JR-2022-LON-001034

In the Upper Tribunal (Immigration and Asylum Chamber) Judicial Review

In the matter of an application for Judicial Review

The King on the application of
HELEN IBESHILE IJOYAH
(no anonymity order is in force)

Applicant

versus

Secretary of State for the Home Department

Respondent

ORDER

BEFORE Upper Tribunal Judge Perkins

HAVING considered all documents lodged, neither party having attended the handing down of the judgment,

IT IS ORDERED THAT:

(1) The application for judicial review is refused for the reasons in the attached judgment. I am particularly grateful to Mr David Jones of Counsel for his suggested corrections after seeing an embargoed draft of my reasons. I have adopted them all.

(2) I decline Mr Jones's written request for an anonymity order. This is not a protection case and I see no risk of harm to the parties or family members arising from their details being in the public domain. Anonymity should not be granted without good reasons and I find none here.

(3) The Applicant shall pay the Respondent's reasonable costs on the standard basis, to be assessed, if not agreed.

(4) The Applicant has the benefit of cost protection under section 26 Legal Aid, Sentencing and Punishment of Offenders Act 2012. Any request by the Defendant for costs to be paid by the First Claimant, is to be determined in accordance with Regulations 10 and 16 of the Civil Legal Aid (Costs) Regulations 2013.

(5) There be a detailed assessment of the Applicant's publicly funded costs.

(6) Permission to appeal is refused because I see no arguable error of law in my decision. It may be that the Court of Appeal will think that there is a point of general importance here but, respectfully, that is matter for that Court.

Signed: Jonathan Perkins

Upper Tribunal Judge Perkins

Dated: **20 December 2024**

The date on which this order was sent is given below

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date): 23/12/2024

Solicitors:
Ref No.
Home Office Ref:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a point of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).

Case No: JR-2022-LON-001034

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breams Buildings
London, EC4A 1WR

23 December 2024

Before:

UPPER TRIBUNAL JUDGE PERKINS

- -

Between:

THE KING
on the application of
HELEN IBESHILE IJOYAH

Applicant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- -

Mr D Jones
and
Mr S Galliver-Andrews
(Counsel, instructed by Bhatt Murphy Solicitors), for the Applicant

Mr J Anderson
(Counsel, instructed by the Government Legal Department) for the Respondent

Hearing date: 21 June 2023

- -

DECISION AND REASONS

- -

Judge Perkins:

1. I confirm that I have read the documents relied upon, including all of the pleadings and interlocutory orders. I have only considered in my written judgment the things that I have found particularly helpful.

2. I indicate my findings at different parts of my judgment. For the avoidance of doubt, I have made my findings after a wide and (I hope) full consideration of the material and if it appears that I have made any finding before considering all of the papers and submissions that appearance is wrong.

3. I realise that the decision invites criticism for repetition but I have found no other way to show that I have engaged with the arguments made in the pleadings, submissions, skeleton arguments and, to some extent, correspondence.

4. Although it has been necessary to consider a substantial bundle the core challenge is expressed succinctly in the Statement of Facts and Grounds for Judicial Review and in the Detailed Grounds of Defence.

5. According to the Applicant, her challenge is to the Respondent's decision on 10 April 2022 to rescind her indefinite leave to remain and replace it with 30 months of limited leave to remain.

6. The Detailed Grounds of Defence express the challenge differently. They assert:

> "The substantive issue in the claim is whether the Applicant has indefinite leave to remain. The Respondent submits that she does not, because her indefinite leave to remain was revoked by a deportation order signed on 21 November 2014 and served on 3 December 2014."

7. This difference of expression illuminates the nature of the dispute between the parties.

8. The decision of 10 April 2022 was explained in a letter dated 20 April 2022 and I set out below the substantial parts of that letter:

> Thank you for your email of 14 April 2022 in which you[r?] client has raised a query with regard to the leave to be issued.
>
> On 26 July 2013 your client was convicted at Snaresbrook Crown Court of committing an act/series of acts with intent to pervert the course of public justice. On 30 August 2013 she was sentenced to 27 months' imprisonment. A decision was made on 21 November 2014 to deport your client and refuse her human rights claim. The decision was certified under section 94B of the Nationality, Immigration and Asylum Act 2002, giving an out of country appeal right, and the Deportation Order under the UK Borders Act 2007 was signed on the same date.
>
> Your client's Indefinite Leave to Remain was invalidated by the Deportation Order signed on 21 November 2014. As your client's refusal of her human rights claim was certified under section 94B of the 2002 Act, she did not have a pending appeal when the deportation order was signed and her Indefinite Leave to Remain was therefore invalidated.
>
> Following a judicial review challenge, the decision of 21 November 2014 was withdrawn on 20 June 2015 with a new decision to be made. The deportation order, however, remained in place. Further enquiries were subsequently made into your client's circumstances.
>
> Since then, your client has received two further convictions, both in 2018: distributing indecent photographs or pseudo-photographs of children; and failing to comply with notification requirements, breach

> of a sexual harm prevention order and commission of a further offence during the operational period of a suspended sentence order. Further submissions have also been made on your client's behalf, which included various evidence, including an independent social work report on the impact of your client's deportation on her children. In the light of all the further submissions, it has been decided not to pursue deportation against your client and the deportation order was revoked on 10 April 2022. However, the revocation of a deportation order does not revive any previous leave invalidated when the deportation order was made. Your client cannot be left ·without any leave, and she will therefore be granted 30 months' leave under Part 13 (paragraph 399B) of the Immigration Rules."

