



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/02013/2013

THE IMMIGRATION ACTS

Heard at Field House
On 27 November 2014

Determination Promulgated
On 22 December 2014

Before
LORD BURNS
UPPER TRIBUNAL JUDGE JORDAN

Between

Ithayachandran

Appellant

and

The Secretary Of State For The Home Department

Respondent

Representation:

For the Appellant: Mr J. Martin, Counsel instructed by Nag Law Solicitors

For the Respondent: Mr M. Shilliday, Home Office Presenting Officer

DECISION AND REASONS

Introduction and immigration history

1. The appellant as a citizen of Sri Lanka who was born on 18 December 1982. He appeals against the determination of the First-tier Tribunal (Judge Randall and Mr Getlevog) promulgated on 7 July 2014 dismissing his appeal against the decision of the Secretary of State made on or about 25 September 2013 to deport him.

2. The appellant claims to have arrived in the United Kingdom 7 January 2010 entering illegally and avoiding immigration controls. He claimed asylum on 29 January 2010. His application was refused by the respondent on 15 June 2010. His appeal was dismissed on 9 August 2010. On 23 June 2011 the appellant failed to comply with his reporting conditions and was listed as an absconder. On 21 October 2011 he was arrested for stealing from his employee and fraud and remanded in custody. On 16 January 2012, at Oxford Crown Court, he was convicted on three counts. On count 1, he was accused of dishonestly making false representations; on count 2, of being in possession of a false or improperly obtained or another person's identity document and on count 3, theft. On counts 1 and 2, he was sentenced to 8 months imprisonment. On count 3, he was sentenced to 4 months imprisonment to run consecutively, making a total period of imprisonment of 12 months.

The criminal offending

3. In sentencing the appellant, the Judge said:

"You have now admitted three offences; one of fraud, one of possession of identity documents with an improper intention and one of theft.

The circumstances:

As having arrived unlawfully in this country and having applied for political asylum and finding it refused, that you disappeared. You then used your brother's documents to gain employment because you knew you were not lawfully entitled to employment as a failed asylum seeker, and having taken that employment after a few months, you deliberately breached your position of trust with your employers by finding a means to obtain cash from the machines, which you did on several occasions, stealing from your employers £1774 in cash.

It is perfectly clear that the combination of these offences and the offences in isolation clearly pass the custody threshold and you will receive a custodial sentence. I take into account in your favour the fact that you are hitherto of good character, that you pleaded guilty to those offences, though not on the first occasion, and I take into account the totality of the sentence that is to be passed upon you, in shortening the sentence somewhat, though they will be consecutive to each other.

I also do not have to consider the question of whether I should recommend you for deportation, bearing in mind the sentence I shall pass upon you totals 12 months. However, if I had to consider the issue, I would be recommending it to the Home Secretary that you be deported on completion of the custodial part of your sentence."

The grounds of appeal to the Upper Tribunal

4. The grounds of appeal assert that the decision to make a deportation order against the appellant was unlawful because it was predicated on the fact that a sentence of 12 months imprisonment invoked the provisions of paragraphs 398, 399 and 399A of the Immigration Rules which operated against the appellant in imposing a rule that it would only be in exceptional circumstances that the public interest in

deportation was outweighed. It was this ground, Ground 1, by which Upper Tribunal Judge Goldstein was persuaded had particular arguable merit. In order to assess this appeal, it is necessary to consider the provisions that effect deportation in the case of criminal misconduct.

Statute law

5. Subsections 3(5) and (6) of the Immigration Act 1971 (as amended by the British Nationality Act 1981 and the Immigration and Asylum Act 1999) provide

(5) a person who is not a British citizen is liable to deportation from the United Kingdom if –

(a) the Secretary of State deems deportation to be conducive to the public good;

(6) Without prejudice to the operation of subsection (5) above, a person who is not a British citizen shall also be liable to deportation from the United Kingdom if, after he has attained the age of seventeen, he is convicted of an offence for which he is punishable with imprisonment and on his conviction is recommended for deportation by a court empowered by this Act to do so.

