



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

Appeal Number: IA/49647/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 10 September 2015**

**Decision and Reasons
Promulgated
On 16 September 2015**

Before

**MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE GRUBB**

Between

NUNO MIGUEL MENDES MOREIRA

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No appearance

For the Respondent: Mr D Clarke, Home Office Presenting Officer

DETERMINATION AND REASONS

1. Nuno Miguel Mendes Moreira, the appellant, is a national of Portugal. He has been in the United Kingdom since 2010 or 2011. He has been convicted of an offence of facilitating a breach of United Kingdom Immigration Law and sentenced to a term of imprisonment of 24 months. The Secretary of State made a decision to deport him. That decision was served on him apparently on 4 October 2014 at which time he was, as we

understand it, in detention. A notice of appeal to the First-tier Tribunal was put in, many weeks out of time, on 4 December 2014. Time was extended, for reasons that are wholly unclear, by Judge NMK Lawrence on 19 January 2015. There has been no challenge to that decision and it follows that the appellant has a pending appeal before the First-tier Tribunal.

2. It is an appeal against what is formally an EEA decision; and, although EEA appeals are not suspensive, Regulation 24AA of the Immigration (European Economic Area) Regulations 2006 (as amended) applies to them. The effect of that Regulation is that it prevents an appellant's removal during the appeal process unless the case is certified under that Regulation, as one to which paragraphs (2) and (3) of the Regulation apply. A certificate can be issued under those paragraphs if the Secretary of State considers that the removal of an appellant to the country to which it is proposed to remove him would not be unlawful under s.6 of the Human Rights Act 1998 as a breach of anybody's human rights. Paragraph (3) of the Regulation gives an example.

3. In the present case the appellant's case has been certified and it follows that the fact that he has appealed does not prevent his removal. Paragraph (4) of Regulation 24AA is as follows:

"If P applies to the appropriate court or tribunal (whether by means of judicial review or otherwise) for an interim order to suspend enforcement of the removal decision, P may not be removed from the United Kingdom until such time as the decision on the interim order has been taken, except -

- (a) where the expulsion decision is based on a previous judicial decision;
- (b) where P has had previous access to judicial review; or
- (c) where the removal decision is based on imperative grounds of public security."

4. On 30 December 2014 the appellant's solicitor, Pasha Immigration, wrote to the Upper Tribunal asking for an order cancelling the appellant's deportation which was then due to take place the following day. In response, Judge Rintoul of the Upper Tribunal made a decision on 31 December. The decision is headed "Upper Tribunal Immigration and Asylum Chamber" and the number of the appellant's appeal, IA/49647/2014; the heading continues by giving the status of the judge as an Upper Tribunal Judge. The decision sets out Regulation 24AA(4) and continues as follows:

"I am persuaded that the letter of 30 December 2014 from the appellant's representatives, Pasha Immigration, requesting an emergency injunction to cancel the deportation of the appellant today is, in effect, for the purposes of regulation 24AA(4) an application for an interim order to suspend enforcement of the removal decision. I am satisfied also that none of sub-paragraphs (a) to (c) apply, and that accordingly, **the appellant may not be removed from the United Kingdom** until a decision on the application

is made, and that pursuant to the powers given to the Upper Tribunal that it has the power to make such an order.

The interim application will now be listed for hearing, in the Upper Tribunal. Directions for that hearing will be issued in due course, but it is expected that the respondent wish to be represented by Counsel and the Treasury Solicitors.

SUMMARY OF DECISION

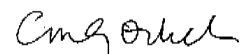
The appellant is not to be removed from the United Kingdom until further order

Signed

Upper Tribunal Judge Rintoul.”

5. The Government Legal Department, on behalf of the Secretary of State, has enquired whether that order has any effect or whether the Secretary of State may, despite it, proceed to the appellant’s removal. There have been some delays in dealing with that request but it was arranged to be listed before us today at 2 o’clock. Both parties were given notice of the hearing and notice was also subsequently sent indicating the areas which this hearing would deal with. The Government Legal Department is not here. Mr Clarke, who does not have the government’s file, has done his best to master the issues. There is no appearance by or on behalf of the appellant and there has been no indication of a change of representative. We have considered whether to proceed in the absence of the appellant. It appears to us that although the matter is of a little complexity, there is simply no question at all as to the proper outcome of the query raised by the Government Legal Department’s letter and we have therefore proceeded in the absence of the appellant or his representative and with the limited assistance that Mr Clarke has been able to give us.
6. The position is as follows. First, this Tribunal, the Upper Tribunal, has jurisdiction (a) in appeals, if there is an appeal against the decision of the First-tier Tribunal and (b) in immigration judicial reviews. In each case there are requirements as to permission. The Upper Tribunal has no jurisdiction simply to intervene in an appeal pending before the First-tier Tribunal and make an order on it. Secondly, the First-tier Tribunal has no power to make an interim order preventing the Secretary of State from removing an appellant from the United Kingdom. Thirdly, Regulation 24AA(4) gives, of itself, no power to anybody to make an interim order; it merely describes the effect, if an application for such an order is made to the appropriate court or tribunal. We see nothing in that Regulation or anything else that might lead us to a conclusion that the application to which the Regulation refers is anything other than an ordinary application for a stay on removal. Such an application is made by means of judicial review either in the Upper Tribunal or in the High Court, depending on the circumstances. No such application has ever been made in this case.

7. It follows that Judge Rintoul had no power to make the order he made. The Upper Tribunal has no jurisdiction at all in this case and if, despite the addressing of the solicitor's letter and the heading of the decision it is seen as a decision of the First-tier Tribunal, then it is a decision by a body which had no jurisdiction to grant a stay on removal. There was nothing that could properly be described as an application to the appropriate court or tribunal and so Regulation 24AA(4) did not apply.
8. The question therefore is what to do now. The Government Legal Department very properly have not taken the attitude that an order made without any jurisdiction should be ignored. We therefore consider whether we have power to set aside the order. Upper Tribunal Rule 43 empowers the Upper Tribunal to set aside a decision which disposes of proceedings; this order does not purport to dispose of any proceedings. By s. 25(2)(c) of the Tribunals Courts and Enforcement Act 2007 the Upper Tribunal has in judicial review proceedings the powers of the High Court in relation to (a) the attendance and examination of which has been the production and inspection of documents and (c) of all other matters incidental to the Upper Tribunal's functions. It appears to us that the determination of whether the Tribunal had jurisdiction to make a particular order is a matter incidental to its functions but on its face, as distinct from its apparent effect, Judge Rintoul's decision is not a decision in judicial review proceedings. By s. 3(5) of the same act, however, the Upper Tribunal is a Superior Court of Record and so, subject of course to any statutory restriction including the rule-making powers of the Tribunal Procedure Committee, the Upper Tribunal has power to regulate its own procedure. That power includes the power to set aside its own decisions: see Akewashula v SSHD [1999] Imm AR 594 at 600.
9. In the circumstances, it appears to us that we have jurisdiction to set aside Judge Rintoul's order as made without jurisdiction, and we do so. It follows that, at the present time, the Secretary of State is not inhibited from removing the appellant from the United Kingdom.



C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 14 September 2015