9. It is the Applicant's case that that decision is ultra vires and contrary to the Respondent's public policy.

10. The grounds then set out the remedies that the Applicant seeks. Essentially she requires an order quashing the Respondent's decision on 10 April 2022 to revoke her indefinite leave to remain and replace it with limited leave to remain and then a declaration that any "historic" (I suggest pre-existing might be a better description) deportation order was either rescinded by a consent order signed in June 2015 or had implicitly been withdrawn and fallen away because of the conduct of the Respondent, and particularly a letter of 6 September 2016 confirming that she had retained her indefinite leave to remain which in turn led to her son being a British national.

11. Before considering the Summary Grounds or Detailed Grounds of Defence I outline some of the salient facts.

12. There is much in the material before me which I find does not need specific comment. In particular there is evidence about the Applicant's strained relationship with her children and her own challenging childhood experiences. These things might support a further application for leave and failure to disclose them could expose the Applicant to criticism for not discharging her duty of candour. I am aware of the evidence but I have not found it important to the decision that I have to make.

13. At the start of the hearing before me I declined to admit further evidence and I said:

> I refuse the application to introduce evidence in a statement dated 30 May 2023.
>
> This was drawn after disclosure and was, I accept, intended to help in a case where there are important issues touching on the rights of a child.
>
> However, I do not consider it relevant to the issues before me except to the extent that it consolidates strands of evidence that are in the papers. That might be convenient but it is not necessary and, as far as I can see, the statement does not purport to identify the evidence that is already in the papers.
>
> I find that admitting the statement would risk drawing attention away from the pleaded case. If it is necessary to consider evidence that was before the Respondent I must be referred to it.

14. The Applicant was born in 1976 in Nigeria and arrived in the United Kingdom when she was 9 years old. On 4 July 1999 she was given indefinite

leave to remain but on 30 August 2013 she was sent to prison for 27 months for the offence of perverting the course of justice. The Applicant has other convictions for offences of dishonesty and violence and had been the subject to two suspended sentences of imprisonment.

15. The order for her deportation was signed on 21 November 2014 and was clearly made under the provisions of section 35(2) of the UK Borders Act 2004. On 24 November 2014 the Applicant's application for leave on human rights grounds was refused and certified under the provisions of Section 94B of the Nationality, Immigration and Asylum Act 2002 which, essentially, provided for a certification process to permit the removal of people in certain specified categories even though they had outstanding appeals.

16. On 22 December 2014 the Applicant started judicial review proceedings seeking to challenge both the deportation decision and the certification decision. The application for permission to bring judicial review proceedings was compromised on 9 July 2015 but the effect of the compromise is disputed.

17. It is the Applicant's case that the Respondent agreed to withdraw the decision to deport dated 24 November 2014 *and* to withdraw the certification under Section 94B *and* to make a fresh decision. It is the Respondent's case that the Applicant remained liable to a deportation order even though the decision to deport had been withdrawn. This is contested by the Applicant.

18. There was correspondence between the Applicant and the Respondent in which the Applicant set out her reasons for wanting to remain in the United Kingdom. These included her having contact with her children.

19. It was the Applicant's contention that at the very least there was an implied decision to revoke the deportation order and not merely to withdraw the notice of decision to deport.

20. Importantly, in correspondence dated 6 September 2016, the Respondent confirmed that she was withdrawing the decision letter of 24 November 2014 and would make a new decision but continued "as such [the Applicant's] ILR will remain until she is advised otherwise".

21. The Applicant was assisted for some time by Bail for Immigration Detainees (BiD) and on 22 June 2022 the Respondent sent a letter which purported to have an attachment explaining why she had been given 30 months' limited leave to remain but the alleged attachment never appeared.

22. It remained the Applicant's contention that the assurance that she had indefinite leave to remain still applied.

23. On 31 July 2022 there was a letter from the Respondent stating that the Applicant had been given discretionary leave to remain in lieu of humanitarian protection. She had never applied for humanitarian protection and that letter seems to have been sent in error.

24. The grounds supporting the claim are dated 5 August 2022. They begin simply enough with the assertion that the substantive claim is whether the Applicant has indefinite leave to remain and it is the Respondent's case that she does not because her indefinite leave to remain was revoked by a deportation order signed on 21 November 2014 and served on 3 December 2014.

25. The Detailed Grounds of Defence are dated 24 February 2023. They include the Respondent's version of the factual background. The versions are not in conflict but understandably the emphasis is different and the consequences in law of the decision are disputed.

26. The Respondent recognised that the Applicant is a Nigerian national who has lived in the United Kingdom since 1985 and was given indefinite leave to remain in 1991. She is said to have a "significant history of offending" with "twelve convictions for 25 offences". This must mean she was convicted on twelve occasions. The most serious consequence of her criminal behaviour was her sentence of 27 months' imprisonment.

27. It is the Respondent's case that the Applicant was notified of her liability to deportation because she is a foreign criminal on 23 July 2014. She responded to a detailed questionnaire and on 18 August 2014 made further representations that were treated as a human rights claim. Still further representations in pursuance of that claim were made in October and then November 2014.

