Upper Tribunal
(Immigration and Asylum Chamber)

Greenwood (Automatic Deportation: Order of Events) [2014] UKUT 00342 (IAC)

THE IMMIGRATION ACTS

Heard at Newport
On 20 March 2014

Promulgated on

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Before

MR C M G OCKELTON, VICE PRESIDENT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JOSEPH HILMAN GREENWOOD

Respondent

Representation:

For the Appellant: Mr I Richards, Senior Home Office Presenting Officer
For the Respondent: Mr M Gill QC, instructed by Emmanuel & Co

(1) The appealable decision that s 32(5) of the UK Borders Act 2007 applies is not invalid by reason of being dated after the deportation order to which it relates.

(2) *In an appeal against automatic deportation there is no appeal against a decision to deport or against the order to deport, but only against the decision that s 32(5) applies.*

(3) *If the First-tier Tribunal gives directions under s 86 of the Nationality, Immigration and Asylum Act 2002 they should be clear, so that the person affected knows whether to challenge them and everybody can tell whether they have been complied with.*

(4) It does not appear that the First-tier Tribunal has power to 'remit' to the Secretary of State.

DECISION AND REMITTAL

1. This is an appeal by the Secretary of State. The respondent, whom I shall call "the claimant", is a national of Jamaica, born in December 1978. He came to the United Kingdom in 2002 as a visitor. He sought a year's further leave as a student, which was granted, expiring on 30 September 2003. He undertook only three months of the course. He then remained in the United Kingdom without leave.

2. Save for family matters, to which I refer in a moment, there appears to be little or no information about his activities in the United Kingdom for the subsequent ten years, other than in relation to his criminal offending. He has been twice convicted of possession of Class A drugs with intent to supply, and has been sentenced to terms of imprisonment totalling six years.

3. The claimant married shortly after his first arrest. His wife has three children from a former relationship, two of whom are over eighteen. His wife has another child, born in 2009, said not to be the claimant's child; and the claimant has another child, also born in 2009, to a different woman. The claimant's marriage is, however, said to be subsisting.

4. The Secretary of State has made a number of attempts to have the claimant deported on the grounds that his deportation would be conducive to the public good. A decision to make a deportation order followed his first conviction. The Asylum and Immigration Tribunal allowed an appeal against that decision. As a result, the claimant was granted leave to remain for just over four years.

5. After the expiry of that leave he applied for indefinite leave to remain as the spouse of his wife. That application was refused, and an appeal was dismissed by the First-tier Tribunal. The claimant's second conviction followed and he was sentenced to five years imprisonment. The claimant had obtained permission to appeal to the Upper Tribunal against the dismissal of his appeal. Judge Grubb set aside the First-tier Tribunal's decision, but made a new decision also dismissing the appeal. The claimant applied out of time for permission to appeal to the Court of Appeal and no such permission was granted. The Secretary of State then sought to carry that decision into effect by means of a deportation order. The claimant was served with two notices. First, there is a deportation order, specifically made under s.32(5) of the UK Borders Act 2007 ("the 2007 Act"). That order is dated 17 June 2013. The other notice is headed "Decision that section 32(5) of the UK Borders Act 2007 applies". It considers in detail the information available to the Secretary of State, in relation in particular to the claimant's immigration and offending history and his relatives in the United Kingdom. That decision is dated 24 June 2013.

6. The appellant appealed again to the First-tier Tribunal. The grounds of appeal, as summarised by the First-tier Tribunal were as follows:

> "(i) a decision to deport on section 32 grounds must be made before a Deportation Order is made, a decision which is made after a Deportation Order has been signed cannot be a lawful decision; and
> (ii) in any event, the decision to deport under section 32(5) is contrary to the Article 8 rights of the appellant and his family members."

