Upper Tribunal
(Immigration and Asylum Chamber)

Nkomo (Deportation: 2014 rights of appeal) [2016] UKUT 00285 (IAC)

THE IMMIGRATION ACTS

Heard at Stoke	**Promulgated on**
29 January 2016	.....

Before

MR C M G OCKELTON, VICE PRESIDENT

UPPER TRIBUNAL JUDGE MARTIN

Between

VICTOR VUSI NKOMO

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr M Chaudhry, of Duncan Lewis Solicitors.

For the Respondent: Mr A McVeetie, Home Office Presenting Officer.

1. The No 3 Commencement Order of the 2014 Act, SI 2014/2771, extends the new appeals provisions to identified persons , but the amendment of it in SI 2014/2928 further extends those provisions to identified decisions .

2. In consequence, a person against whom a deportation decision was made in the period 10 November 2014 – 5 April 2015 may have no right of appeal if the decisions actually made carry rights of appeal only under the new appeals provisions. (Note: A further change was made to the commencement provision with effect from 2 March 2015, which did not fall for consideration on the facts of this case.)

DECISION AND REASONS

1.
Th e appellant, a national of Zimbabwe , has permission to appeal against a determination of the First-tier Tribunal . At the hearing we raised concerns about the e ffect of the decisions made in the appellant's case and the extent to which they gave rise to rights of appeal. Mr McVeetie took brief instructions and returned to tell us that "the decision is correct". In the circumstances we received

little help from the parties: we do not intend that as a criticism. As the matter goes to jurisdiction, however, we must determine it.

2.
T he appellant, as we have said, is a national of Zimbabwe . He came to the United Kingdom in 2003. He claimed asylum. He was recognised as a refugee. In accordance with the practice in operation at that time, he appears to have been granted indefinite leave to remain: we say “appears”, because although there must have been a grant of some sort of leave, there is no reference to such grant in any of the Secretary of State’s documentation before us: on the other hand, it is not said that he was remaining in the United Kingdom without leave.

3.
The appellant has been convicted of numerous offences in this country, including an offence of rape. On 4 December 2009 he was sentenced to ten years imprisonment for that offence. That conviction and sentence brought the appellant within the definition of “foreign criminal” in s 32 of the UK Borders Act 2007. He was liable to automatic deportation, subject to the operation of the exceptions in s 33. One of those exceptions is that the person’s deportation would breach the United Kingdom ’s obligations under the Refugee Convention; there are other exceptions, including an exception that the person’s deportation would breach the United Kingdom ’s obligations under the European Convention on Human Rights.

4.
On 8 M ay 2012, the Secretary of State wrote to the appellant indicating that she proposed to have him removed from the United Kingdom . She drew his attention to s 72 of the Nationality, Immigration & Asylum Act 2002 and invited him to indicate any reason why he should not be regarded as a person who had been convicted by final judgment of a particularly serious crime and who constituted a danger to the community of the United Kingdom . The significance of that wording and classification is that, if the appellant fell within that category, he would not be protec ted by the Refugee Convention from return to Zimbabwe : see art 33.2 of the Refugee Convention. Those acting for the appellant made extensive submissions in response, including submissions that the appellant’s removal would breach articles 2 and 3 of the ECHR.

5.
On 30 October 2014 the Secretary of State issued a decision headed “Cessation of Refugee Status”. It considers the submissions made in the light of other material available to the Secretary of State and, amongst other things, concludes that the appellant is no longer entitled to refugee status, there having been a change of circumstances within the meaning of art icle 1C(5) of the Refugee Convention. The letter also rejects the claims based on the ECHR. The letter concludes as follows:

“71. The Home Office is therefore satisfied that, subsequent to obtaining refugee status in 2003, you can no longer, because the circumstances in connection with which you were recognised as a refugee have ceased to exist, continue to refuse to avail yourself of the protection of the country of nationality.

72. In light of the above, it has been decided to cease your refugee status in view of the fact that Article 1C(5) of the 1951 Refugee Convention and subsequently Paragraph 339A(v) of the Immigration Rules, now applies. This decision has been recorded as determined on the date of this letter [30 October 2014].

73. You do not have a right of appeal against the decision to cease your refugee status. However, you will be afforded an opportunity to appeal against the accompanying immigration decision.

74. As you are no longer a refugee, you should now surrender your original grant of refugee status letter issued on 2 April 2003. This must be returned immediately.

75. If you have not yet taken advice on your position, you are strongly advised to do so now."

6.
We have not heard of any "accompanying immigration decision" of the date of that letter or thereabouts. The letter makes no reference to the appellant's position as a person with a grant of leave to remain.