6. The appellant was not the subject of a recommendation for deportation as the Judge's sentencing remarks made clear. It is true that the Judge was mistaken as to his understanding of the statutory provisions because he clearly thought that a sentence of 12 months resulted in automatic deportation which, for reasons that follow, is not in the appellant's case correct. Be that as it may, the appellant was *not* made the subject of a recommendation for deportation. Accordingly, pursuant to the 1971 Act, the liability for deportation arises if the Secretary of State deems it to be conducive to the public good, s. 3(5)(a).

7. The UK Borders Act 2007 provides for the automatic deportation of some criminals. Such an individual is defined in s. 32 (1) as a 'foreign criminal',

(a) who is not a British citizen,

(b) who is convicted in the United Kingdom of an offence, and

(c) to whom Condition 1 or 2 applies.

Subsection (2) in these terms:

Condition 1 is that the person is sentence to a period of imprisonment of at the least 12 months...

Subsections (4) and (5) provide:

(4) For the purpose of section 3(5)(a) of the Immigration Act 1971, the deportation of a foreign criminal is conducive to the public good.

(5) The Secretary of State must make a deportation order in respect of the foreign criminal (subject to section 33).

8. Section 33 of the United Kingdom Borders Act 2007 provides, as Exception 1, that the removal of a foreign criminal in pursuance of a deportation order must not breach the appellant's rights under the Human Rights Act, which with reference to the circumstances of this case, means that the removal must not violate the appellant's Article 8 rights to which due respect must be afforded.
9. This might suggest that the appellant was a foreign criminal by reference to the 12-month sentence of imprisonment. However, s.38 - Interpretation - contains a crucial departure from this position:

(1) In section 32(2) [see para. 7, above] a person who is sentenced to a period of imprisonment of at least 12 months...

(b) does not include a reference to a person who is sentenced to a period of imprisonment of at least 12 months only by virtue of being sentenced to consecutive sentences amounting in aggregate to more than 12 months...

It is not suggested that the reference to '*consecutive sentences*' (in the plural) excludes the circumstances in the case before us where the appellant was subjected to a single consecutive sentence.

The Immigration Rules

10. The Immigration Rules Part 13 dealing with Deportation provide:

396. 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 Secretary of State must make a deportation order in accordance with section 32 of the UK Borders Act 2007. [Inserted from 9 July 2012 with savings for applications made before the date.]

398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

(a) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;

(b) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months;
or

(c) the deportation of the person from the UK 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,

the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors.

399. This paragraph applies where paragraph 398 (b) or (c) applies if -

- (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
 - (i) the child is a British Citizen; or
 - (ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case
 - (a) it would not be reasonable to expect the child to leave the UK; and
 - (b) there is no other family member who is able to care for the child in the UK; or
- (b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK, or in the UK with refugee leave or humanitarian protection, and
 - (i) the person has lived in the UK with valid leave continuously for at least the 15 years immediately preceding the date of the immigration decision (discounting any period of imprisonment); and
 - (ii) there are insurmountable obstacles to family life with that partner continuing outside the UK.

399A. This paragraph applies where paragraph 398(b) or (c) applies if -

- (a) the person has lived continuously in the UK for at least 20 years immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK; or
- (b) the person is aged under 25 years, he has spent at least half of his life living continuously in the UK immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK.

The Criminal Casework Directorate's criteria for deportation

11. That part of the Home Office which deals with deportation in the wake of criminal convictions has set out a policy which offers guidance to caseworkers when considering whether the removal of an individual is conducive to the public good. It does not, of course, need to consider the circumstances that are already provided in s. 32 of the 2007 Act and paragraphs 398 and following of the Immigration Rules. Instead, it focuses upon lesser offending or offences of the type which the Secretary of State considers to be particularly damaging to the public interest. It is not disputed that, at the material time, the criteria for deportation included those who had been sentenced to a period of imprisonment of 12 months but made up of three shorter sentences within a period of five years. The appellant's offending pattern was capable of falling within the relevant criteria.

