Upper Tribunal
(Immigration and Asylum Chamber)

Ali (s. 76 – "liable to deportation") Pakistan [2011] UKUT 00250 (IAC)

THE IMMIGRATION ACTS

Heard at Birmingham (Sheldon Court)	**Determination Promulgated**
On 22 March 2011	**24 May 2011**

Before

Mr C M G Ockelton, Vice President

Designated Immigration Judge McCarthy

Between

MR AMIR ALI

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr A Muman, instructed by J M Wilson Solicitors

For the Respondent: Mrs Cantrell, Home Office Presenting Officer

The phrase “liable to deportation” in s 3(5) of the Immigration Act 1971 includes, in the case of a person within s 3(5)(a), the notion of the Secretary of State’s deeming deportation to be conducive to the public good. The provision of s 32(4) of the UK Borders Act 2007, that a person subject to automatic deportation is a person whose deportation is conducive to the public good, is not identical. Such a person is “liable to deportation” within the meaning of s3(5), so becoming a person whose leave may be revoked under s 76(1) of the Nationality, Immigration and Asylum Act 2002, only if the Secretary of State has deemed his deportation to be conducive to the public good.

DETERMINATION AND REASONS

Introduction

1.

Section 76 of the Nationality, Immigration and Asylum Act 2002 empowers the Secretary of State to revoke indefinite leave. Under certain circumstances, one of the conditions of the exercise of the discretion to do so is that the person “is liable to deportation”. What precisely does that phrase mean, particularly when the person is a “foreign criminal” within the meaning of s 32 of the UK Borders Act 2007?

2.
There are, we are told, no decided cases on the question. Permission to appeal to the Upper Tribunal was granted in this case so that the matter could be decided at this level. In these circumstances it is particularly unfortunate that the Home Office Presenting Officer was not prepared to make any detailed submission on the wording of the relevant statutory provisions. With the help of the parties we are, however, reasonably confident that we have been able to identify them. Although the journey through them is slightly convoluted, it appears to us that the answer is clear.

The Law

3.
It is convenient to begin by setting out the relevant statutory provisions.

4.
In the Nationality, Immigration and Asylum Act 2002, s 76 is, so far as relevant, as follows:

“76 Revocation of leave to enter or remain

(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.

(3) [allows the revocation of leave granted to a person who has ceased to be a refugee]

(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).

…

(5) A power under subsection (1) or (2) to revoke leave may be exercised—

(a) in respect of leave granted before this section comes into force;

(b) in reliance on anything done before this section comes into force.

…”

5.
We do not need to set out the provision defining “indefinite leave”, but s 3 of the Immigration Act 1971 is clearly of importance. Subsections (5) and (6) are as follows:

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

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

(b) another person to whose family he belongs is or has been ordered to be deported.

(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 UK Borders Act 2007 introduced a process of automatic deportation of “foreign criminals” as defined. By s 32, a “foreign criminal” is a person who is not a British citizen and is convicted in the United Kingdom of an offence, and either is sentenced to a term of imprisonment of over 12 months, or is sentenced to a term of imprisonment on conviction of a specified offence.

7.
Subsections (4) and (5) are as follows:

“32 (4) For the purpose of section 3(5)(a) of the Immigration Act 1971 (c. 77), 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 a foreign criminal (subject to section 33).”

8.
Section 33 is headed “Exceptions”. The relevant provisions are as follows:

“33 (1) Section 32(4) and (5)—

(a) do not apply where an exception in this section applies (subject to subsection (7) below), and

(b) are subject to sections 7 and 8 of the Immigration Act 1971 (Commonwealth citizens, Irish citizens, crew and other exemptions).

(2) Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach—

(a) a person's Convention rights, or

(b) the United Kingdom's obligations under the Refugee Convention.

(3) Exception 2 is where the Secretary of State thinks that the foreign criminal was under the age of 18 on the date of conviction.

(4) Exception 3 is where the removal of the foreign criminal from the United Kingdom in pursuance of a deportation order would breach rights of the foreign criminal under the Community treaties.

(5) Exception 4 is where the foreign criminal [is subject to extradition or similar proceedings].

(6) Exception 5 is where [a hospital order or similar provisions] has effect in respect of the foreign criminal.

(7) 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."

The Appellant

9.
The appellant is a national of Pakistan. He came to the United Kingdom in 2004 with his mother: he was then aged 14. They came to join his father, who was settled here. The appellant was granted indefinite leave to remain, with his mother and other siblings, on 31 May 2006.

10.
In November 2008 he was convicted on counts of robbery and handling stolen goods. He received concurrent sentences, the longest being of 21 months detention in a young offenders' institution. There is no doubt that he is a "foreign criminal" within the meaning of the 2007 Act.

