



IAC-FH-AR-V1

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

Appeal Number: IA/26318/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 16 September 2015**

**Decision & Reasons Promulgated
On 3 December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR KOLOLA KANGU
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Miss A Fijiwala, Home Office Presenting Officer

For the Respondent: In person

DECISION AND REASONS

1. The respondent's appeal against the Secretary of State's decision to revoke his indefinite leave to remain, under section 76 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") was allowed by First-tier Tribunal Judge Hodgkinson ("the judge") in a decision promulgated on 19 February 2015. In short, the judge concluded that the decision of the Supreme Court in Gorje [2014] UKSC 28 fell to be applied. A deportation order made in the appellant's case on 19 December 2012 had the effect of invalidating his leave to remain. It followed that the Secretary of State's decision to revoke that leave under section 76 of the 2002 Act was

misconceived. As the respondent's indefinite leave came to an end in consequence of the deportation order, there was nothing for her to revoke.

2. The Secretary of State applied for permission to appeal. It was contended on her behalf that the respondent's indefinite leave "was not in fact revoked" as he succeeded in an earlier appeal against a decision that section 32(5) of the UK Borders Act 2007 ("the 2007 Act") applied in his case and so "the deportation order cannot be said to have come into force". Only when a deportation order came into force would it invalidate a person's leave to remain.
3. Reliance was placed upon section 79 of the 2002 Act, which provides that a deportation order may not be made while an appeal "relating to" a decision to make such an order may be brought or remains pending.
4. It was also contended in the grounds that the judge misunderstood Gorje. The appellant in that case had exhausted his appeal rights and so the deportation order came into force, invalidating his leave. The Supreme Court was clear in Gorje that a deportation order could not have been made until he was no longer able to pursue an appeal.
5. Permission to appeal was granted on 6 May 2015.
6. The respondent, Mr Kangu, appeared in person. He was happy to proceed and explained that he had not been able to instruct solicitors, having received a letter regarding the appeal only two weeks ago. I explained the procedure to be followed to him and he confirmed that he understood that he would have an opportunity to respond to Miss Fijiwala's submissions and to make submissions of his own, supporting the judge's decision. I made it clear to Mr Kangu that some difficult law was involved and the discussion would prove to be rather technical in nature. He remained content to proceed.

Submissions on Error of Law

7. Miss Fijiwala said that Mr Kangu was the subject of a deportation order, made on 19 December 2012. He won his appeal against a decision to deport him and so the order was not pursued. This had the effect of leaving Mr Kangu's indefinite leave intact. It was not revoked. He was always a person "liable to deportation". In that regard, Miss Fijiwala relied upon Ali (Section 76 - "liable to deportation") Pakistan [2011] UKUT 00250 (IAC). In that case, the Upper Tribunal made it clear that a person subject to automatic deportation is "liable to deportation" within the meaning of section 3(5) of the 1971 Act and therefore a person whose leave may be revoked under section 76(1) of the 2002 Act, so long as the Secretary of State has deemed his deportation to be conducive to the public good.
8. Reliance was also placed upon section 79(1)(a) and (b) of the 2002 Act. It was clear that a deportation order may not be made against a person while an appeal "relating to" the decision to make such an order is pending. As Mr Kangu won his appeal, the deportation order was not fully made as it would not be enforced.

9. The Supreme Court judgment in Gorje concerned a deportation order made under the 1971 Act, which came into force once the appellant had exhausted his rights of appeal. His indefinite leave then fell away. It was clear that the appellant in Georj could not be removed at any earlier stage.
10. The judge erred in concluding that the decision under section 76 was misconceived.
11. I asked Miss Fijiwala to address the absence of any distinction drawn by the Supreme Court in Gorje between the scheme provided for in the 1971 and 2002 Acts on the one hand, and the “automatic deportation” scheme in the 2007 Act on the other. She replied that there were policy differences and the Secretary of State was under a duty to make a deportation order under the 2007 Act. The position was different under the 1971 Act. The deportation order made against the respondent in the present appeal ought perhaps to have been revoked, in accordance with usual policy. It was not clear why it had not been. In any event, his indefinite leave survived and so the Secretary of State was properly able to revoke it under section 76 of the 2002 Act.

Findings and Conclusions on Error of Law

12. The critical question is this: did the judge err in applying the conclusions reached by the Supreme Court in Gorje that the making of a deportation order brings a person’s indefinite leave to remain to an end and that such leave is not revived following a successful appeal or even revocation of the order?
13. As Miss Fijiwala submitted, the facts in Gorje were very different from those in the present appeal. Notice was served upon Mr Gorje that a decision to make a deportation order against him had been made. An appeal brought against that decision failed and so the Secretary of State proceeded to make an order, in April 2008. Mr Gorje then made a further application to the Secretary of State on the basis of his human rights and, in due course, there was a further appeal which succeeded in March 2009. The deportation order was revoked. Mr Gorje asked the Secretary of State to confirm that he still had indefinite leave to remain and was told in response that he would be given shorter periods of leave instead. His case before the Supreme Court was advanced on the basis that his indefinite leave revived on revocation of the deportation order. The Supreme Court held that although the words of section 5 of the 1971 Act are, as words, capable either of importing revival of leave or of not doing so, the correct construction is that there is no revival. Mr Georj remained liable to deportation although his removal could not be put into effect in the light of his successful human rights appeal. The Secretary of State was entitled to give him successive periods of limited leave.
14. Mr Kangu was served with a decision that section 32(5) of the 2007 Act applied in his case. He brought an appeal against that decision. Section 82(3A) of the 2002 Act provides that such a decision is an “immigration decision” for the purposes of Part V of the 2002 Act (“Appeals”). On the

same day, 19 December 2012, a deportation order was made by the Secretary of State. Section 5(1) of the 1971 Act provides that a deportation order invalidates any leave given to a person before the order is made.

