



**Upper Tribunal  
(Immigration and Asylum Chamber)**  
HU/10895/2015

Appeal Number:

**THE IMMIGRATION ACTS**

**Heard at Birmingham  
on 6 June 2017**

**Decision &  
Promulgated  
on 7 June 2017**

**Reasons**

**Before**

**UPPER TRIBUNAL JUDGE HANSON  
DEPUTY UPPER TRIBUNAL JUDGE ROBERTSON**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**WARREN ALVIN MILLER  
(anonymity direction not made)**

Respondent

**Representation:**

For the Appellant: Mr Mills Senior Home Office Presenting Officer

For the Respondent: Mr Sarwar instructed by SLK Immigration Solicitors

**DECISION AND REASONS**

1. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Holt ('the Judge'), promulgated on 14 November 2016, in which the Judge allowed Mr Miller's appeal against a decision, stated to be a decision to revoke his Indefinite Leave to Remain (ILR), dated 29 October 2015, said to be contrary to Mr Miller's right to private and family life.

## **Background**

2. Mr Miller entered the United Kingdom in 2002 as a visitor. His leave was subsequently extended resulting in a grant of ILR in 2003. On 19 July 2013 Mr Miller was convicted at Worcester Crown Court of conspiracy to supply Class A controlled drug – heroin, conspiracy to supply Class A controlled drug – crack cocaine and conceal, disguise, convert, transfer and remove criminal property. On 7 February 2014 Mr Miller was sentenced to 32 months’ imprisonment.
3. On 25 July 2014 Mr Miller was served with an order for his deportation from the United Kingdom due to his criminal activity. His appeal against the deportation order came before First-tier Tribunal Judge Rose sitting at Sheldon Court Birmingham on 25 March 2015. In a decision dated 30 March 2015 Judge Rose allowed Mr Miller’s appeal on human rights grounds.
4. On 16 June 2015, the Secretary of State wrote to Mr Miller advising him of the intention of the Home Office to revoke his ILR and providing him with an opportunity to submit representations in support of a continued entitlement to ILR. Mr Miller’s representatives responded on 26 June 2015 but such response was not considered by the Home Office to establish compelling reasons as to why Mr Miller’s ILR should not be revoked. Accordingly, on 29 October 2015 Mr Miller was served with a Reasons for Revocation of Indefinite Leave letter.
5. [30 – 31] of the letter are in the following terms:
  30. In light of the above, it has been decided to revoke your ILR in view of the fact that Section 76(1), of the Nationality, Immigration and Asylum Act 2002 applies to you. This decision has been recorded as determined on 29 October 2015.
  31. You have a right of appeal against the decision to revoke your ILR under section 82(2)(f) of the Nationality and Immigration Act 2002. The relevant papers are enclosed.
6. An application for leave to appeal to the Upper Tribunal issued by the Secretary of State was granted by another judge of the First-tier Tribunal in the following terms:
  1. The appellant, a citizen of Jamaica, had his indefinite leave to remain (ILR) revoked on 29. 10.2015 (an earlier deportation appeal having been allowed on family life grounds), and his appeal was allowed by Judge of the First-tier Tribunal Holt (promulgated on 14.11.2016).
  2. The grounds, which were in time, complained that the judge erred in: allowing the appeal when there was no jurisdiction, since the position taken in the refusal letter, that there was an appeal right, had been a mistake.
  3. The Secretary of State not only stated that there was a right of appeal in the written decision, but also adopted the same position throughout the appeal process, including at the hearing, where a representative was present. The errors in the decision and at the hearing, if they were such, were on the part of the Secretary of State, and the grounds are silent as to how they occurred, but it is also notable that neither the appellant’s counsel nor the judge spotted the issue.

4. In *R v Secretary of State for the Home Department ex p Ram* [1979] 1 All ER 687 leave granted by mistake (if no fraud) had to be honoured (an analogous situation but with more serious consequences). An appeal right is a statutory matter, however, and it is arguable that the Secretary of State cannot grant such a right on a discretionary basis where none exists. Even if this was a concession rather than a pure error it is therefore still arguable that there was no jurisdiction to hear the appeal.
5. There is an obvious concern about fairness where a party raises an issue for the first time after the hearing, and in general a judge will not err in law in not dealing with an issue not before her, but I have nevertheless decided that this is an appropriate case in which to grant permission because of the jurisdictional point.
6. Despite the matter not being raised it is arguable that the judge did not have jurisdiction, and erred in law as a result. The Secretary of State should be prepared to address any costs issues at the error of law hearing.