7.
On 21 November 2014 a deportation order against the appellant was signed. That order is specifically made under the provisions of s 32 of the 2007 Act: that is to say under the "automatic depo rtation" provisions. As a deportation order, however, it had the effect under s 5(1) of the Immigration Act 1971 of invalidating the appellant's leave. The order was served on him under cover of a letter dated 24 November 2014. The letter is headed "Decision to refuse a protection cla im and/or a human rights claim"; it notes the representations made in response to the letter proposing to invoke s 72. At paragraph 8 it says:

"On 30 October 2014 your refugee status was ceased and as at that date, you have no legal status to remain in the United Kingdom ."

8.
It then sets out the history and consideration of the appellant's case in full, including submissions in relation to art 8. Paragraphs 142 to 147 are as follows:

"142. Further to the reasons given within our letter of 4 June 2014 and taking all relevant factors into account, it is considered that objective evidence indicates that matters in Zimbabwe have altered fundamentally and durably since your departure in 2003. You have not established a claim that your return to Zimbabwe would occasion treatment that would breach our obligations under the 1951 Refugee Convention and/or Articles 2 and 3 of the ECHR.

143. The Home Office is therefore satisfied that, subsequent to obtaining refugee status in 2003, you can no longer, because the circumstances in connection with which you were recognised as a refugee have ceased to exist, continue to refuse to avail yourself of the protection of the country of nationality.

144. In light of the above, it has been decided to cease your refugee status in view of the fact that Article 1C(5) of the 1951 Refugee Convention and subsequently Paragraph 339A(v) of the Immigration Rules, now applies. This decision has been recorded as determined on the date of this letter. [24 November 2014].

145. You do [sic] have a right of appeal against this decision. Further information as to your appeal rights is set out in another section of this letter.

146. As you are no longer a refugee, you should now surrender your original grant of refugee status letter issued on 2 April 2003. This must be returned immediately.

147. If you have not yet taken advice on your position, you are strongly advised to do so now. "

9.
The following paragraphs consider and reject the art icle 8 claim. The closing paragraphs of the letter are unnumbered. The crucial ones are as follows:

“Decision

As explained above, your protection and human rights claim has been refused. As such, it is not accepted that you fall within any of the exceptions to deportation at section 33 of the UK Borders Act 2007. Therefore, section 32(5) of the same Act requires the Secretary of State to make a deportation order against you. A deportation order has been made against you and is enclosed with this decision.

Appeal

You have the right to appeal against the decision to refuse your protection and human rights claim under section 82(1) of the Nationality, Immigration and Asylum Act 2002 from within the UK .

Any appeal must be made on one or more of the following grounds:

•
that your removal from the UK would breach the UK ’s obligations under t h e Refugee Convention ;

•
that your removal from the UK would breac h the UK ’s obligations in relation to persons eligible for a grant of humanitarian protection;

•
that your removal from the UK would be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention).

You must not appeal on grounds which do not apply to you. You must also explain the reasons that you are appealing against the decision and provide any supporting evidence that is available to you in order to substantiate your grounds of appeal.”

10.
The letter continues by referring to an earlier notice served under s 120 of the 2002 Act, confirming that the appellant’s claim is not certified under s 94B of the same Act, indicating that the appellant’s removal will be to Zimbabwe , and noting that he is liable to detention. The final paragraph of the letter, above the signature, states that the notice is given “in compliance with the Immigration (Notices) Regulations 2003”.

11.
The appellant’s notice of appeal to the First-tier Tribunal was against the decisions incorporated in that letter.

Statutory rights of appeal

12.
Rights of appeal against immigra tion decisions are governed by P art 5 of the Nationality, Immigration and Asylum Act 2002. Decisions which can be the subject of an appeal are listed in s 82; the permissible grounds of appeal are listed in s 84. However, ss 82 and 84 as they have stood since the coming into force of the 2002 Act, with small additions and amendments, are entirely replaced by s 15 of the Immigration Act 2014. Although, because of the impact of international conventions, there are certain central elements in common forming the rationale of both original and modified provisions, the two regimes are mutually exclusive in the sense that the decisions which the 2014 Act makes appealable are entirely new: none of the decisions appealable under the 2002 Act as originally enacted (or subsequently amended before 2014) survives the 2014 replacement. Similarly, the

grounds of appeal have been reduced in number and rewritten. As a result, the allowable grounds of appeal are different from those previously available. The 2014 Act contains a number of other important provisions. We nee d to refer to only one of them: via s 19, new ss 117A – 117D are inserted into the 2002 Act.