11.
The appellant was invited to submit any reasons why he should not be subject to automatic deportation. He gave written reasons and attended an interview conducted by a representative of the respondent. He observed that he had been in the United Kingdom for nearly 15 years, that he had indefinite leave to remain, and that his siblings were British citizens.

12.
The Secretary of State's response was a letter dated 1 October 2009, reading, so far as relevant, as follows:

"…I am writing to inform you that the Secretary of State has taken note of your conviction… at Wolverhampton Crown Court for Robbery and Handling Stolen Goods. The Secretary of State takes a serious view of your conduct and, in the light of your conviction he has given careful consideration to your immigration status and the question of your liability to deportation…

In all the circumstances, however, the Secretary of State has decided not to take any action against you on this occasion but you should clearly understand that, notwithstanding the fact that there are no conditions attached to your stay here, the provisions of the Immigration Act 1971 as amended by the Immigration and Asylum Act 1999 relating to deportation continue to apply to you. Under these provisions a person who does not have the right of abode is liable to deportation if the Secretary of State deems his deportation to be conducive to the public good or if he is convicted of an offence and recommended for deportation by a court.

I should warn you therefore that if you should come to adverse notice in the future, the Secretary of State will be obliged to give further consideration to the question of whether you should be deported. If you commit a further offence, the Secretary of State would also need to consider the automatic deportation provisions of the UK Borders Act 2007. You should be aware that under such circumstances, the Secretary of State may be legally obliged to make a deportation order against you…"

13.
A further letter was sent on 20 November 2009, informing the appellant of the Secretary of State's intention to revoke his Indefinite Leave to Remain. The relevant parts of that letter are as follows:

"…The UK Border Agency is proposing to revoke your indefinite leave to remain under section 76 of the Nationality, Immigration and Asylum Act 2002. Section 76(1) gives the Secretary of State the power to revoke indefinite leave to enter or remain in the United Kingdom where 'the person is liable to deportation but cannot be deported for legal reasons.'

…It is noted that you claim to have first arrived in the United Kingdom in 1995. Records show that you were granted indefinite leave to remain in line with your mother and siblings on 31 May 1996. Your rights under the European Convention on Human Rights have been carefully considered. It has been decided that your removal at this time may place the United Kingdom in breach of Article 8 of the European Convention on Human Rights…

As you remain liable to deportation because of your criminal convictions, but cannot be deported for legal reasons, section 76(1) is applicable and enables the Secretary of State to revoke your indefinite leave to remain.

…As part of the assessment of your continuing entitlement to Indefinite Leave to Remain status, I am providing you with the opportunity to respond to the points made in this letter. If you wish to make any comments on the proposal to revoke your indefinite leave to remain and replace it with a limited period of Discretionary Leave you should forward them as below…

Any comments you wish to make should be sent… by December 2009…"

14.
The appellant made no further comments. The decision to revoke his indefinite leave to remain was made on 29 December 2009, by Notice of Decision and accompanying letter both with that date. The accompanying letter sets out a summary of the appellant's relevant history and of s76. It continues as follows:

"As detailed above, you have been convicted of crimes in the United Kingdom which render you liable to deportation. However, your rights and those of your family members have been considered under Article 8 of the ECHR. It has been concluded that at present, your deportation would bring about a

disproportionate interference with your private and family life under Article 8 of the ECHR. In other words, you cannot presently be deported for legal reasons.

In light of the above, it has been decided to revoke your Indefinite Leave in view of the fact that Section 76(1) of the Nationality, Immigration and Asylum Act 2002 applies to you."

15.
The letter goes on to indicate that there is a right of appeal against that decision, but that the appellant should surrender the letter granting him indefinite leave to remain.

16.
The Notice of Decision is in the following terms:

On 31 May 1996 you were granted indefinite leave to remain in the United Kingdom on the grounds of settlement.

However, the decision has been made to revoke your indefinite leave on 29 December 2009 and to replace it with a grant of 3 years' Discretionary Leave. This is in recognition of the fact that we cannot deport you at present because there are ECHR barriers to removal. However we will keep your position under regular review.

Consequently, I have decided that you no longer meet the requirements of the immigration rules under which you were granted leave to remain in the United Kingdom on the basis of your length of residence and, therefore, I am giving you notice that your indefinite leave to remain in the United Kingdom has been revoked under section 76(1) of the Nationality, Immigration and Asylum Act 2002. Full details for this decision are provided in the attached letter.

This revocation of indefinite leave to enter or remain will take effect at the end of the period when you can appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002, or when an appeal brought under that section is finally determined, withdrawn or abandoned (or when it lapses under section 99 of that Act).