### **Error of law**

7. The starting point in this matter must be the chronology. It is not disputed that Mr Miller was granted ILR. It is not disputed that Mr Miller is a foreign criminal as that term is defined in the UK Borders Act 2007 who was made the subject of a deportation order because of his criminal conduct.
8. The power to make a deportation order and, as a first step, to decide to make one, stems originally from section 5(1) and section 3(5)(a) and section 3(6) of the Immigration Act 1971. Section 3(5) of the 1971 Act gives the Secretary of State power to deport a non British Citizen (a) if he deems it to be conducive to the public good (b) if another member of the family is to be deported and (c) if a court recommends it after conviction of an offence punishable by imprisonment.
9. The passing of the UK Borders Act 2007 changed the landscape in relation to deportation decisions. The most common source of a decision to deport a convicted person now lies in the provisions of section 32 of that Act. The effect of that section is that (i) a non-British citizen who (inter-alia) is sentenced to a term of imprisonment or more is termed a 'foreign criminal', (ii) as such is deportation is deemed to be conducive to the public good for the purposes of section 3(5)(a) of the 1971 Act so that he is liable to deportation, and (iii) the making of a deportation order is mandated re-rather than discretionary, and irrevocable, unless specific exemptions apply, which one is the removal would infringe Convention rights.
10. Section 5(1) and (2) of the Immigration Act 1971 provide:
  - 5(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 to him before the order is made or while it is in force.

5 (2) a deportation order made against a person may at any time be revoked by further order of the Secretary of State, and shall cease to have effect if he becomes a British citizen.

11. The deportation order affecting Mr Miller is an “automatic deportation” order deemed to be conducive to the public good for the purposes of section 3(5) of the 1971 Act. The effect of section 5(1) of the 1971 Act is that Mr Miller’s ILR was invalidated as a result of the making of the deportation order.
12. Mr Miller, arguably, remains liable to be deported but an order for his deportation cannot be made in his present circumstances because it would entail an infringement of his Convention rights.
13. Mr Mills was asked whether the Secretary of State had made a further order granting Mr Miller ILR. He advised the Tribunal that this had not occurred.
14. The situation relating to a grant of leave invalidated following the making of a deportation order, and whether the revocation of that order had the effect of reviving leave previously granted, has been the subject of detailed investigation by the Senior Courts culminating in the judgment of the Supreme Court in the case of *R (on the application of Fitzroy George) v Secretary of State for the Home Department [2014] UKSC 28*. The Court of Appeal had found that such previous leave was revived which was an argument rejected by the Supreme Court where they find in the concluding section of their judgment:
  29. The terms of section 5 of the 1971 Act are, as words, capable either of importing revival of leave or of not doing so. Revival is not their natural meaning, because the natural meaning is that revocation takes effect when it happens and does not undo events occurring during the lifetime of the deportation order. Revival is a significant and far-reaching legal concept, and it is much more likely that it would have been specifically provided for if it had been intended.
  30. The reasoning of the Court of Appeal, from section 76 of the 2002 Act, cannot be supported. Whilst statutes in *pari materia* should be construed consistently if possible, a later statute is not a reliable guide to the meaning of an earlier one, especially in a field such as immigration where social and political pressures have led to fast moving changes in the legislation. In particular, the history of the treatment of section 5(2) of the 1971 Act in successive rules laid before Parliament both before and ever since the 1971 Act was passed shows very plainly that there cannot have been a legislative assumption that revival was its effect.
  31. The contrary construction, involving no question of revival, is entirely consistent with the scheme of the 1971 Act (and indeed subsequent statutes) on the topic of deportation. The position of Mr George is not analogous to someone with a pending appeal. His status as a person liable to deportation has long since been established; his appeal challenging it failed long ago. Persons are liable to be deported, under any of the procedures which may apply, because their presence in the United Kingdom is judged not to be conducive to the public good. That is true of Mr George. If it turns out that there is a legal obstacle to actual removal, for example because of Convention rights which cannot be infringed, that does not alter the fact he is a person whose presence is not conducive to the public good. There is no legal

symmetry in indefinite leave to remain coexisting with the status of someone whose presence is not conducive to the public good. It makes perfectly good sense, whilst the legal obstacle remains, for the Secretary of State to be in a position to revisit the terms of leave to enter. Moreover, the legal obstacle is not necessarily, or even usually, permanent. If it arises from conditions in the individual's home country, those conditions may change or he may come into favour with the authorities when previously he was not. If it arises from his family connections in the United Kingdom, those may easily change. If someone in his position cannot at present be deported because to do so would infringe his article 8 rights, and if indefinite leave to remain were thereupon to revive, he would remain irremovable if he turned his back on his family, or they on him, as may not infrequently occur. Whilst there may be different routes by which the Secretary of State could now achieve a similar result, for example via section 76 of the 2002 Act, it is clear that this was also the coherent result of the 1971 Act, from the time that it was enacted.