7. The First-tier Tribunal (Judge Holder and Mrs S E Singer) was persuaded of the merits of the first ground. It concluded at paragraph 23 as follows:

> "23. The respondent's decision to deport Mr Greenwood dated 24 June 2013 is not in accordance with the law. Given the fundamental nature of the respondent's error, we remit the matter back to the respondent for the error to be remedied.
> We, therefore, do not proceed to decide the substance of the article 8 appeal.
> We allow the appeal against deportation to the afore-mentioned extent only."

8. The Secretary of State sought and obtained permission to appeal to this Tribunal. The grounds of appeal are, first, that s.34 of the 2007 Act requires the deportation order to be made at a time chosen by the Secretary of State; there is no reference in that section to a requirement that the order post-date the decision, so that the timing of the order cannot affect the legality of the process; secondly, the appeal to the Tribunal is against the decision, not against the order.

The Law

9. Although the Secretary of State sets out s.34 of the 2007 Act in her grounds, neither the First-tier Tribunal in its determination nor Mr Gill QC in his skeleton argument thought it worthwhile setting out the other statutory provisions applicable in this case. They are as follows. In the UK Borders Act 2007:

> **32. Automatic deportation**
> (1) In this section "foreign criminal" means a person –
> (a) who is not a British citizen,
> (b) who is convicted in the United Kingdom of an offence, and
> (c) to whom Condition 1 or 2 applies.
> (2) Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months.
> (3) Condition 2 is that –
> (a) the offence is specified by order of the Secretary of State under section 72(4)(a) of the Nationality, Immigration and Asylum Act 2002 (c.41) (serious criminal), and
> (b) the person is sentenced to a period of imprisonment.
> (4) For the purpose of section 3(5)(a) of the Immigration Act 1971 (c.77), the deportation of a foreign criminal is conducive to the public good.
> (5) The Secretary of State must make a deportation order in respect of a foreign criminal (subject to section 33).
> (6) The Secretary of State may not revoke a deportation order made in accordance with

subsection (5) unless –

(a) he thinks that an exception under section 33 applies,

(b) the application for revocation is made while the foreign criminal is outside the United Kingdom, or

(c) section 34(4) applies.

(7) Subsection (5) does not create a private right of action in respect of consequences of non-compliance by the Secretary of State

33. Exceptions

(1) Section 32(4) and (5)-

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

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

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

(a) a person's Convention rights, or

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

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

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

[(5)(6) set out exceptions 4 and 5]

(7) The application of an exception –

(a) does not prevent the making of a deportation order;

(b) results in it being assumed neither that deportation of the person concerned is conducive to the public good nor that it is not conducive to the public good;

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

34. Timing

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

(2) A deportation order may not be made under section 32(5) while an appeal or further appeal against the conviction or sentence by reference to which the order is to be made –

(a) has been instituted and neither withdrawn nor determined, or

(b) could be brought.

(3) For the purpose of subsection (2)(b)-

(a) the possibility of an appeal out of time with permission shall be disregarded, and

(b) a person who has informed the Secretary of State in writing that the person does not intend to appeal shall be treated as being no longer able to appeal.

(4) The Secretary of State may withdraw a decision that section 32(5) applies, or revoke a deportation order made in accordance with section 32(5), for the purpose of –

(a) taking action under the Immigration Acts or rules made under section 3 of the Immigration Act 1971 (c.77) (immigration rules), and

(b) subsequently taking a new decision that section 32(5) applies and making a deportation order in accordance with section 32(5).

36. Detention

(1) A person who has served a period of imprisonment may be detained under the authority of the Secretary of State –

(a) while the Secretary of State considers whether section 32(5) applies, and

(b) where the Secretary of State thinks that section 32(5) applies, pending the making of the deportation order.

(2) Where a deportation order is made in accordance with section 32(5) the Secretary of State shall exercise the power of detention under paragraph 2(3) of Schedule 3 to the Immigration Act 1971 (c.77) (detention pending removal) unless in the circumstances the Secretary of State thinks it inappropriate.

(3) A court determining an appeal against conviction or sentence may direct release from detention under subsection (1) or (2).