15. I was handed a copy of the deportation order, which in terms refers to the Secretary of State's duty under section 32 (5) of the 2007 Act and goes on to explain to Mr Kangu that "once any right of appeal" has been exhausted, the order requires him to leave the United Kingdom and prohibits him from entering so long as it remains in force.
16. Mr Kangu won his appeal.
17. Did the Supreme Court draw any distinction in Gorje between the "automatic deportation" scheme in the 2007 Act and the scheme in place before that Act came into force? The clear answer is "no". There is a brief mention of the 2007 Act in paragraph 7 of the judgment and more detail in paragraph 17, where the 2007 Act scheme is described by Lord Hughes as one which "provides another example of a case when section 76 would be available without there being any deportation order to be revoked". If the Secretary of State makes a decision that section 32(5) of the 2007 Act applies, so as to render an individual liable to deportation

"... it is not the making of a deportation order but the antecedent decision that the provisions of the Act apply which is appealable ... So, if challenge were made to that decision and were upheld on human rights grounds, there would be no deportation order to be revoked but the individual's indefinite leave to remain could be removed and replaced with a different kind of leave by acting under section 76 (of the 2002 Act)".
18. At first reading, this paragraph might appear to support the Secretary of State's case that Mr Kangu's successful appeal against the decision that section 32(5) applied in his case left his indefinite leave to remain intact, and therefore liable to be revoked by means of a later decision under section 76 of the 2002 Act.
19. On a closer reading, however, it is clear that paragraph 17 of the judgment, forming part of the reasoning towards the overall conclusion reached by the Supreme Court, in fact supports the argument put on Mr Kangu's behalf in the First-tier Tribunal and the judge's conclusion that he had no indefinite leave when the section 76 decision was made. This is because the critical words in that paragraph are "... the antecedent decision ...", and, where a successful appeal follows "... there would be no deportation order to be revoked ...".
20. In the present appeal, and as is usual in "automatic deportation" cases, the decision that section 32(5) applies is not an antecedent decision at all. It is a decision made contemporaneously with the deportation order itself. It is clear that Lord Hughes has in mind a successful appeal against an antecedent decision which has the result that *no deportation order is made* and so there is nothing to be revoked. The usual 2007 Act case, and the case in this appeal, is that a deportation order is made at the same

time as the decision giving rise to an appeal. As noted above, the order invalidates a person's leave to remain by virtue of section 5(1) of the 1971 Act.

21. Do the words contained in the deportation order, to the effect that Mr Kangu was not required to leave until his rights of appeal were exhausted, make any difference? In my view, they do not. It was made clear to him that there would be no immediate enforcement but the deportation order itself was not contingent upon success or failure in any appeal.
22. Nor does section 79 of the 2002 Act make any difference. It provides that a deportation order may not be made in respect of a person while an appeal "relating to" the decision to make the order could be brought or remains pending. However, subsection (3) is perfectly clear: "This section does not apply to a deportation order which states that it is made in accordance with section 32(5) of the UK Borders Act 2007."
23. Does the decision in Ali bear on the issues in this appeal? I conclude that it does not. Ali is concerned with the meaning of the phrase "liable to deportation" and the Upper Tribunal draw a distinction between the 1971 Act scheme and the provisions of section 32(4) of the 2007 Act. The decision in Ali is not concerned with the impact of a deportation order, or revocation of such an order, on a person's indefinite leave.
24. The deportation order made on 19 December 2012 has remained intact and has not been revoked. When it was made, it had the effect of invalidating Mr Kangu's indefinite leave to remain. His successful appeal against the Secretary of State's decision that section 32(5) of the 2007 Act applied in his case did not revive that leave. Nor was his indefinite leave preserved in some way by the explanation in the deportation order that he would not be required to leave until the dismissal of any appeal and the exhaustion of his appeal rights. The analysis made by the Supreme Court in Gorje applies in Mr Kangu's case and there is no sensible basis for concluding that it does not.
25. It follows that the judge made no legal error in concluding as he did. At the time the Secretary of State purported to revoke Mr Kangu's indefinite leave, by means of a decision under section 76 of the 2002 Act, he had no leave at all. His indefinite leave came to an end when the deportation order was made on 19 December 2012. The judge was right to conclude that the Secretary of State's decision was misconceived and of no lawful effect.
26. The decision of the First-tier Tribunal shall stand.

Notice of Decision

27. The decision of the First-tier Tribunal, containing no error of law, shall stand.

Anonymity

28. There has been no application for anonymity and I make no direction on this occasion.

Signed

Date

Deputy Upper Tribunal Judge R C Campbell

FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed

Date

Deputy Upper Tribunal Judge R C Campbell