32. On its correct construction, section 5(2) of the 1971 Act does not mean that if the deportation order is revoked, the invalidation by section 5(1) of leave to remain is retrospectively undone and the previous leave to remain does not revive. Mr George remains liable to deportation, even though it cannot at present be carried out. His position in the United Kingdom must be regularised, but that does not entail a recognition of indefinite leave to remain. The Secretary of States grants to him of successive limited leaves is perfectly proper. Whether or not it may become appropriate after the passage of time to re-grant indefinite leave to remain is a matter for her.
  33. For those reasons, the appeal of the Secretary of State should be allowed and the order of the judge dismissing the claim for judicial review should be reinstated.
15. It was accepted by both advocates that Mr Miller's ILR has been invalidated by the making of the deportation order and not automatically revived following the decision of Judge Rose allowing the appeal on human rights grounds. Mr Mills confirmed there had been no further grant of ILR to Mr Miller by the Secretary of State.
  16. It is known there was a previous practice by the Secretary of State in cases such as this to serve upon a beneficiary of ILR a notice of intention to revoke that leave and then to produce a decision confirming the revocation, if that was the appropriate outcome. Such a practice, arguably, has no merit following the decision of the Supreme Court in *Fitzroy George* which clarified the legal effect of a deportation order upon an earlier grant of leave to remain.
  17. As there is no evidence that Mr Miller has had ILR since the date of the making of the deportation order and the revocation of the previous grant of such leave, the service of a notification of intention to revoke indefinite leave to remain has no effect and is not a lawful decision. The Secretary State cannot purport in the circumstances to revoke a non-existent status.
  18. From the material misdirection in law that led the decision-maker to follow the earlier practices, notification of intention to revoke Mr Miller's ILR was issued, purportedly conferring a right of appeal to the First-tier Tribunal, which was exercised.
  19. Post 10 November 2014 and the changes introduced by the Immigration Act 2014, an appeal may now only be brought, by virtue

- of section 82 (1) of the 2002 Act, where the Secretary of State has decided to refuse a protection claim made by an appellant, or a human rights claim made by an appellant, or where the Secretary of State has decided to revoke an appellant's protection status.
20. In this case, no protection or human rights claim has been made. The decision to grant Mr Miller a limited period of leave did not entail an interference with a protected right or raise protection issues. It is therefore not a decision in relation to which there is a statutory right of appeal. As the question of jurisdiction was not considered by Judge Holt in the decision under challenge, who proceeded to treat the matter as a valid appeal and to determine the same accordingly when there was no jurisdiction to do so, we find that to a material error of law.
  21. The way forward in this case, as there is no power in a statutory appeal to quash a decision, is to conclude that Judge Holt materially erred in making a misdirection of law and determining a matter for which she had no jurisdiction. We therefore set aside the decision of the First-tier Tribunal.
  22. In proceeding to remake the decision, we remind ourselves that in *Virk v Secretary of State for the Home Department [2013] EWCA Civ 652* it was held that although the Secretary of State had failed to raise before the First-tier Tribunal the issue of that Tribunal's jurisdiction to entertain a family's application for leave to remain, the Upper Tribunal was entitled to dismiss the family's subsequent appeal against the First-tier Tribunal's decision on the basis that the First-tier Tribunal had not had jurisdiction, notwithstanding that the point had not been raised below.
  23. The appeal now before the Upper Tribunal is therefore a matter upon which we cannot make a decision, for want of jurisdiction, there being no valid appeal against the respondents, unlawful, decision.
  24. Having announced our decision in court Mr Sarwar raised the issue of costs and sought an order that the Secretary of State shall pay Mr Miller's costs. This was resisted by Mr Mills although he accepted that the decision purporting to confer a right of appeal has always been legally incorrect. It is not only that that decision is incorrect, for want of jurisdiction, but that the procedure adopted by the decision-maker is itself arguably flawed for the reasons set out above. This case involves a chain of events arising from poor decision-making the consequences of which are that Mr Miller brought an appeal, incurring legal costs, against an arguably unlawful decision, but which purported to give him a legal right that did not exist.
  25. We consider the appropriate order for costs at this stage is for an order that the Secretary of State shall pay Mr Miller's reasonable costs of the claim with reference HU/10895/2015, to be assessed if not agreed.

## **Decision**

26. **The First-tier Tribunal Judge materially erred in law. We set aside the decision of the original Judge. We are unable to remake the decision want of jurisdiction.**
27. **The Secretary of State shall pay Mr Miller's reasonable costs of the claim, to be assessed if not agreed.**

Anonymity.

28. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. We make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....

Upper Tribunal Judge Hanson

Dated the 6 June 2017