Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/28611/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 13th June 2016	**On 14th July 2016**

Before

Upper Tribunal Judge Rimington
(Immigration and Asylum Chamber)

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

Mr Shane John Ellis
(No Anonymity direction made)

Respondent

Representation:
For the Appellant: Ms Ahmed, Home Office Presenting Officer
For the Respondent: Mr Jaufurally of Callistes Solicitors

DECISION AND REASONS

The Appellant

1. The application for permission to appeal was made by the Secretary of State but nonetheless for the purposes of this decision I shall refer to the parties as they were described before the First-tier Tribunal that is Mr Lewis as the appellant and the Secretary of State as the respondent.

2. The appellant is a citizen of Jamaica born on 19th June 1981. The appellant came to the UK with his mother as a minor and on 27th June 2006 he was granted indefinite leave to remain. On 16th September 2007 he was arrested and charged with robbery. On 20 May 2010 he was sentenced to 8 years imprisonment (although that sentence was reduced to six years). On 22nd July 2010 he was notified of his liability to automatic deportation. On 14th September 2012 it was recorded that a deportation order was made against him. He appealed and his appeal was allowed by First-tier Tribunal Judge Ross on Article 8 grounds. The Secretary of State was appeal rights exhausted on 13th July 2013.

3. On 25th June 2014 the Secretary of State made a decision to revoke the appellant's Indefinite Leave to Remain by way of Section 76 of the Nationality Immigration and Asylum Act 2002, which the appellant appealed.

4. First-tier Tribunal Judge Shamash allowed the appeal on 4th December 2015 deciding that the use of Section 76 of the Nationality Immigration and Asylum Act 2002 (NIA Act 2002) was an abuse of process because, when the respondent made a deportation order against the appellant on 14th September 2012, she found that the appellant's indefinite leave to remain was automatically revoked and she recorded that the Secretary of State proceeded to reinstate his Indefinite Leave to Remain (ILR) after his appeal which succeeded on Article 8 grounds.

5. The judge recorded paragraph 9 of her decision

> '... it was agreed between the parties that when the respondent made the deportation order against the appellant on 14th September 2012 the appellant's indefinite leave to remain was automatically revoked. It was also agreed between the parties that once Immigration Judge Ross had allowed the appeal under Article 8 this appellant's ILR was reinstated'.

6. The First Tier Tribunal Judge, in allowing the appeal, found that it was not open to the respondent to use Section 76 in these circumstances. It was also recorded by the Judge [10] that the Home Office Presenting Officer accepted that *'following the decision of Immigration Judge Ross it was open to the Home Office to grant 30 months discretionary leave'*. Judge Shamash at [11] stated

> 'I invited Ms Uzodinma to address me on how the respondent could justify the revoking of ILR once it had been reinstated when there was no material change in circumstances'.

And

> '... this case turned on whether or not it was appropriate for the respondent to use Section 76 NIA in the case of an appellant whose case had been allowed by an Immigration Judge'.

7. The judge then noted that the respondent agreed the appellant had not re-offended and added that Section 32 of the UK Borders Act was no

longer relevant since the previous First-tier Tribunal Judge had found that the appellant fell within one of the exceptions to automatic deportation because his rights would be breached under Article 8 ECHR. She concluded that the respondent had, after the deportation order, reinstated ILR.

8. No written evidence of that reinstatement was produced and I should add that a concession in legal error has no effect.

9. The Secretary of State challenged First-tier Tribunal Judge Shamash's decision. She stated that the judge appeared to be under the impression that the Appellant was granted ILR following his successful appeal and the Secretary of State was now seeking to revoke that ILR. It was submitted that the legal position regarding the ILR granted on 27th June 2006 was defined by Section 35(2) of the UK borders Act 2007 which inserted the following into Section 79 Nationality Immigration and Asylum Act 2002,

> 'At the end of section 79 (no deportation order pending appeal) add
>
> "(3) This section does not apply to a deportation order which states that it is made in accordance with section 32(5) of the UK Borders Act 2007.
>
> (4) But a deportation order made in reliance on subsection (3) does not invalidate leave to enter or remain, in accordance with section 5(1) of the Immigration Act 1971, if and for so long as section 78 applies'

10. Thus, Section 79(3) confirmed that the provision preventing a deportation order being made pending appeal *did not apply to a deportation order made in accordance with Section 32(5) of the UK Borders Act 2007* (automatic deportation) but also, by virtue of Section 79 (4), a deportation order made in reliance on subsection (3) (ie Section 32(5)) *did not invalidate leave to enter* or remain so long as Section 78 applied. Section 78 refers to removal whilst an appeal is pending. Thus a deportation order under the automatic deportation provisions could be made but would not invalidate ILR whilst the appeal was pending.