The issue before us

12. It is common ground that, by reason of the two concurrent 8-month sentences and the 4-month consecutive period of imprisonment, the appellant is not a foreign criminal, as defined, and is not therefore subject to the automatic deportation provisions contained in s. 32 of the 2007 Act. However, it is as a result of the

confusion that has arisen in the minds of decision-makers that this appeal comes before the Upper Tribunal. Were it to be established that the respondent misconstrued the legal basis of her decision-making and had proceeded on the basis that the appellant was subject to automatic deportation (to the disadvantage of the appellant), her decision would have been unlawful. If the First-tier Tribunal had then failed to identify the error, this would amount to an error on a point of law. Alternatively, if the Upper Tribunal approached the appeal on a similar false premise, this, too, would amount to an error on a point of law requiring us to give consideration to whether the decision has to be re-made.

13. This requires us to go through the various decisions and notices made or served by the respondent and to consider whether the respondent's approach was lawful and then go on to consider the First-tier Tribunal's approach.

The respondent's 16 May 2012 Notification of Liability to Automatic Deportation (ICD 3050)

14. This was received by the appellant on 22 May 2012 and is variously described as the Notification of 16 May and 22 May. The letter states:

"The Secretary of State has noted your conviction on 14 March 2012 at Oxford Crown Court for Fraud/Embezzlement [etc] and for which you were sentenced to 1 years, 0 months, 0 days and takes a very serious view of your offence. In the light of your conviction, you are liable to deportation under the Immigration Act 1971. You may be subject to automatic deportation in accordance with section 32(5) of the UK Borders Act 2007 unless you fall within one of the following exceptions set out in Section 33 of the UK Borders Act 2007:..."

15. This was clearly directed towards automatic deportation, which, for the reasons we have given, was wrong in law and skewed the respondent's decision-making to the disadvantage of the appellant.

The respondent's letter of 25 October 2012 (ICD 0350)

16. This is entitled 'Notice of Intention to Deport' and was issued to the appellant giving him ten working days to reply. The Notice seeks reasons why the appellant should not be deported. It does not suggest that the decision is being exercised on automatic grounds. Indeed, the tone of its contents suggests that the answers will inform the decision whether to deport or not, a position at variance with automatic deportation. In the respondent's letter of 25 September 2013, this is described as Notification of Liability to Deportation on conducive grounds. The contents do not suggest that the appellant was required to demonstrate he fell within an exceptional category. There was no purpose in serving a second Notification of Intention to Deport if the 16 May 2012 letter had performed its allotted task. Inferentially, it was an afterthought to the decision of 22 May 2012 and designed to stand in its place.

The respondent's letter of 25 September 2013

17. This refers to the earlier letter of 25 October 2012 which it describes as seeking reasons why the appellant should not be deported. It does not suggest that automatic deportation is being contemplated. The letter refers to the consecutive nature of the four-month period of imprisonment. The first paragraph entitled "Liability to Deportation" makes no reference to automatic deportation and concludes *'the representations received have been considered but for the reasons set out below on it has been concluded that your deportation would be conducive to the public good'* expressly addressing deportation on conducive grounds.
18. On the second page of this letter there is reference to the Notification of 22 May 2012 - 'Notification of Liability to Automatic Deportation' - and then to the letter of 25 October 2012 - 'notification of liability to deportation on conducive grounds'. (In different parts of the same letter it refers to the 25 October 2012 letter as both ICD 3050 and ICD 0350 but my copy of the letter is that it is an ICD 0350.)
19. When we first considered the letter of 25 September 2013 in which reference is made to the Notification of Liability to Automatic Deportation, we were concerned that the respondent was approaching consideration of the application as falling within the automatic deportation provisions. However, it is clear that the reference to the 22 May 2012 letter is only an historical recital of what occurred. On page 3 of the letter there is a reference to paragraph 396 of the Immigration Rules but no reference to paragraphs 398(b) which refers to deportation being conducive to the public good following conviction of an offence for which a sentence of at least 12 months imprisonment was imposed or 398(c) namely offending which has caused serious harm or where the individual is a persistent offender who has shown particular disregard for the law. It is therefore clear that the omission of these paragraphs confirms what the opening paragraph of the letter states, namely that the Secretary of State was treating this as a conducive deportation appeal subject to the normal presumption in favour of all deportation cases contained within paragraph 396.

