



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

Appeal Number: IA/02563/2015

THE IMMIGRATION ACTS

Heard at Glasgow

On 25th June 2015

**Decision and Reasons
Promulgated**

On 16th July 2015

Before

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

Between

ADEBAYO OLUWAGBENGA AINA

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Decker (Friend of the Appellant)

For the Respondent: Mr S Duffy, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the appellant against a decision of First-tier Tribunal Judge Bradshaw ("the judge"), promulgated on 31 March 2015. The Judge found that a deportation order made by the respondent on 11 January 2011 was not made in accordance with the law and should be revoked and then went on to dismiss the appeal on immigration and ECHR grounds.

Background

2. The appellant is a national of Nigeria who was born on 6 April 1987. On 17 December 2013, the respondent refused the appellant's application for a residence card as confirmation of his right to reside in the UK as the family member of an EEA national exercising treaty rights of movement in the UK. The respondent relied on Regulation 20(1) of the Immigration (EEA) Regulations 2006. The respondent narrated that the appellant received a custodial sentence totalling 12 months following conviction in the criminal courts on 13 October 2010.
3. On 11 January 2011, the appellant was served with a deportation order made under Section 3(5)(a) of the Immigration Act 1971. The deportation order was made because the respondent decided that the appellant was "*a foreign criminal*" as defined by Section 32(1) of the UK Borders Act 2007. The appellant appealed against that decision. His appeal was heard in Glasgow on 27 February 2014 and in a determination promulgated on 25 March 2014, his appeal was dismissed on all grounds. The appellant appealed against that decision and in a determination of the Upper Tribunal promulgated on 9 September 2014, the First Tier Tribunal's decision promulgated on 25 March 2014 was set aside and the case was remitted to the Secretary of State to consider of new. The Upper Tribunal found that the Secretary of State had failed to make a decision on whether the deportation order served on 11 January 2011 should be revoked before considering whether or not the appellant is entitled to a residence card.
4. On 12 January 2015, the respondent decided not to revoke the deportation order served on 11 January 2011.
5. The appellant appealed the respondent's decision of 12 January 2015. His appeal was heard by First Tier Tribunal Judge Bradshaw on 13 March 2015. In a determination promulgated on 31 March 2015, the Judge found that the deportation order made by the respondent was not made in accordance with the law and should be revoked, but dismissed the appeal on immigration and ECHR grounds.
6. Grounds of appeal were lodged and, on 22 April 2015, Designated First Tier Tribunal Judge McCarthy granted permission to appeal, finding that each of the five areas identified in the grounds of appeal are arguable. Those areas are:
 - (1) The misapplication of the principle set out in Devaseelan [2002] UKIAT 00702, by adopting findings from an earlier determination that had been set aside;
 - (2) The misapplication of the transitional provisions of Paragraph 2(3) of Schedule 3 of the Immigration (EEA) (Amendment) (No. 2) Regulations 2013;
 - (3) The misapplication of the principle set out in SSHD v Akrich (ECJ) Case C-109/01 [2004] 2WLR 871

(4) The misapplication of Regulation 9 of the 2006 EEA Regulations by taking account of the short period of time the appellant's British wife worked in Germany; and

(5) The misapplication of Article 8 ECHR (a failure to carry out a proper balancing exercise of all relevant factors, statutory and otherwise).

The Hearing

7. At the very start of the hearing, the Home Office presenting officer conceded that there is sufficient set out in the grounds of appeal to come to a set aside decision in relation to the Immigration (EEA) Regulations 2006 and the "*Devaseelan point*" and asked us to direct the Secretary of State to consider this application of new, recognising that the deportation order has been correctly revoked.
8. Mr Decker, a friend of the appellant, has assisted the appellant throughout these proceedings. He took us to the terms of the grounds of appeal and reminded us that the issue of a residence card is a matter for the Secretary of State's discretion. Mr Decker relied on Section 86(3) of the 2002 Act and urged us to review the Secretary of State's exercise of discretion in this case.

Consideration

9. We find that the judge was correct in his analysis and conclusions in relation to the legality of the deportation order made against this appellant. Between [67] and [71], the judge correctly found that the deportation order was made because the respondent decided that the appellant was "*a foreign criminal*" as defined by s.32(1) of the UK Borders Act 2007. As a matter of fact, the appellant had been sentenced to two consecutive six month periods in custody, so that his was a custodial sentence totalling 12 months. It was not a sentence which amounted "*...in aggregate to more than 12 months*". The decision to revoke the deportation order does not contain an error in law and there is no challenge to that.
10. It is correctly conceded that the judge erred in law at [73] of his decision because he placed reliance on the conclusions of an earlier determination which had been set aside by the Upper Tribunal, and then relied on those findings (which had been set aside) as a part of his reasoning. That is the first ground of appeal for the appellant. There is substance in that ground of appeal; we find that because the principle set out in *Devaseelan* has been incorrectly applied, the decision cannot stand. We therefore set it aside.
11. Having done so, we find that the Secretary of State still has to decide, in accordance with the law, the appellant's application for a residence card (applying the discretion contained in Regulation 21 of the Immigration (EEA) Regulations 2006) taking account of her powers in relation to

deportation set against the particular facts and circumstances pertaining to the appellant.

Decision

12. We find that the determination of First Tier Tribunal Judge Bradshaw promulgated on 31 March 2015 contains a material error of law. We therefore set the decision aside. We substitute the following decision.
13. The appeal is allowed. The application remains outstanding and awaits a lawful decision by the Secretary of State.

Signed

Date

Deputy Upper Tribunal Judge Doyle