28. On 21 November 2014 (that is after all the representations had been received) a deportation order was signed and on 24 November 2014 the Respondent refused and certified the human rights claim so that any appeal had to be brought out of country. These decisions were served on the Applicant in early December 2014 and this prompted a challenge to the certification. Proceedings were issued. The application for judicial review was refused on the papers but there was an oral renewal hearing leading to a consent order on 20 March 2015 giving the Respondent time to give further consideration to the case.

29. This led to further correspondence telling the claimant that "the decision to deport your client dated 24 November 2014 has been withdrawn". I remind myself that the deportation order was dated 21 November 2014. The decision on 24 November 2014 was to refuse and certify the human rights claim.

30. As indicated above, there was then the consent order on 9 July 2015. It began with the heading:

> "Upon the Defendant withdrawing her decision dated 24 November 2014 to deport the Claimant and agreeing to reconsider her immigration status".

31. The Detailed Grounds of Defence assert at paragraph 15:

> "Crucially for the present case, neither the correspondence nor the consent order provided that the deportation order itself has been withdrawn nor did they make any provision suspending or reversing its effect".

32. There was a letter on 30 July 2015 from the Respondent which states, possibly a little awkwardly:

> "I can confirm receipt of the consent order agreed in your client's name and the agreement to withdraw and reconsider the letter dated 24 November 2014; that of the Notice of Decision to Deport and to refuse the Human Rights Claim has now been withdrawn.

> Your client remains liable to deportation in accordance with Section 32(5) of the UK Borders Act 2007 and subject to consideration of Section 33 of the same Act ...".

33. There is then reference to a General Case Information Directorate [GCID] on 30 July 2015 saying:

> "... emailed SCW to ask if we are just reconsidering and withdrawing notice, or DO is also being revoked".

34. Further representations were received from the Applicant's solicitors on 25 August 2015 and this prompted another GCID, this time on 30 September 2015 stating:

> "... case under review – reconsideration – consent order agreed to reconsider decision to deport letter, advised by SCW IM that Do was obtained lawfully therefore does not require revoking as chain of email placed on file".

35. There were further correspondence and it was noted in the GCID on 9 November 2015:

> "Telephone call received from Tiffany Taylor at Evidence and Enquiry regarding whether subject's ILR remains valid. After discussing case with SCW JS, although subject's DO has not been revoked it is not in force until she is ARE or an out of country ROA has been afforded therefore subject retains her ILR at present. Call returned to Tiffany to inform her of this".

36. The detailed grounds then go on to describe this statement as "incorrect" in the sense that it was an erroneous statement about the Applicant's status and assert that the proper position is that the deportation order, having been made and served and not revoked, had the effect of cancelling the indefinite leave to remain. This was said to be the consequence of Section 5(1) of the Immigration Act 1971.

37. Section 5(1) of the Immigration Act 1971 provides that:

> "Where a person is under section 3(5) or (6) above liable to deportation, then subject to the following provisions of this Act the Respondent 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 him before the order is made while it is in force."

38. Section 3(6) concerns a person recommended for deportation by a court and is not relevant here.

39. Section 3(5) provides that a person:

> "... 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) [family members of such a person.]"

40. Thus, where the Respondent has deemed a person's deportation to be "conducive to the public good" that person is "liable to deportation" and if the Respondent chooses to make an order against that person then Section 5 of the 1971 Act operates to invalidate that person's leave.

41. It is, I think, clear and accepted that at least in the case of a person whose deportation is "conducive to the public good" the making of a deportation order against the person cancels any leave that they might have to be in the United Kingdom. This is provided by Section 3(5) of the 1971 Act. At the time it was passed into law it no doubt contemplated the case of person subject to deportation because the Respondent had made a positive decision that the person's presence in the United Kingdom was not conducive to the public good.

42. Section 32 of the Borders Act 2007 introduces the idea of "automatic deportation", that is where certain criteria are established the Respondent is obliged by statute to make a deportation order.

43. The 2007 Act does not prescribe the consequences of making a deportation order. These have already been prescribed by section 5 of the 1971 Act and includes the cancellation of leave.

44. Section 32(4) of the 2007 Act provides that "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." I cannot avoid concluding that when an "automatic" deportation order is made it *must* be the case that the Respondent "deems his deportation to be conducive to the public good" if for no other reason than the fact that that is what statute law provides.

45. Thus according to statute a consequence of making a deportation order is that a person's leave is extinguished. This I consider to be the default position.

46. Deportation Orders, even "automatic" ones, do not make themselves. Section 32(5) of the 2007 Act obliges the Respondent to make a deportation order (subject to exceptions) and Section 34 of the 2007 Act provides that:

> "Section 32(5) requires a deportation order to be made at a time chosen by the Secretary of State"

and the rest of that section, in so far as is presently relevant, provides that any such decision must be made after the time for appealing the sentence of the criminal court has elapsed.

47. In the case of a "conducive" deportation the Respondent may not make a deportation order against a person who is appealing a decision to the Tribunal (see section 79 of the 2002 Act) but section 79(3) expressly provides that section 79 does not apply in the case of "automatic" deportation. Section 79(4) provides that:

> "But a deportation order made in reliance on subsection (3) does not invalidate leave to enter or remain, in accordance with section 5(1) of the Immigration Act 1971, if and for so long as section 78 above applies."

