decisions made but not finally determined before the commencement date.
20. That shows beyond any doubt that the provisions of the 2012 Act do not apply in the circumstances of this case.
21. Accordingly as we have said, these convictions were rehabilitated in 2006.
22. So far as the Article 8 side is concerned, the Immigration Judge did consider it. There were very detailed reasons given in the refusal letter why in the view of the Secretary of State the respondent was not able to rely on Article 8 and indeed that it was proportionate that he should be removed.
23. Judge Robinson dealt with the Article 8 aspect relatively briefly. She referred to **Huang**. She said she considered the family and private life, recognised that his partner's immigration status was, as it was put, problematic. She is here it seems unlawfully, and has been for a significant period of time. But nowhere did she consider the detailed matters that have to be taken into account in accordance with the Rules as they applied at the relevant time. Indeed it seems clear that the respondent is not able to bring himself within the Rules that relate to Article 8 and will

have to depend upon a decision outside the Rules. But it seems to us in the circumstances that Judge Robinson's conclusion in relation to Article 8 was regrettably superficial and did not deal with the real issues that had been raised in the decision letter.

24. However for the reasons that we have given, we take the view that she was correct to say that the decision not to revoke the deportation order was one which should not stand, that the Secretary of State had not properly taken account of the rehabilitation and of the length of time that had elapsed since the commission of the offences and the fact that there was nothing against the respondent's conduct other than overstaying since that time.
25. We make it clear that the fact that we uphold the Judge Robinson's decision in allowing the appeal under the Immigration Rules does not mean and cannot mean that the respondent has a right to remain. Although we reject the respondent's appeal against the decision of Judge Robinson that the deportation order should be revoked, we allow the appeal in relation to her decision on human rights grounds. Technically I think all that we need say is that her reasoning in respect of Article 8 cannot stand and therefore her decision in relation to Article 8 cannot form the basis of any application or cannot be used by the respondent to his benefit in relation to any decision that will have to be made in relation to leave to remain.
26. It seems to us in the circumstances that the sensible course is to remit the matter to the Secretary of State so that the Secretary of State can decide and give further reasons which are not based upon the commission of the offence and the decision to deport based upon those convictions as to whether leave to remain should be permitted.
27. Since a year has elapsed since the decision was made it would be sensible for the Secretary of State to require the respondent to make representations on the up-to-date position as to why he and his dependents should now be permitted to remain in the country and the Secretary of State will then make a decision one way or the other and that may well be subject to an appeal if removal is still maintained. But that will involve a proper and detailed consideration on appeal if the decision to remove which will be a decision under Section 10 is maintained. The full circumstances will be taken into account.

### **Notice of Decision**

The appeal is dismissed.

No anonymity direction is made.

For the reasons set out in the decision, the matter is remitted to the Secretary of State to reconsider any claim by the respondent to remain.

A handwritten signature in black ink, appearing to be 'M. Collins', written in a cursive style.

Signed  
Mr Justice Collins

Date: 12 November 2015