…

38. Interpretation

…

(4) In sections 32 and 33-

…

(c) "deportation order" means an order under section 5, and by virtue of section 3(5), of the Immigration Act 1971

… .

In the Nationality, Immigration and Asylum Act 2002:

82. Right of appeal: general

(1) Where an immigration decision is made in respect of a person he may appeal

(2) In this Part 'immigration decision' means—

…

(j) a decision to make a deportation order under section 5(1) of [the Immigration Act 1971]

…

(3A) Subsection (2)(j) does not apply to a decision to make a deportation order which states that it is made in accordance with section 32(5) of the UK Borders Act 2007; but –

(a) a decision that section 32(5) applies is an immigration decision for the purposes of this Part, and

(b) a reference in this Part to an appeal against an automatic deportation order is a reference to an appeal against a decision of the Secretary of State that section 32(5) applies.

Section 84 sets out grounds of appeal, including, in s.84(1)(e) that the immigration decision is otherwise not in accordance with the law.
Section 86 provides as follows:

86. Determination of appeal

(1) This section applies on an appeal under section 82(1)

(2) [The Tribunal] must determine –

(a) any matter raised as a ground of appeal (whether or not by virtue of section 85(1))

…

The Immigration (Notices) Regulations 2003 (SI 658/2003) require the decision-maker to give notice of a decision which carries a right of appeal, and the notice has to include or be accompanied by the reasons for the decision. The Asylum and Immigration Tribunal (Procedure) Rules 2005, as applied to the First-tier Tribunal, provide for the calculation of time for appealing from the date of the service of the notice of the decision.

Submissions

10. Mr Gill's response to the Secretary of State's grounds is as follows. Section 32(5) is expressly subject to s.33. It follows that the deportation order under s.32(5) cannot be made in circumstances in which s.33 prevents it being made. Accordingly, the Secretary of State is required to consider whether s.33 applies, before the deportation order can be made. Considering whether s.33 applies is equivalent to considering whether s.32(5) applies: if the one does not apply, the other does. It is only once the Secretary of State has decided that s.32(5) applies (which decision is appealable, and notice of which has to be served on the person affected), that the deportation order is to be made. It follows, in Mr Gill's submission that a decision that s.32(5) applies must be made before the deportation order is made. The Secretary of State's invocation of s.34 is incorrect: it may be for the Secretary of State to decide when the deportation order is made, but that cannot permit the Secretary of State to make a deportation order at a time when she cannot lawfully make such an order. Further, if a deportation order has already been made, it is "an unlawful fetter on the process of assessing the relevant article 8 considerations resulting in appealable decision". Thus, there can be no proper consideration of the applicability of s.32(5), including any relevant s.33 exceptions, if the decision-maker is working in the context of the orders having already been made. In Mr Gill's written skeleton he asserts:

> "It flaws both decisions, which in this case are the deportation order and the decision concluding that it has to be made".

11. Mr Gill's argument is accordingly that in the present case the deportation order was unlawfully made, because it was made too early, and the decision that s. 32(5) applies was unlawful because it was made in the context of an existing deportation order.

Error of Law

12. There are two, possibly three, errors of law in paragraph 23 of the First-tier Tribunal's determination. The first, and the most important, is that the decision referred to in that paragraph is not a decision that was for the Tribunal's consideration. In a deportation under s.32 of the 2007 Act, there is no "decision to deport". Such a decision is made in the case of a discretionary deportation decision under the Immigration Act 1971 ("the 1971 Act"), and carries a right of appeal as an immigration decision under s.82(2)(j) of the 2002 Act. But as subsection (3A) of s.82 makes clear, that

is not the process in the case of an automatic deportation. There, there are two events: the making of the deportation order (which does not carry a right of appeal) and the decision that s.32(5) applies (which does).