48. Section 78 is headed "No removal while appeal pending" and provides, inter alia, that an appeal is "pending" when section 104 says that it is.

49. In order to understand this section it is important to appreciate that the default position is that the making of a deportation order extinguishes any leave a person has to be in the United Kingdom. Section 79 of the 2002 Act provides that a deportation order cannot be made until after any human rights claims prompted by the decision to make a deportation order have been determined and the appeal process is complete but this only applies

to "conducive" deportation because the same section provides an exception for cases of "automatic" deportation. In such a case a deportation can be made when an appeal is "pending" but, contrary to the default position, the making of the order will not invalidate leave "if and for so long as section 78" applies and the application of section 78 is limited by section 78(4) to appeals brought while the appellant is in the United Kingdom in accordance with section 92.

50. Paragraph 37 of the Detailed Grounds of Defence is particularly important. It asserts:

> "On 10 April 2022, the deportation order was revoked. The decision letter stated that the Applicant's ILR was invalidated by the DO singed (signed?) on 21 November 2014".

51. On 25 April 2022 BiD wrote to the Respondent asserting that the Applicant's Indefinite Leave to Remain had not been revoked and referred to the letter of 8 September 2016.

52. On 16 June 2022 the Applicant was given limited leave to remain until January 2025 and on 8 July 2022 the Applicant claimed judicial review.

53. The Detailed Grounds of Defence then set out relevant legislative provisions. These are intended to support the conclusion contended from paragraph 50 of the Detailed Grounds of Defence which assert that the (much amended) 2002 Act, creates a distinction between a deportation order described as "under the usual regime ('conducive deportation')" and "a deportation order under the "automatic deportation regime".

54. In the case of a conducive deportation regime a deportation order *cannot* be made while an appeal could be brought or was pending but under the automatic deportation regime there is no such restriction. A deportation order can be made while an appeal could be brought or was pending but a deportation order made under the automatic deportation regime would not invalidate leave to enter or remain "if and for so long as section 78 above applies".

55. The detailed grounds then explain when Section 78 does apply. It applies only when an appeal is "pending" and "pending" is defined by Section 104. I set out below how it is defined:

> "(1) An appeal under section 82(1) is pending during the period –
>
> (a) beginning when it is instituted, and
>
> (b) ending when it is finally determined, withdrawn or abandoned (or when it lapses under section 99)."

56. The grounds then refer to a decision of Lord Hughes in **R (George) v SSHD [2014]** I consider **George** in more detail below.

57. The Detailed Grounds of Defence emphasise that there is a clear distinction between a deportation order under the "usual" or "conducive" regime (these are the same thing) and a deportation order made under the "automatic" deportation regime.

58. Under the conducive regime a deportation order *cannot* be made while an appeal against a decision refusing protection can be brought or was pending but when an order is made it operates to extinguish any existing leave. However, under the "automatic" regime an order can be made when an appeal is pending but the making of the order will not act to extinguish

leave, and thus permit removal, "if and for so long as section 78 applies". As indicated above, section 78 only applies where an appellant is in the United Kingdom "in accordance with section 92".

59. It is important to get a firm grip on the two different deportation regimes.

60. The "usual" or "conducive" regime applies where the Respondent has had to decide if a person's presence in the United Kingdom is conducive to the public good. Where that occurs the person has to be notified of the intention to make a deportation order. The deportation order itself cannot be appealed but a notice of an intention to make a deportation order will often prompt an assertion that removing the person will contravene the United Kingdom's obligations under the European Convention on Human Rights. Such a decision is appealable and the deportation order cannot be made on "conducive" grounds until such an appeal has been brought or the time for bringing such an appeal has lapsed. In the event of an order being made under the "conducive" regime then that order will invalidate any leave a person had to remain. Thus in the case of "conducive" deportation a person who may be deported and who asserts a human right to remain in the United Kingdom cannot be removed while that claim is being determined. In those circumstances their leave to remain, if any, continues until any appeal is determined. If such an appeal has been determined against the appellant, and a deportation order is made, any existing leave is brought to an end by making the order because this is provided by section 5(1) of the Immigration Act 1971 but before that can happen the subject is given an opportunity to establish a right to remain. If the subject fails to do that then the deportation order can be made in the knowledge that it is inappropriate for the subject to have leave because the subject cannot show any entitlement to leave.

61. There is another regime. This is described as the "automatic deportation regime" and, typically, applies to a "foreign criminal" as defined in the rules or legislation, that is, broadly, a foreign national who has been sent to prison for at least one year.

62. Such a person is, broadly, subject to a similar opportunity to raise a protection claim before removal but the restriction on making a deportation order in the case of someone whose appeal is pending does not apply in the case of someone subject to automatic deportation. A person subject to automatic deportation is protected from removal by reason of the deportation order not invalidating leave to enter or remain provided Section 78 applies. Section 78 applies only to an appeal brought while the appellant is in the United Kingdom "in accordance with section 92" and Section 94B provides for a certificate that there would be no "real risk of serious irreversible harm" if the appellant were removed and if the appellant is removed pursuant to a certificate the provision of Section 78 which prevent removal while an appeal is pending are disapplied.