11. The Secretary of State submitted that in the light of the above and following the appeal it was open to the SSHD to decide that the Appellant remained liable to deportation, by virtue of his sentence (section 76(1)(a)) but could not be deported for legal reasons by virtue of the finding of the tribunal that it would be in breach of his Human Rights (Article 8) Section 76(1)(b). It was submitted this was not an abuse of process as asserted at [21] of Judge Shamash's decision but a procedure prescribed by law.

12. At the hearing before me, Mr Jaufurally submitted that it was common ground that a deportation order had been signed by the respondent. He cited Section 79(4) of the NIA Act 2002 which states that

> *'But a deportation order made in reliance on subsection (3) does not invalidate leave to enter or remain in accordance with section 5(1) of*

the Immigration Act 1071, if and for so long as section 78 above applies'.

Section 78 stated

s78 (1) 'while a person's appeal under Section 82(1) is pending he may not be

a. removed from the United Kingdom in accordance with a provision of the Immigration Acts, or

b. required to leave the United Kingdom in accordance with a provision of the Immigration Acts, or

(2) In this section 'pending' has the meaning given by Section 104'

13. Mr Jaufurally argued that in the light of Section 79(4) of the NIA 2002 the fact that the appellant won his appeal against the deportation order did not mean that the deportation order did not have an effect, **George R (on the application of) v SSHD** [2014] UKSC 28. He argued that the effect of the deportation order was to invalidate the appellant's ILR and the Secretary of State had therefore *chosen* to reinstate his ILR after the deportation order and subsequently attempted to revoke it. During the hearing Mr Jaufurally pointed to the letters of the Secretary of State, which he suggested, by the Secretary of State's conduct, showed she had chosen to reinstate ILR. The effect of the successful appeal, and thus the ending of the appeal proceedings, was to induce revocation of ILR. Section 79 NIA only had force whilst the appeal was pending. Thus the Secretary of State was now attempting to revoke an ILR which had been reinstated. That was an abuse and the decision of the First-tier Tribunal Judge should be upheld.

14. Ms Ahmed submitted that the respondent was still able to revoke ILR as the appellant was both liable to deportation but there were legal reasons why he could not be deported.

Conclusions

15. The grounds of appeal to the First-tier Tribunal stated that the Secretary of State's decision was challenged on the basis that it was not in accordance with the law and that it was not in accordance with the appellant's human rights. The judge, however, finding an abuse of process, allowed the appeal but did not identify how the appeal was allowed. I turn to a consideration of the challenge to the First-tier Tribunal Judge's decision as set out above.

16. Sections 3(5) and (6) of the Immigration Act 1971 contain the provisions for deportation. Procedure for and further provisions regarding deportation are found in Section 5 of this Act and provide for the actual making of an order.

17. Section 79 of the NIA 2002 relates to Deportation Orders and appeals, and states as follows

(*1) A deportation order may* ***not*** *be made in respect of a person while an appeal under section 82(1) against the decision to make the order*

(a) could be brought (ignoring any possibility of an appeal out of time with permission), or

(b) is pending

(2) In this section 'pending' has the meaning given by Section 104

(3) ***This section does not apply to a deportation order which states that it is made in accordance with section 32(5) of the UK Borders Act 2007***

(4) But a ***deportation order made*** *in reliance on subsection (3) does not invalidate leave to enter or remain, in accordance with section 5(1) of the Immigration Act 1971, if and for so long as section 78 above applies.*

Section 104 NIA Act as then read as follows

(1) An appeal under section 82(1) is pending during the period-

(2) (a) beginning when it is instituted, and

(b) ending when it is finally determined, withdrawn or abandoned (or when it lapses under section 99)

(3) …

(4) …

(5) An appeal under Section 82 (a) (c) (e) or (f) shall be treated as finally determined if a deportation order is made against the appellant.

18. Section 78 read as follows

(1) While a person's appeal under Section 82(1) is pending he may not be-

(a) removed from the United Kingdom in accordance with a provision of the Immigration Acts, or

(b) required to leave the United Kingdom in accordance with a provision of the Immigration Acts.

(2) In this section 'pending' has the meaning given by Section 104

(3) Nothing in this section shall prevent any of the following while an appeal is pending-

(a) the giving of a direction for the appellant's removal from the Untied Kingdom,

(b) the making of a deportation order in respect of the appellant (subject to section 79), or

(c) the taking of any other interim or preparatory action

19. When a deportation order is revoked under Section 5(2) of the Immigration Act 1971 the effect is such that leave, which was invalidated, is not reinstated should an appeal be successful **George R (on the application of) v SSHD** [2014] UKSC 28. In the case of **George** there is no doubt that the appellant was liable to deportation **and** the Deportation Order had been effectively made and his leave invalidated.