13. The First-tier Tribunal had concluded in the preceding paragraphs of its determination that the deportation order must in all cases post-date the appealable decision. That was also wrong, for reasons which I shall set out. If it had been right, it might have meant that the deportation order itself could have been challenged in another forum. The decision that s.32(5) is in those circumstances also "not in accordance with the law" would have required an investigation of the circumstances in which such a decision could lawfully be made after the making of an *(ex hypothesei* invalid) deportation order. Although Mr Gill made submissions on that issue to me, and perhaps to the First-tier Tribunal, the conclusion that having the events occur in the order they did in this case invalidates the decision as well as the order appears to be wholly unreasoned in the First-tier Tribunal's decision; and the reference in paragraph 23 to the "decision to deport" makes it clear, in my judgement, that the Tribunal was confused.

14. The second error was the failure to consider the article 8 grounds: that was an error because s.86(2) required the Tribunal to determine "any matter raised as a ground of appeal". Although the failure to do so was clearly an error of law in this case, it is not one for which the Tribunal should be criticised. Despite the terms of s.86(2) it is very often proper for a First-tier Tribunal to determine that, because an appellant succeeds on one or more of his grounds, it is unnecessary to consider the others. In those circumstances, to issue a determination dealing with the grounds on which the appellant is successful alone is an effective, economical and (despite s.86) proper way of the Tribunal's performance of its duties. On an appeal, if the First-tier Tribunal's primary conclusion was correct, then although the failure to determine all the matters raised as grounds of appeal is a technical error of law, it will not cause the determination to be set aside: in those circumstances, the First-tier Tribunal's determination will stand as the determination of the appeal.

15. Where, however, the First-tier Tribunal's reason for allowing the appeal on the grounds it did consider is one which on appeal is found itself to be erroneous in law, the unfortunate consequence is that the view has to be taken in retrospect that the First-tier Tribunal was obliged to determine the other grounds as well. In such circumstances, therefore, the error constituted by the breach of s.86(2) acquires an importance, because, owing to the failure to deal with what have again become important issues in the appeal, the First-tier Tribunal's determination cannot stand. That is the position here.

16. As I indicated above, there is a third possible error in paragraph 23 of the Tribunal's decision. In the second sentence, the Tribunal says:

> "Given the fundamental nature of the respondent's error, we remit the matter back to the respondent for the error to be remedied".

17. Ignoring the pleonasm of “remit back” I think it is in general doubtful whether the First-tier Tribunal has jurisdiction to remit a matter to a decision-maker. It has a power to allow or dismiss an appeal; and if allowing an appeal it has a power to give directions, with which the Secretary of State must comply. It does not formally have the power to quash the decision under appeal, but it is well understood that a decision of the Tribunal to the effect that the decision was not in accordance with the law prevents the decision-maker from relying on it or acting on it, so that it is to that extent of no effect. In those circumstances, if the decision is one which results from an application made by an individual, the position is that the application is outstanding, awaiting a lawful decision. No remittal is necessary. Any circumstances arising from the fact that an application has not yet been decided (for example under s.3C of the 1971 Act, or s.77 of the 2002 Act) will continue, and will be treated as not having been interrupted by the unlawful decision. If there is any doubt about the matter, the First-tier Tribunal, in allowing the appeal, can direct the decision-maker to treat the applicant accordingly.

18. If, on the other hand, the decision is one which results not from an application but from the Secretary of State’s own motion (for example, deportation, removal, curtailment) the Tribunal’s determination that the decision was an unlawful one simply leaves the matter open, as it was before. The Secretary of State cannot continue to treat the appellant as though the decision under appeal had been a lawful one. Again, if necessary, that can be made clear by a direction; but there the First-tier Tribunal’s jurisdiction stops. In cases where the Secretary of State is the initiator of actions, it is not the Tribunal’s function to suggest that such action ought to be re-initiated.

19. The parties have a right of appeal against the direction itself by virtue of s.87(4) of the 2002 Act, and it is therefore open to the Secretary of State to challenge a direction if she considers that it is not the appropriate one for carrying into effect the Tribunal’s determination. If it is not challenged, the Secretary of State must comply with it: s.87(2) and (3). For these reasons it is essential that any direction that is given is clear, so that the decision-maker can know whether it needs to be challenged, and so that everybody can know whether or not it has been complied with.