63. All of this distils into something quite simple. If a person is subject to conducive deportation the order cannot be made until the appeal process is over. Once the order is made that person's leave comes to an end. This contrasts with the automatic procedure whereby a person subject to automatic deportation can be subject to a deportation order while an appeal is pending but their leave to enter or remain is not terminated by the existence of a deportation order provided that the person is bringing an appeal from within the United Kingdom. Importantly the person must be in

the United Kingdom "in accordance with Section 92". Section 92(3) provides that a claim certified under Section 94B must be brought from outside the United Kingdom and therefore, where a Section 94B certificate has been issued the provision disapplying the provision that means that a deportation order is disapplied is itself disapplied.

64. This is what the Respondent says has happened here. The Applicant was liable to automatic deportation because she had been sentenced to 27 months' imprisonment. On 17 July 2014 the Respondent informed the Applicant of her liability to deportation and this prompted her to make further representations against deportation that were treated as a human rights claim. However, this was the automatic deportation regime and the existence of a human rights claim did not prevent the Respondent signing a deportation order which she did on 21 November 2014. The Respondent does not suggest that this had effect until it was served (see paragraph 55 of Detailed Grounds of Defence). It was served on 3 December 2014 together with a decision to deport and refuse the human rights claim dated 24 November 2014 and also certified the claim under Section 94B of the 2002 Act. That is the Respondent said that this was a case where the right of appeal against the refusal of the claim on human rights grounds was exercisable out of country.

65. It is important to appreciate that the Respondent is not obliged to certify an application under section 94B. That is a decision that she can make as she chooses if she is satisfied that the facts justify it and, is almost inevitable, there will be decisions that are very marginal. It follows that the Respondent might want to change her mind.

66. If the Respondent had decided not to certify the application under section 94B the Applicant would have to be in the United Kingdom to pursue an appeal and so would be residing in the United Kingdom in accordance with section 92 and so section 78 would prevent her removal, but the Respondent decided that section 94B did apply and so she was not residing "in accordance with section 92" and so could not take advantage of the "No removal while appeal pending" provisions of section 78.

67. The Applicant sought judicial review and the application was refused but she applied to renew her grounds and "grounds for oral renewal" were settled by Counsel and dated 18 March 2015. These grounds made it plain that the challenge was "focused squarely on the Section 94B certificate". There was no challenge to the making of the deportation order.

68. I pause and remind myself that this is consistent with the scheme. There was automatic deportation so the order could exist while the human rights claim was considered and appealed and the Respondent certified the claim so that the appeal could only be brought out of country.

69. It is against this background that there was a consent order on 20 March 2015.

70. This was followed by a letter dated 18 May 2015 from the Respondent saying:

> "Further to Consent Order CO/5988/2014 dated 20 March 2015, fresh consideration has been given to whether the application of Section 94B of the Nationality, Immigration and Asylum Act 2002 to the decision to deport your client dated 24 November 2014, which was

upheld in a further decision dated 18 December 2014 was appropriate".

71. The letter then said that the decision to deport the claimant dated 24 November 2014 had been withdrawn and the Respondent promised to "reconsider the immigration status of your client as soon as possible".

72. On 3 July 2015 there was a letter from the Applicant's solicitors referring to a consent order and expressing surprise that the Administrative Court had asked what steps they wished to be taken in the matter. The consent order obliged the Respondent to say what steps had been taken as a result of reconsideration and that had not been done. They then pressed for a finalised consent order dealing with costs.

73. There was then a letter from the Respondent on 30 July 2015 confirming receipt of a consent order and agreeing to withdraw and reconsider the letter dated 24 November 2014 and said that the "notice of decision deport and to refuse a Human Rights claim which has now been withdrawn". However, it was also said that the Applicant remained liable to deportation in accordance with Section 32(5) of the UK Borders Act 2007. She was then given the Section 120 notice. In the Summary Grounds of Defence the Respondent asserts that "the crucial point" is that "the deportation order had been made and served and it operated to cease the Applicant's indefinite leave to remain". It was the Respondent's contention that the decision to deport and to refuse and certify the claim on human rights grounds was a separate decision and its withdrawal did not in any way act to set aside the deportation order that had been made. It is the Respondent's contention that there were indeed separate decisions. The making of the deportation order was one and the consideration of human rights exception was another.

74. If the Respondent had intended to withdraw the deportation order then she could have said as much.

75. It is the Respondent's contention that the deportation order was made on the basis of a human rights decision and that human rights decision was certified under Section 94B so that the Applicant had to pursue her appeal out of the country. Because this route had been taken Section 78(4) meant that the bar on removal under Section 78 did not apply and so Section 79(4) did apply. Her leave to remain was invalidated when the decisions were served.

76. I remind myself of the operation of Section 79. This says that a deportation order may not be made in respect of a person while an appeal may be brought or is pending. But the Section that prohibits making a deportation order, does not apply in the case of automatic deportation. Section 94(4) provides that a deportation order made in reliance of sub-Section 3, that is automatic deportation, does not invalidate leave "if and for so long as section 78 applies". Section 78 prevents removal while an appeal is pending. Section 78 only applies to an appeal brought while the appellant is in the United Kingdom in accordance with Section 92 and Section 92 determines the place from which an appeal may be brought. Section 78 applies under the heading "No removal while appeal pending" and prohibits a person's removal while a Section 82(1) appeal is pending. It provides that he" may not" be removed or required to leave. Section 78(3) makes it plain that nothing in the Section which prevents removal prevents making a

deportation order or giving directions relating to removal or preparing for a person's removal.