20. The Supreme Court in **George,** however, made clear the procedures for making and the automatic deportation provisions are distinct from the non automatic deportation provisions although both stem from Section 3(5)(a) of the Immigration Act 1971. At [17] of **George** there was specific reference to the differing scheme of deportation under Section 32(5) of the UK Borders Act and the attendant use of Section 76 in automatic deportations. The Court noted

> "Although the 2007 Act was not in existence when section 76 was enacted, its scheme for automatic deportation provides another example of a case when section 76 would be available without there being any deportation order to be revoked. If the Secretary of State determines that section 32(5) of the 2007 Act applies to render an individual **liable** to deportation it is not the making of a deportation order but the antecedent decision that the provisions of the act apply which is appealable."

21. At [28] the Supreme Court acknowledged that the import of the 2007 Act

> "... needs to be resolved on facts arising from it and not hypothetically on a case to which it has no application."

22. Under Section 32(5) of 2007 Act the decision which is being appealed is an 'antecedent decision' and whether the Secretary of State must make a deportation order or not. Following a successful appeal therefore, there is no longer a *requirement* on Secretary of State to make a deportation order. The making of a deportation order under Section 32((5) of the 2007 Act is ***specifically subject to*** Section 33 which sets out the exceptions such as where it would breach a person's Convention Rights.

23. In this case the appellant successfully appealed the requirement of the Secretary of State under Section 32(5) of the 2007 Act to make a deportation order against the appellant. As First-tier Tribunal Judge Shamash stated Section 32 (5) (that the Secretary of State *must* make a deportation order) did not apply because the appellant's appeal fell within an exception. His deportation would still be deemed to be conducive to the public good under Section 33 (7) which specifically states that

> *'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'*

24. A deportation order therefore can still be made in accordance with Section 32(5), but further to Section 79 NIA a deportation order made under this provision (Section 32(5)) does ***not*** have the effect of invalidating leave. Section 79 prevents the deportation order having the effect of invalidating leave where there is reliance on Section 32(5) whilst an appeal is pending. Mr Jaufurally asked what the effect of the deportation order was and further submitted that in accordance with Section 79, because the appeal had ended, the deportation order had taken effect. The appellant's leave had ended. His argument was that Section 78 would operate *only whilst the appeal was pending* and once the appeal had ceased under the terms of Section 104 NIA Act 2002 then the Deportation Order would have effect and the ILR would have ceased.

25. The full terms of the Deportation Order dated 14th September 2012, however, are as follows

> *'Whereas Shane John Ellis is a foreign criminal as defined by section 32(1) of the UK Borders Act 2007:*
>
> *The removal of Shane John Ellis is, under section 32(4) of that Act conducive to the public good for the purposes of Section 3(5)(a) of the Immigration Act 1971:*
>
> *The Secretary of State must make a deportation order in respect of a foreign criminal under section 32(5) of the UK Borders Act 2007 (subject to a section 33).*
>
> *Therefore in pursuance of Section 5(1) of the Immigration Act 1971,* ***once any Right of Appeal, that may be exercised from within the United Kingdom under section 82(1) of the Nationality and Asylum Act 2002 is exhausted, and said appeal is dismissed, or*** *if Shane John Ellis* ***does not have a right of appeal*** *that may be exercised from within the United Kingdom, the Secretary of State, by this order,* ***requires,*** *the said Shane John Ellis to leave and prohibits him from entering the United Kingdom* ***so long as this order is in force****.'*

26. It would appear that the terms of the order are conditional and dependent on the appellant either having his appeal dismissed or having no right of appeal. In this case the appellant's appeal was not dismissed but allowed and this suggests that the deportation order was not therefore activated because the conditions aforesaid were not fulfilled. In other words the appellant's ILR was not invalidated by the deportation order during the appeal and the order lapsed following the successful appeal.

27. Section 5 of the Immigration Act 1971 states as follows

> 'Procedure for, and further provisions as to, deportation**.**
>
> *(1) Where a person is under section 3(5) or (6) above liable to deportation, then subject to the following provisions of this Act the Secretary of State may make a deportation order against him, that is to say an order requiring him to leave and prohibiting him from*

entering the United Kingdom; and a deportation order against a person ***shall invalidate any leave*** *to enter or remain in the United Kingdom given him before the order is made or* ***while it is in force.***'

28. In other words the operation of Sections 78 and 79 of the NIA was such that whilst the appeal was pending the leave was not invalidated and when the appeal was successfully completed by virtue of the words of the order, it was no longer in force as a result of the successful appeal.