13.
The implementation of the provisions of the 2014 Act and the new appeals provisions in particular, has taken a rather curious course. The first event to which we need to make reference is that by virtue of the Immigration Act 2014 (Commencement No. 1, Transitory and Saving P rovisions) Order 2014 (SI 2014/1820), Section 19 of the 2014 Act came into force on 28 July 2014. One of the inserted provisions, section 117D, contains at sub-section 2 a definition of a "foreign criminal" for the purposes of the newly-inserted sections. The definition encompasses a person who is a foreign national who has been convicted of an offence and sentence to a term of at least 12 months imprisonment (there being certain exceptions which we do not need to set out). Although Part 5A is not directly relevant to our decision, it is important, for reasons which will appear, to note that, the appellant's history being what it is, he became a "foreign criminal" within the meaning of section 117D(2) on the coming into force of that section on 28 July 2014.

14.
The next instrument we need to mention is the Immigration Act 2014 (Commencement No. 3, Transitional and Saving Provisions) Order 2014 (SI 2014/2771). This order was made on 15 October 2014, and has the function of bringing a number or provisions of the 2014 Act into force on various dates in October, November and December 2014. So far as the appeals provisions are concerned, it operates as follows. Article 2 brings section 15 of the 2014 Act (including the new appeals provisions) into force on 20 October 2014, subject to the saving provisions in articles 9, 10 and 11. Article 9 is as follows:

"9. Notwithstanding the commencement of the relevant provisions, the saved provisions [that is to say, the appeals provisions in Part V of the 2002 Act before amendment by the 2014 Act] continue to have effect, and the relevant provisions do not have effect, other than so far as they relate to the persons set out respectively in articles 10 and 11, unless article 11(2) or (3) applies. "

15.
Article 11 sets out a category of persons constituting post-20 October 2014 applicants for leave to remain as a Tier 4 Migrant or the family member of a Tier 4 Migrant. T here are certain exceptions, and, rather alarmingly, paragraph (4) of the article is worded as though it has entirely general effect; fortunately we do not have to decide whether paragraph (4) applies outside the confines of article 11. We shall not need to refer again to article 11 and the persons incorporated in it. Article 10, however, is as follows:

"10. The persons referred to in article 9 are –

(a) a person ("P1") who becomes a foreign criminal within the definition in section 117D(2) of the 2002 Act on or after 20 October 2014; and

(b) a person who is liable to deportation from the United Kingdom under section 3(5)(b) of the 1971 Act because they belong to the family of P1."

16.

We shall not need to refer again to family members. Article 10(a) makes a clear distinction between those who come within the section 117D(2) definition on or after the commencement date and others. Typically, coming within the definition after the commencement date would be by being sentenced to a long enough term of imprisonment on or after that date. We shall call such persons “new foreign criminals”. Persons who fell within the definition before 20 October 2014 we shall call “old foreign criminals”. (It may be noted that a person who is already an old foreign criminal does not become a new foreign criminal by receiving a sentence on or after 20 October 2014: he “became” a foreign criminal before that date.)

17.
Although we cannot of course know for certain, it appears that the convoluted drafting of the No. 3 Commencement Order confused the Secretary of State and her decision-makers as well as everybody else who had to try to understand it. Decisions were made in respect of old foreign criminals on the understanding that the new appeals provisions, rather than the old appeals provisions, would apply to them. When it was appreciated that that was wrong, a further statutory instrument was promoted, the Immigration Act 2014 (Transitional and Saving Provisions) Order 2014 (SI 2014/2928), made on 6 November 2014 and coming into force on 10 November. The operative part is article 2, as follows:

“2(1). The saved provisions [that is, the old appeals provisions] continue to have effect, and the relevant provisions [that is, the new appeals provisions] do not have effect, other than –

(a) in accordance with articles 9 – 10 and 11 of [the No. 3 Commencement Order];

(b) in relation to a deportation decision made by the Secretary of State on or after 10 November 2014 in respect of –

(i) a person (“P”) who is a foreign criminal within the definition in section 117D(2) of the 2002 Act;

(ii) a person who is liable to deportation from the United Kingdom under section 3(5)(b) of the 1971 Act because they belong to the family of P.

(2) In this article, “a deportation decision” means a decision to make a deportation order, a decision to refuse to revoke a deportation order, or a decision made under section 32(5) of the UK Borders Act 2007”

18.
Thus, the new appeals provisions from 10 November 2014 now applied not only to new foreign criminals, but also “in relation to” deportation decisions made against both old and new foreign criminals. There is no doubt about the purpose of that addition. Under the old provisions, a decision to make a deportation order carried a right of appeal. Under the new provisions, a decision to make a deportation order does not carry a right of appeal. The effect of SI 2014/2928 was that deportation decisions made in respect of those within the section 117D(2) definition carried, for the future, no right of appeal. What that order clearly did not do, however, was to add old foreign criminals to the category of persons to whom the new appeals provisions applied. Articles 9 to 11 of the No. 3 Commencement Order extend the new provisions to two categories of person ; the subsequent order extends the appeals provisions only to a category of decision .