20. In the present case the purported remittal in para 23 must be supposed to be a direction, because it is not merely the allowing or the dismissing of the appeal. If it is a direction, it is a direction “for the error to be remedied”. The Tribunal had no jurisdiction to give any view on the validity of the deportation order itself. It had apparently decided that a notice that s.32(5) applied to the appellant was, because dated after the deportation order, unlawful. It is wholly unclear how the Tribunal considered that the matter could be remedied; and it would accordingly be wholly unclear whether the matter had been remedied by any subsequent action by the Secretary of State.

21. For these reasons I have concluded that the Secretary of State’s second ground has merit. The Tribunal’s determination contains an error of law and I set it aside.

The interpretation of ss 32(5) and 33

22. That leaves again for determination the principal question. That question is, in my judgement, rather more complex than the First-tier Tribunal appear to have appreciated. Mr Gill's primary submission, at first sight attractive although, as I shall explain, wrong, is that, if the decision that s.32(5) applies post-dates the deportation order itself, the process is unlawful. But the Tribunal has no jurisdiction to determine the general lawfulness of the process: it has jurisdiction only in relation to the decision that s.32(5) applies. For the appellant to succeed in this argument, therefore, he needs to show both that the process is unlawful and that, as a result, the decision that s.32(5) applies is an unlawful decision. That submission is not even immediately attractive. If, as a matter of law, Decision A must pre-date Decision B, it is easy to see that Decision B might be unlawful if it preceded Decision A; but it is by no means so easy to see that Decision A, which should anyway have been the earlier, is invalidated by being illegally preceded by Decision B. In those circumstances the more obvious conclusion would be that Decision A was unaffected by the illegality, but opened the doors to a lawful Decision B now being made.

23. In order to discover whether either of these arguments can succeed, it is necessary to consider the statutory provisions in some detail. I should say that I do not for a moment doubt that the normal process envisaged is that a decision that s.32(5) applies will be made before the deportation order is signed, and that, as a result, the appealable notice that s.32(5) applies will be dated before, or on the same date as, the deportation order itself. The question is whether the reversal of the dates invalidates the process and, if so, what is the consequence for an appeal before the Tribunal.

24. Section 32(5) contains the rule: a deportation order must be made. Section 32(5) is subject to s.33, which contains the exceptions. Although a number of the exceptions (such as a claim under the Human Rights Act) may require assessment and judgment, none is a matter of discretion. If an exception applies, s.32(5) does not apply, although a deportation order under the 1971 Act may be made as a matter of discretion. If no exception applies, s.32(5) has its mandatory effect.

25. Once a deportation order under s.32(5) has been made, the circumstances in which it can be revoked are limited, and, for present purposes, very interesting. If the appellant is in the United Kingdom, the deportation order can be revoked only in the circumstances set out in s.32(6)(a), and s.34(4). Section 32(6)(a) necessarily envisages a situation in which, after the deportation order has been made, the Secretary of State reaches a view that an exception applies. The section does not specify how such a thing might happen, but the two obvious possibilities are (a) that the person affected persuades the Secretary of State that some matter previously brought to her attention establishes an exception and (b) that some new matter is brought to the Secretary of State's attention which, alone or in combination with matters of which she was previously aware, establish an exception. Experience suggests that such representations will very often be a claim that deportation would breach some person's human

rights. Clearly the Secretary of State must deal with the representations. If indeed she is persuaded of their force, she will reach the conclusion that an exception applies (whether or not it applied at the time of the making of the order itself) and is entitled, under s.32(6)(a) to revoke the deportation order. If she is not persuaded by the representations, then s.32(6)(a) does not apply and she is not entitled to revoke the deportation order. It must stand.