29. There is no evidence that ILR has been reinstated by other means. I do not accept that the letters submitted by the Secretary of State pointed to a 'reinstatement of leave as suggested'. Indeed the letter of the Secretary of State dated 14th September 2012, accompanying the deportation order, to which I was referred states that '*any previous grant of leave is invalidated, at such time as your appeal is dismissed* ***and*** *finally determined in line with the United Kingdom's Immigration Rules'.* As stated the appeal was to be dismissed and finally determined, that is, read in the conjunctive. The appeal was not dismissed. As stated, leave was not invalidated under the automatic deportation provisions and would not have been so invalidated until determination of the appeal. That is reflected in the Secretary of State's letter. On determination of the appeal in relation to his deportation, the appellant succeeded and thus I conclude leave was not invalidated by this process or at the determination of that process and therefore not as claimed 'reinstated' only to be revoked again. Indeed, Ms Ahmed submitted that the appellant was not 're-granted' indefinite leave to remain again. His ILR was only revoked on 24th June 2014 and that decision was appealed and needs to be determined.

30. This was not a case where there was an abuse of process as the appellant's leave had not been revoked such that it could be reinstated only to be the subject for further invalidation.

31. That is not the end of the narrative. Section 76 of the NIA Act 2002 with the rubric 'Revocation of leave to enter or remain' sets out

(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.

(2) The Secretary of State may revoke a person's indefinite leave to enter or remain in the United Kingdom if—

(a) the leave was obtained by deception,

(b) the person would be liable to removal because of the deception, but

(c) the person cannot be removed for legal or practical reasons.

…

(4) In this section—

- *"indefinite leave" has the meaning given by section 33(1) of the Immigration Act 1971 (c. 77) (interpretation),*
- *"liable to deportation" has the meaning given by section 3(5) and (6) of that Act (deportation),*
- *"refugee" has the meaning given by the Convention relating to the Status of Refugees done at Geneva on 28th July 1951 and its Protocol, and*
- *"removed" means removed from the United Kingdom under —*

(a) Paragraph 9 or 10 of Schedule 2 to the Immigration Act 1971 (control of entry: directions for removal), or

(b) Section 10(1)(b) of the Immigration and Asylum Act 1999 (c. 33) (removal of persons unlawfully in United Kingdom: deception).

32. As can be seen from above, the appellant's deportation may still be conducive to the public good. As set out in **SS Nigeria v SSHD** [2013] EWCA Civ 550 at [54] a foreign criminal's deportation remains conducive to the public good notwithstanding his successful reliance on Article 8. **In SS Nigeria v SSHD** [2013] EWCA Civ 550 Laws LJ has this to say

> "I would draw particular attention to the provision contained in s.33(7): "section 32(4) applies despite the application of Exception 1...", that is to say, a foreign criminal's deportation remains conducive to the public good notwithstanding his successful reliance on Article 8. I said at paragraph 46 that while the authorities demonstrate that there is no rule of exceptionality for Article 8, they also clearly show that the more pressing the public interest in removal or deportation, the stronger must be the claim under Article 8 if it is to prevail. The pressing nature of the public interest here is vividly informed by the fact that by Parliament's express declaration the public interest is injured if the criminal's deportation is not effected. Such a result could in my judgment only be justified by a very strong claim indeed"

33. His deportation is deemed to be conducive to the public good further to Section 32(4) of the 2007 Act **but** it is not clear that the appellant's deportation has *specifically been deemed* by the Secretary of State to be conducive to the public good. The conditional deportation notice falls away but that in itself relies on the Section 32(4) of the 2007 Act. There needs to be the specific deeming by the Secretary of State within the meaning of Section 3(5) of the Immigration Act 1971 and in accordance with **Ali (s 76 'liable to deportation') Pakistan** [2011] UKUT 00250 (IAC).

> "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 observation. "Liable to deportation" has, as s 76(4) provides, the 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 s3(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."

34. Nowhere in her decision has the Secretary of State specifically deemed the appellant's deportation as conducive to the public good. The decision letter dated 25th June 2014 giving reasons for revoking his ILR only states in terms

> *'I should therefore warn you that any further criminal offending may result in you being liable for deportation in the future'.*

Reliance on Section 32 of the 2007 Act is insufficient. Therefore the appellant is not yet deemed '*liable to deportation'* for the purposes of Section 76 and as such the decision of the Secretary of State was not in accordance with the law.

35. The decision of the Secretary of State afforded the appellant a right of appeal under Section 82(2)(f) of the Nationality Immigration and Asylum Act 2002. Two grounds of appeal were put forward that under Section 84(1)(e) (not in accordance with the law) and 84(1)(c) (Human Rights). The judge failed to consider the relevant evidence and make the necessary findings or decide on what basis the appeal was allowed. This was an error of law.

36. The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). For the reasons given above I set aside the decision of Judge Shamash and allow the appeal to the limited extent the appellant awaits a lawful decision from the Secretary of State with regards revocation of his Indefinite Leave to Remain.

Signed Date 6th July 2016

Upper Tribunal Judge Upper Tribunal Rimington