19.
The Immigration Act 2014 (Commencement No. 4, (Transitional and Saving Provisions and Amendment) Order 2015 (SI 2015/371) , made on 25 February 2015 completes the picture. So far as the appeals provisions are concerned, it operates by amending the provision s of article 9 ff of the No.

3 Commencement Order. The overall effect is that the new appeals provisions relate to all decisions made after 6 April 2015; the old appeals provisions continue to apply to decisions made before that date and carrying a right of appeal, and to certain decisions made after that date in response to applications before that date.

20.
We return now to the appellant's position. He is an old foreign criminal. The Commencement No. 3 Order did not bring the new appeals provisions into force in respect of him as a person. The subsequent order, however, brought the new appeals provisions into force in respect of any deportation decision made against after 10 November 2014. As we have said, there was such a decision, the deportation order made on 21 November and served on 24 November. That decision, made under s 32 of the 2007 Act, incorporated the decision that the appellant was a person to whom s 32(5) applied: see JG (Jamaica) v SSHD [2015] EWCA Civ 410 at [36]. It would therefore have carried a right of appeal under the old appeals provisions, but the new appeals provisions apply to it by virtue of SI 2014/2928, with the effect that there is no right of appeal against it. The other decisions made by the Secretary of State in relation to the appellant are, however, problematical. The first is that made on 30 October 2014, revoking the appellant's refugee status. That decision was correctly characterised in the letter of 30 October as carrying no right of appeal. A decision to revoke protection status is one of the types of decision carrying a right of appeal under the changes introduced by the 2014 Act, but those changes were not in force in relation to the appellant on the date of that letter. The old appeals provisions enable an appeal against the revocation of r efugee status only under s 83A, in circumstances which do not apply to this appellant.

21.
The letter of 24 November 2014 purports to make decisions of precisely the type envisaged as appealable decisions under the new appeals provisions, that is to say (according to the heading of the letter) decisions to refuse a protection claim and a human rights claim, and, according to the text at paragraphs 144 to 145, which we have set out above, a new appealable decision to revoke the appellant's protection status. Even taking the letter on its own terms, however, as an attempt to make decisions appealable under the new regime, and to give lawful notice of them, the letter has difficulties, because it fails to set out the right of appeal against the revocation of protection status and the grounds upon which that appeal can be exercised. As such, it fails to give such notice of that decision as is required by the Immigration (Notices Regulation) 2003, invoked in the closing paragraph of the letter.

22.
There is, however, a much graver difficulty with the letter. As we have explained, the appellant, being an old foreign criminal, is not a person to whom the new appeals provisions applied in the period before 6 April 2015, save insofar as related to a deportation decision. The letter makes and notifies decisions of a sort that would be appealable under the new appeals provisions, and sets out in respect of two of them the rights of appeal which would exist under the new appeals provisions; but it fails to observe that the new appeals provisions do not apply to the appellant in respect of decision s in those categories. We cannot of course say that the Secretary of State was not entitled to make the decisions that she did. None of them was, however, a decision carrying a right of appeal under the old appeals provisions; and the new appeals provisions did not apply. It follows that the appellant had no right of appeal against the decisions communicated in the letter of 24 November 2014. There was no right of appeal against the deportation order, because, by virtue of SI 2014/2928, the new appeals provisions

applied to it; there was no right of appeal against the other decisions, because the new appeals provisions did not apply to them. The First-tier Tribunal had no jurisdiction to hear his appeals.

23.
We reach that conclusion with no pleasure. The position is obviously wholly unsatisfactory. The decision-maker appears to have misunderstood the effect of the Commencement Orders, probably in particular that of SI 2014/2928, and to have made decisions in respect of the appellant that were thought to carry a right of appeal but in fact and in law did not do so. It is not our job to decide how the appe llant should now be treated; at a minimum, however, we would have thought that he is entitled to have the 24 November 2014 decisions remade: if remade now they will carry the right of appeal that was evidently intended. So far as we are concerned, however, the position is simply that we allow the appellant's appeal against the First-tier Tribunal Judge's decision on the ground that it was made without jurisdiction.

C. M. G . OCKELTON

VICE PRESIDENT OF THE UPPER TRIBUNAL

IMMIGRATION AND ASYLUM CHAMBER

Date: 12 May 2016