The Notice of Decision of September 2013

20. The Notice of Decision: Decision to make a Deportation Order which is undated but accompanied the letter of 25 September 2013 letter (both are signed by the same person) provided that the decision was being made pursuant to s. 3(5)(a) of the 1971 Act and expressly provided that the Secretary of State deemed it to be conducive to the public good to make the deportation order. Accordingly, the appellant became liable for deportation pursuant to the Secretary of State's power to make an order under s. 5(1) of the 1971 Act:

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...

The making of the decision gives rise to the right of appeal exercised by this appellant under s. 82(1) and (2) (j) of the Nationality, Immigration and Asylum Act, 2002.

21. It was on the basis of this reasoning that deportation was put in motion.

The respondent's supplementary reasons letter of 26 March 2014

22. It is not entirely easy to understand the function of this post-decision letter, coming as it does in the period running up to the hearing before the panel which took place on 6 June 2014. It may be that it was felt necessary to revisit the appellant's earlier asylum claim in the light of fresh country guidance. However, since the appellant's original asylum claim had been comprehensively disbelieved, the rehearsal of this material might not have been entirely necessary. However, the decision maker referred to a January 2014 witness statement made by the appellant to the effect that he had attended various events in the United Kingdom which included protests against the Sri Lankan government. It may be that this was considered, potentially, in the context of a fresh claim. For our purpose, however, the importance of the document lies in the decision-maker's treatment of the Article 8 claim. Having recited paragraph 396 of the immigration rules as they apply to all persons liable to deportation, including the appellant, the letter goes on to consider paragraph 398 of the Immigration Rules and the fact that the appellant had been sentenced to a period of one year's imprisonment. The letter, therefore, falls into the trap set by s.38 of the 2007 Act and fails to realise that the appellant was not subject to the provisions of paragraph 398 by reason of his 4-month consecutive sentence. There is no doubt, therefore, this supplemental decision letter is legally flawed but it is not, of course, the decision against which the appellant appealed to the Tribunal. For our purposes, it is irrelevant save insofar as it perpetuated the confusion that had originally tainted this application in believing the appellant was subject to automatic deportation. If, of course, this led to the panel confusing itself, such a result is understandable but, for the reasons we now live, this did not happen.

The First-tier Tribunal's determination

23. In paragraph 3 of the panel's determination, reference is made to the letter of 16 May 2012 couched in terms that this was an automatic deportation case requiring the appellant to establish that he fell within one of the exceptions in s. 33 of the 2007 Act. The panel, however, draws a distinction between the approach of May 2012 and the letter of 25 September 2013 served with the Notice of Decision to deport on conducive grounds thereby making it clear that this letter pointed to the operation of s. 3(5)(a) of the 1971 Act and not the automatic deportation provisions found in s. 32 of the 2007 Act. The panel clearly well understood the approach adopted in the supplementary reasons letter of 26 March 2014, classifying the letter as '*surprisingly*' reverting to consideration of the automatic deportation provisions but commenting that no new immigration decision had been served.

This was, of course, consistent with the March 2014 letter being the respondent's attempt to fend off a fresh claim.

24. The panel then went on to set out the provisions of paragraphs 396 to 399A of the Immigration Rules, amongst others, before focusing on the refusal letter of 25 September 2013 which is, as we have found, the letter which underpinned the deportation decision and which approached the appellant's case as a conducive deportation case.
25. In paragraph 6.5 of its determination, the panel referred to the Criminal Casework Directorate's criteria for deportation and referred to the first limb of paragraph 396, that is, the general presumption in favour of deportation for a person, like the appellant, who was liable for deportation. Both these references are consistent with the panel approaching the appeal on the basis that it was being considered on conducive grounds. This is reflected in paragraph 3.5 of the determination where the panel referred to the amended grounds of appeal following the supplementary refusal letter of 20 March 2014. Unsurprisingly, the appellant submitted that the Secretary of State was in error in this letter in arguing the case on the basis of paragraph 398(b) of the Rules and arguing, correctly, that paragraphs 398 to 399A did not apply at all.
26. It cannot, therefore, be properly argued that the panel was not well aware of the distinction that was being drawn between a deportation decision based on conducive grounds and the automatic deportation provisions. This is made plain in paragraph 27 in which the panel's reasoning is made explicit:

"Section 32 of the UK Borders Act defines a 'foreign criminal'. The definition includes a non-British citizen sentenced to a period of imprisonment of at least 12 months. Section 38(1)(b) of the UK Borders Act states that a sentence of at least 12 months custody does not include consecutive sentences that are individually less than 12 months duration, but amount in aggregate to 12 months or more. Thus the appellant is not a foreign criminal as defined in s. 32(1); and the presumption pursuant to s. 32(4) that for the purposes of s. 3(5)(a) of the Immigration Act 1971, the deportation of a foreign criminal is conducive to the public good does not apply, as the appellant is not a 'foreign criminal'. The respondent has not suggested that there are other reasons for treating the appellant as a foreign criminal. Indeed he refers in the refusal letter of 25 September to the IDIs which state that 12 months imprisonment (including an aggregate of 12 months from more than one offence) in the previous five years is the threshold for a conducive deportation.

27. It is apparent from the foregoing that the panel was aware of the legal provisions that were to be applied. It repeated Mr Martin's submissions to that effect in paragraph 46 of the determination and concluded in paragraph 55 as follows:

"As part of our looking at the casing in the round, we have taken account of the fact that the offences in question cumulatively amount to 12 months imprisonment. We note that the respondent is not now proceeding under the automatic deportation provisions, *even though he started out on that basis*. But we also take account of the fact

that the Judge in his sentencing remarks stated that he would have made a recommendation had he been required to do so. We apprehend that he was under the mistaken impression because the length of the sentences amounted to 12 months in total, this matter would proceed under the automatic deportation procedures in any event. It is a relevant factor that the sentencing Judge was indicating that, had he thought he needed to do so, he would be recommending that the appellant should be deported." [The italics are our own.]

28. For these reasons we are satisfied that the approach adopted by the panel (notwithstanding the attempts by the Presenting Officer at the commencement of the hearing and by the draftsman of the supplementary reasons for deportation provided on 26 March 2014 as well as the 22 May 2012 Notification of Liability to Automatic Deportation) was never distracted by the respondent's siren calls that this was an automatic deportation case. Nor, importantly, was the respondent herself in the letter which underpins the decision to make a deportation order. Although the writer makes reference to the May 2012 Notification of Liability to Automatic Deportation letter, the respondent does not rely upon it as informing the approach she adopts. We consider the reference is part of the recital of the case history and no more. It is apparent to us that the appeal was considered both by the respondent and by the First-tier Tribunal as a conducive deportation case, as indeed it was.

Conclusion

29. For the reasons that we have given we are satisfied that neither the respondent in the relevant decision and her supporting reasons letter nor the panel in its determination acted unlawfully. The panel correctly concluded that the respondent had made a lawful deportation decision.
30. In the course of the hearing before us no substantial arguments were advanced in relation to Ground 2, namely, that the panel's consideration of the Article 8 claim was wrong. Although Upper Tribunal Judge Goldstein admitted the remaining grounds to be arguable, it was Ground 1 (the lawfulness of the decision) upon which he focused. We are satisfied that the First-tier Tribunal's determination in relation to Article 3 was legally sustainable. In paragraph 48 the panel concluded that neither the appellant's nor his wife's relationships with their respective biological families and others amounted to family life. The First-tier Tribunal formed the impression that the appellant and his wife were trying to play down the evidence of their knowledge of the situation in Sri Lanka. This, the panel found, militated against the existence of exceptional circumstances in line with the decision of *MF (Nigeria) v SSHD* [2013] EWCA Civ 1192. It found that the couple had accommodation available to it in Colombo and would not be returned in a state of destitution. It described how the parents of the appellant's wife visited Sri Lanka; that this marriage was embarked upon in the full knowledge of the appellant's conviction and his liability to deportation. Its conclusion that the appellant's removal would not breach the provisions of the ECHR, including

Article 8, was properly supported by adequate reasoning. There is no arguable case that this conclusion was based on an error of law.

DECISION

The panel made no error on a point of law and the original determination of the appeal shall stand.

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL

10 December 2014