77. The point is that this Section provides for the co-existence of leave to remain and a deportation order because it prevents removal by way of deportation or at all while an appeal is pending. Section 78 only applies to an appeal brought while the appellant is in the United Kingdom under Section 92 and Section 92 provides "place from which an appeal may be brought or continued".

78. Section 92(1) says the Section applies to determine the place from which an appeal under Section 82(1) may be brought or continued. Section 92(2) provides that such an appeal must be brought from outside the United Kingdom if it has been certified under Section 94(7) and otherwise it must be brought from within the United Kingdom. Section 92(3) provides for an appeal on human rights grounds rather than a protection appeal to be brought from outside the United Kingdom if it has been certified under 94(7) (removal to a safe country) or Section 94B. Otherwise, it must be brought from within the United Kingdom. Section 92(4) applies to an appeal made while the appellant is outside the United Kingdom so clearly is of no relevance here. Section 92(5) applies to the revocation of protection status. Section 92(6) applies to appeals started from within the United Kingdom continuing from outside the United Kingdom when they are certified. Section 92(7) also applies to appeals brought or continued from outside the United Kingdom and is similarly irrelevant. Section 92(8) applies where a person starts an appeal in the United Kingdom but leaves. Again that has no relevance here.

79. It must be that Section 78 applies "only to an appeal brought while the appellant is in the United Kingdom in accordance with Section 92" and that must mean pursuing an appeal from within the United Kingdom in accordance with Section 92.

80. The Detailed Grounds of Defence refer to the decision of **R (George) v SSHD [2014] UKSC 28, [2014] 1 WLR 2014**, where the Supreme Court indicated that a person's indefinite leave to remain is not reinstated simply by reason of a deportation order being revoked following a successful appeal against a refusal to revoke it. This I have indicated above.

81. I find it quite clear that this is a case where a deportation order was made and served and that acted to terminate the Applicant's indefinite leave to remain. There was a separate decision to deport and to refuse and certify a human rights claim. That is unsurprising. As is explained above, in the case of an automatic deportation, the mere fact that a deportation order was made does not of itself permit removal because the person may still have leave. Here there was a decision that was withdrawn but it was not the decision to make the deportation order. That had already happened. I agree with the Respondent's submissions that the Respondent could have withdrawn the deportation order. She never said that she had and that is because she did not. It was not her intention to withdraw the deportation order and there was no reason to withdraw the deportation order. Here the deportation order was made and there was a human rights decision which was certified under Section 98B effectively meaning the Applicant had to pursue her claim out of country. The bar on removal did not apply and so Section 79(4) did apply. The Applicant's indefinite leave to remain was invalidated on 3 December 2014.

82. I am entirely satisfied as a matter of law that the process that the Respondent says has happened here, namely that there was a deportation order and a separate decision to consider a human rights claim which was certified and then withdrawn, is entirely permissible in principle. I also accept following **George** that the decision in April 2022 to revoke the deportation order did not reinstate any existing leave. That was the point in **George** and is answered by **George**.

83. Before reaching these conclusions, I have reminded myself of Mr Jones' submissions and particularly his skeleton argument beginning at paragraph 29. There he contends clearly that the Respondent was just wrong in her whole approach.

84. He sought to make three points. I set out below paragraph 29 of the Skeleton Argument because I find it is a pithy summary of his case.

85. This says:

> The Applicant contends that the Respondent is wrong in each of the above regard, and that her approach is unlawful, unreasonable and is characterised by a lack of anxious scrutiny. More specifically the Applicant will contend:
>
> > I. That on a proper construction of the statutory scheme relating to automatic deportation the order made on the 21 November 2014 did not remain valid following withdrawal of the deportation decision;
> >
> > II. In the alternative the Applicant will contend that the Respondent's consistent communication and conduct upon withdrawing the deportation decision informed a finding that settled status had been restored;
> >
> > III. Further, even had the Applicant's settled status been relinquished by the 21 November 2014 deportation order the Respondent erred in nonetheless in extending to her only 30 months limited, failing to consider whether on the exercise of her residual discretion the instant case was one in which settled status should be extended.

86. The first is that on a proper construction of the statute the automatic deportation order made on 21 November 2014 did not remain valid after the withdrawal of the deportation decision.

87. It is the Applicant's case that the plain meaning of the statutory language supports this contention.

88. The obligation to make a deportation order under section 32(5) is "subject to section 33" and section 33, it is said, creates exceptions, including exception 1 which applies when removal would breach the European Convention on Human Rights. The suggestion is that this cannot be determined without considering human rights and so reconsideration of human rights necessarily involves reconsideration of the deportation order.

89. I cannot accept this contention.

90. Section 32(4) and (5) (that is the obligation to make a deportation order and the connection to section 3(5)(a) of the Immigration Act 1971 which extinguishes leave) are, expressly, subject to section 33(7). This provides that:

> "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; but section 32(4) applies despite the application of Exception 1 or 4.