26. Before examining Mr Gill's submissions in the light of those statutory provisions, I must refer to s.34(4) which sets out the only other circumstances in which a deportation order made under s.32(5) can be revoked while the person affected is in the United Kingdom. The making of a deportation has a number of effects, including the invalidation of any leave to enter or remain in the United Kingdom that has been given to the person at any time. That is the effect of s.5(1) of the 1971 Act, as made applicable to automatic deportations by s.3(5)(a) of that Act and s.32(4) of the 2007 Act. Thus, if the deportation order has been made, it may not be possible to take certain other action under the Immigration Acts or the Immigration Rules. For these purposes the Secretary of State is entitled to revoke the deportation order for the sole purpose of taking such action, and on the clear condition that, following such action, there will be a new decision that s.32(5) applies and a new deportation order. Section 34 permits only temporary revocation. Whatever other actions or decisions take place whilst the order is revoked, they take place solely on the basis that the order will be re-made in due course.

27. If Mr Gill's submissions are correct, and the appealable notice that s.32(5) must pre-date the deportation order and is necessarily unlawful if it does not, a number of surprising and in my judgement unacceptable consequences would follow. In essence, the Secretary of State would be prevented from considering any new submissions made after the deportation order was signed. She could not consider them and reject them in a new notice that s.32(5) applied, because that would be a notice post-dating the deportation order, which she could not revoke for the purpose of considering the submissions. Further, on the basis of Mr Gill's second submission, she could not lawfully consider them at all, because, as he put it, her judgement would be fettered by the fact that the deportation order had already been made. That last factor throws doubt upon whether she could even consider such submissions and accept them. Once it is brought to her attention that her judgement would be clouded by the fact that the deportation order has been made, it is difficult to know how that factor ought to be taken into account. The truth of the matter is that the statute clearly envisages the possibility of reconsideration of a person's case, and revocation (or at any rate permanent revocation) of the deportation order only if a s.33 exception applies. That reconsideration necessarily has to take place under the shadow of the deportation order; it necessarily results in the deportation order remaining in place unless an exception is applicable; and it necessarily results in a decision that s.38 applies that post-dates the deportation order.

28. It follows from this that the mere fact that a notice that s.32(5) applies post-dates the deportation order cannot be a reason for concluding that an illegal process has been followed.

29. That may not be regarded quite as answering Mr Gill's primary submission which is that the decision that s.32(5) applies to a case must, as a matter of the rationality of the making of the deportation order, precede the making of that order. To that there is a simple answer. The making of the deportation order expressly under s.32(5) is a decision that s.32(5) applies to the case. To treat it otherwise would be bizarre.

30. That is not, however, the end of the matter, because the decision that s.32(5) applies is an appealable decision, and, under the Notices Regulations, an appealable decision must be served with the reasons for the decision. The prospective appellant thus knows the case he is meeting. But I do not think it can be said for a moment that, even in a case where there were no new submissions after the making of the deportation order, the dating of the notice required by the Notices Regulations can invalidate either it or the deportation order. The sole purpose of the notice is to generate and facilitate the right of appeal. It is not an essential part of the process envisaged by ss.32 - 34 of the 2007 Act. (This is in contrast to discretionary deportation orders made directly under the 1971 Act. There, the appealable notice of decision is a part of the statutory process, as s.79 of the 2002 Act makes clear. Section 79 specifically does not apply to automatic deportation.) The dating of the statement of the reasons for the decision is not, and cannot reasonably be read as, a conclusion that those reasons were only identified after the deportation order was made.

31. Mr Gill also sought to draw comfort from s.36. He pointed out that strict interpretation is required where detention is permitted. That may be so: but s.36 does not assist him. In sub-section (1) detention is permitted under certain circumstances before the making of the deportation order: but it cannot properly be said that that sub-section indicates that those circumstances, or either of them, have to exist before the order is made; and they are also necessary in order to allow the Secretary of State to maintain detention during the s.34(4) process. Sub-section (2) applies the Immigration Act powers of detention to those subject to automatic deportation. The purpose of the whole section is clearly to bring powers of detention of those who are or may be subject to automatic deportation into line with those applying to persons subject to discretionary deportation.