17.
The appellant appealed to the Asylum and Immigration Tribunal. Following the abolition of that Tribunal, his appeal took effect as an appeal to the Immigration and Asylum Chamber of the First-tier Tribunal. Following a hearing on 12 July 2010, Immigration Judge Meah dismissed his appeal, concluding that the power under s 76 was exercisable in his case. The Immigration Judge also clearly took the view that it was rightly exercised. Permission to appeal to this Tribunal was refused by the First-tier Tribunal, but granted on re-application to the Upper Tribunal. Senior Immigration Judge Warr noted that the ambit of s 76 was "new territory" and said that it was right to grant permission to appeal to consider the appellant's as yet untested arguments.

Discussion

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.

20.
So far, therefore, the appellant is not "liable to deportation" within the meaning of s 76. The question, then, is whether ss 32 and 33 of the 2007 Act make any difference.

21.
As we have said, there can be no doubt that the appellant is a "foreign criminal" within the meaning of s 32. But s 32(5), requiring the Secretary of State to make a deportation order, is subject to s 33, and it is clear that the Secretary of State took the view (which is, of course, not contested) that the appellant's removal would breach rights under the European Convention on Human Rights. Exception 1 in s 33(2), therefore, applies to this appellant. The clear consequence of that is that s 32(5) does not apply to him: there is no obligation to make a deportation order against him. The position in relation to s 32(4) is a little more obscure. Section 33(1) says that it does not apply, but that is subject to subsection (7). And subsection (7) provides that s 32(4) does, after all, apply "despite the application of Exception 1 or 4". The provision of subsection (7)(b), leaving open the question of whether deportation is conducive to the public good, therefore applies only to the other Exceptions.

22.
Thus the journey through s 33 takes us back to where we started, which is at s 32(4). For the purpose of s 3(5)(a) of the 1971 Act, the deportation of the appellant "is conducive to the public good".

23.
That provision is clearly relevant to liability to deportation under s 3(5)(a), but it is not the whole story. Liability to deportation under s 3(5)(a) arises only if the Secretary of State deems that person's deportation to be conducive to the public good. The effect of s 32(4) of the 2007 Act is that, by statute, his deportation is conducive to the public good; so that, if the Secretary of State does (also) deem it to be conducive to the public good, there can be no argument about the basis for the Secretary of State's conclusion. But, as we see it, under s 3(5)(a) of the 1971 Act, the decision of the Secretary of State (or an officer) is a crucial requirement. That paragraph cannot possibly be read as if it provided merely that a person is liable to deportation if his deportation is conducive to the public good.

24.
As we have said, the Presenting Officer before us accepted that the Secretary of State has reached no such conclusion in the present case. It follows that, although the effect of the statutory provisions is that his deportation is conducive to the public good, he is not "liable to deportation" because the Secretary of State has not deemed his deportation to be conducive to the public good. She is presumably at liberty to do so: but, until she does so, the provisions of s 3(5)(a) of the 1971 Act do not apply to him, and, in consequence, those of s 76 of the 2002 do not either.

25.

That is sufficient to dispose of this appeal. As a result, we have not needed to consider whether it is right to describe a person whose Convention rights prohibit his removal as a person who “cannot be deported for legal reasons”. Mr Muman’s submission would have been that it is not. He did not need to expand on his skeleton argument on the issue before us, and we reach no concluded view on this. In case the matter arises in some other case, however, the following observations may be apposite. First, any interpretation of the phrase “for legal reasons” in s 76(1) needs to be able to take into account the contrast with the phrase “for legal or practical reasons” closing subsection 76(2). Secondly, as the Secretary of State’s decision letters in the present case indicate, a right under Article 8 is not necessarily a permanent right. A Convention right prohibiting removal may reduce or vanish in the course of time or by reason of subsequent events. Thirdly, it is not easy to see why a person who cannot be deported because of a right that he has, that is protected by the law of the United Kingdom should not be regarded as a person who “cannot be deported for legal reasons”. We say no more than that.

26.
Mr Muman was also prepared to argue that it was a breach of the appellant’s human rights to replace a grant of indefinite leave to remain by a grant of three years’ discretionary leave. We have noted what is said in his skeleton argument. We think it is unlikely that it would have persuaded us to allow his appeal.

27.
The position is simply that, for the reasons we have given, the Secretary of State could not in the present case exercise powers under s 76, and that her decision was accordingly not a lawful one. The Immigration Judge erred in concluding that it was. We allow the appellant’s appeal.

C M G OCKELTON

VICE PRESIDENT OF THE UPPER TRIBUNAL, IMMIGRATION AND ASYLUM CHAMBER