91. It is clear that in the case of automatic deportation the existence of an unresolved human rights claim does not prevent the making of deportation order and it does not stop a deportation order extinguishing leave.

92. Section 34 enables the Respondent to chose when to make a deportation order.

93. Whilst I agree that section 33 permits the Respondent to decide not to make a deportation order in circumstances where an order would otherwise be required, typically because removal would contravene obligations under the European Convention on Human Rights or the Refugee Convention, I do not agree that it requires such things to be considered before an order is made. It merely permits their consideration.

94. Section 32(5) of the 2007 Act permits the revocation of an automatic deportation order if (inter alia) a section 33 exception applies. The statute clearly contemplates consideration of exceptions after the order is made. I see no basis for concluding that an order made before human rights or refugee convention considerations are determined, or finally determined, is necessarily unlawful although trying to give effect to such an order before human rights claims have been determined may well be unlawful.

95. The Applicant argues, contrarily, that section 79(1) of the 2002 Act prohibits the making of a deportation order when there are human rights of refugee convention points to determine but the law is more nuanced than that. It is plain from section 79(3) that section 79(1) does not apply to an "automatic" deportation order, so the Respondent may make an order, but an automatic deportation order does not engage section 5(1) of the 1971 Act and so does not extinguish leave as long as section 78 of 2002 Act applies. Section 78 provides that a person cannot be removed while an appeal is pending.

96. It is clear from the above that, where section 78 applies, the Respondent may make an "automatic" deportation order before a convention appeal is determined but it will not invalidate leave provided that an appeal was "pending" before the order was made. It follows that a person pursuing a "convention" claim who is subject to "conducive" deportation or "automatic deportation" will not be deprived of their leave while an appeal on convention grounds is being determined.

97. I do not have to decide if an appeal against a decision to refuse an application on convention grounds that the Respondent anticipates making, but has not made, is pending within the meaning of section 78 because section 78 "applies only to an appeal brought while the appellant is in the United Kingdom in accordance with section 92 and here the Respondent certified the refusal decisions under section 94(7). This took the case outside the scope of section 78. It follows that section 78 does not apply and so its provisions that (may) stop section 5(1) of the 1971 Act extinguishing leave clearly do not apply.

98. It follows that I see nothing in the plain meaning of statute that preserves the Applicant's leave after the deportation order was made.

99. I have reflected carefully on the Applicant's contention that I should construe the provisions concerning the "conducive" and "automatic" regimes harmoniously but I am not persuaded by the arguments. First, I do not accept that there is sufficient (if any) vagueness in the words of the statutes to require departure from the plain meaning and I reject further the contention the effect of a deportation order should be the same in every respect. The regimes are intended to be different. The Applicant's circumstances were within the "automatic" regime. The order was made and, I am satisfied, the leave was brought to an end.

100. Some support can be found for the Applicant's contentions in the Conducive Guidance. This clearly contemplates at Stage 1 a decision to make a deportation order that should be communicated to the subject and the decisions makers are told that *Consideration of outstanding human rights claims should be deferred until after the person has had the opportunity to make further representations so that all matters can be considered together.*

101. The guidance then contemplates "Stage 2" which requires consideration of representations.

102. The same guidance confirmed that, in the case of "automatic" deportation, a deportation order can be made without regard to the subject appealing the decision.

103. This, I find, rather than helping the Applicant confirms the existence of two separate but related regimes. It does not suggest that the processes are intended to be the same.

104. The relevant Enforcement Instructions and Guidance contemplates an order being "invalid" and suggest three scenarios that might lead to an order being invalid. They are a person not being in the United Kingdom when the order was signed, the order being "improperly made" and the subject becoming entitled to a right to abode but the fact that an order can be "improperly made" does not help me decide if the order here was improperly made.

105. It is, of course, the Applicant's case in effect if not in substance, that the order was "improperly made" because the evaluation that the Applicant says is required by section 33 of the 2007 Act was not conducted properly but this is not an additional argument in support of the conclusion but a repetition of what I have considered before.

106. I consider now the second limb of the skeleton argument, described there as "Restoration of settled status".

107. The Respondent clearly has the disadvantage of indicating in correspondence that she thought that the Applicant still had ILR. However it does not follow that the representation was correct. I accept that it was made honestly but, I find with the benefit of hindsight, mistakenly. It does not bind the Respondent and it certainly does not determine the law.

108. The Applicant relies on the decision of Irwin J in **Cyros v SSHD** [2016] EWHC 918 (Admin). There the Applicant was made the subject of a deportation following his being sentenced to a long period of imprisonment (for reasons that are not important here, he did not meet the criteria for automatic deportation). His application for leave on convention grounds was refused

and the decision was certified under section 94B of the 2002 Act. Before the High Court, the Respondent accepted that the certification was wrong in law. The Respondent had not applied the correct test. The Applicant's case was reconsidered. The case concerned interlocutory relief and the court was referred to the decision in **R (Fitzroy George) v SSHD** [2014] UKSC 28. I find the following extract from Irwin J's judgment particularly helpful for its explanation of George.

109. Mr Justice Irwin said:

> 35 Mr Poole further argues that even where a deportation is revoked by the exercise of the discretion of the Respondent, such a step does not automatically mean the restoration of ILR. He relies on the decision of the Supreme Court in **R (Fitzroy George) v SSHD** [2014] UKSC 28. In that case the Appellant had exhausted all routes of appeal from the decision to deport him and was subject to a deportation order. However, he made a further Human Rights application pursuant to Article 8 and succeeded, leading to the revocation of the deportation order. The Respondent refused to restore ILR and he challenged that decision. The Supreme Court rejected his claim. Lord Hughes observed, construing Section 5 of the Immigration Act 1971, that the statutory language did not carry the necessary implication of revival of leave:
>
> > "…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." (paragraph 29)
>
> 36 In Fitzroy George the Court considered Section 76 of the 2002 Act, which gives the Respondent the power to:
>
> > "…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"
>
> Lord Hughes went on to conclude that:
>
> > "There is no legal symmetry in indefinite leave to remain co-existing with the status of someone whose presence is not conducive to the public good."
>
> Based on that decision, Mr Poole argues that if it is not deemed inappropriate or unjust not to reinstate the ILR of an individual whose deportation order has been revoked upon a successful appeal on the basis that the individual is still an individual whose presence is no longer conducive to the public good, then it should not be deemed inappropriate or unjust for this Claimant, whose claim is subject to appeal and whose claim may fail."

110. I see nothing in the judgment to suggest that the Respondent's contention that the deportation order extinguished the existing leave was wrong. Rather the High Court ruled that on the particular facts of the case the Applicant had to be treated as if he still had Indefinite Leave to remain, even if he did not. This was because it was clear that the Respondent

should not have certified the claim and "the integrity of public administration is best served by an Order to restore the Claimant's ILR".

111. I find merit in the Respondent's assertion that the case before me is not, and should not be permitted to become, a (very late) challenge to the lawfulness of the deportation order that was made in 2014. It is an argument about the effect of that decision and, I find, that the contention urged by the Respondent is supported rather than undermined by the decision in **Cyros**.

112. The Applicant understands this because the skeleton argument, having drawn attention to the Respondent's indication (now said to be erroneous) that the Applicant's ILR was in force, asserts:

> "By reasonable implication the Respondent has acted of her own motion to preserve the *integrity of public administration*, so as to restore the Applicant's ILR".

113. I appreciate that the Respondent did not seem to notice until the decision complained of on 20 April 2022 (or at least, only shortly before) that the Applicant did not have ILR. I agree that correspondence and internal notes clearly indicate that the Respondent thought that the Applicant had ILR and unequivocally said that she did but that does not mean that the Respondent made a conscious decision to treat the Applicant as if she had ILR when she did. The problem with this contention is that the Respondent claims to have made a mistake when indicating that ILR was in force. Clearly, she would not say that if in fact, she had positively decided to treat the Applicant as if she had ILR and then changed her mind.

114. Further, if as is at least implicit in the Applicant's skeleton argument, the Respondent appreciated in 2015 that she had a positive duty to treat the Applicant as if she had ILR it is hard to see why the Respondent was defending the application in Cyrus in 2016.

115. I am quite satisfied that the Respondent did not reach the binding conclusion that ILR had been restored.

116. Neither party put their case like this but it seems to me that it is at least possible that neither of them gave much thought to the consequences in law of the terms under which the action in 2014 was compromised. Either of them could have insisted that any compromise indicated expressly the Applicant's status while the human rights claim was reconsidered but they did not. The deportation decision was not unequivocally withdrawn and although the Respondent clearly thought for a time that the Applicant continued to have ILR I have seen nothing to suggest that the Respondent ever considered the deportation order to have been withdrawn. It may well be that she decided positively not to withdraw the decision and would have not agreed to the terms of the compromise if it meant that the deportation order was withdrawn. I do not know, but I do know that there is no evidence that it was in fact withdrawn and I agree with Mr Anderson that it is far too late now to recast the terms of the compromise and it is clear to me that the deportation order was not withdrawn.

117. It follows that I respectfully find against the claimant on points I and II in the skeleton argument.

118. I turn now to point III, which I summarise as “the Respondent should have exercised discretion and given further leave” and the rider that there has been “historic injustice.”

119. Without going behind the decisions that I have made and explained above I can see why it might be thought that the making of the deportation order did not cancel the Applicant’s leave. Indeed it is a feature of the case that the Respondent thought for a time that leave had not been cancelled.

120. I cannot find any merit in point III.

121. I agree that the Respondent clearly considered whether to grant further leave at all. I see no basis for criticising the decision to grant some limited leave which can be renewed in time.

122. The point is, I find, answered well by Mr Anderson’s skeleton argument at paragraph 61 and I respectfully adopt it into my judgement. It says:

> “There is nothing unjust about the outcome of the Respondent’s decision. The Applicant has been convicted of serious offences, and continued to offend even after serving a substantial prison sentence. It is unsurprising that the Respondent is reluctant to grant indefinite leave to remain to such a person, whilst at the same time providing a grant of limited leave to remain having regard to the UK’s international obligations. That grant of limited leave strikes an appropriate balance between the broader policy interest in marking and deterring offending, and the Applicant’s interests.”

123. For all these reasons I refuse the application for judicial review.

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