32. I think nothing of the Secretary of State's submission that because s.34(1) does not specify an order of events, no particular order of events is required. If Mr Gill had persuaded me that the statute required the notice that s.32(5) applied to bear a date no later than that of the deportation order, s 34(1) would not have saved the decision is this case. But he has not done so.

33. Nevertheless, in my judgement, Mr Gill's submission falls at every hurdle. So far as the 2007 Act is concerned, the proposition that a person will only

make a deportation order under s.32(5) if he thinks that s.32(5) applies is too obvious to need specific statement. The making of the deportation order under that sub-section is the clearest possible indication that the decision-maker has decided that the sub-section applies. So far as the 2002 Act is concerned, s.82(3A) makes it clear that in these circumstances there is no appeal against the deportation order itself, but only against the decision. The Notices Regulations therefore require the reasons for the decision to be communicated to the person affected. If the date of the notice giving those reasons is a few days after the deportation order, that of itself can give not the slightest ground for suspicion that the person making the deportation order had no reason for doing so. If it is dated later, that may (but need not) be because there has been a reconsideration of the person's case. In either event, the mere fact that the notice bears a decision after that of the deportation order is no ground for saying that the deportation order was made unlawfully or, in particular, that the reasons are unlawful. I therefore reject Mr Gill's primary submission relating to the nature and timing of the process.

34. I turn now to Mr Gill's second submission, which related to the decision-making process in circumstances where the deportation order had already been made. The submission was that, if the reasons were properly to be characterised as having been formulated only on the date of the notice, they were bad in law because a decision-maker could not properly look at the case, taking all relevant factors into account, if he or another person had already made a deportation order which would have been, on Mr Gill's submissions, an order which could not in law yet have been made. This is a very bold submission, and it appears again to carry the implication that, where such an order had been made no further consideration of the case could take place without the erection of some sort of "Chinese wall" in the Home Office preventing a subsequent decision-maker from knowing that a previous decision had been made.

35. That submission is wholly unrealistic. It is a frequent feature of the administration of immigration control that the Secretary of State and other decision-makers reconsider decisions that have already been made. Entry Clearance Officers reconsider visa refusals in the light of new materials and arguments; the Secretary of State acts similarly in relation to her own decisions both on applications and on decisions made of her own motion. There are provisions in the Immigration Rules (for example paragraph 353A of the Statement of Changes in Immigration Rules, HC 395) and in the Secretary of State's published instructions to staff that require new submissions and new factors to be taken into account. In the vast majority of cases such considerations fall to be taken into account where there has already been an adverse decision. The Secretary of State's staff are well practiced in determining whether an adverse decision should stand or should be varied or revoked in the light of new or re-emphasised material. There can be no general doubt that they are capable of performing that task and do perform it: it would in my judgement require very specific facts to show that a decision-maker has been so influenced by the existing decision that he was unable to consider properly the circumstances as a whole.

36. Of course the situation envisaged by Mr Gill is slightly different in two respects. First, the earlier decision was in Mr Gill's submission unlawful, and secondly the decision-maker is not responding to a challenge but merely justifying the earlier deportation order. Those are indeed differences. But even if Mr Gill was right to say that there has been no decision that s.32(5) applies until the signature and date are placed on the notice of that decision, there would again need to be clear evidence to demonstrate that the person formulating the reasons has been unable to do so fairly in the context of the decision having already been made.

37. The right of appeal is against the decision that s.32(5) applies. Such a decision is not rendered unlawful by bearing a date after that of the deportation order, either on the basis that combination of dates necessarily indicates a failure of due process or on the basis that it necessarily indicates that the person giving the reasons was unable fairly to consider the case. The appellant's first ground of appeal to the First-tier Tribunal therefore is to be rejected. The appellant's second ground of appeal is based on article 8. The relevant matters were considered by Judge Grubb, and no doubt his determination will have an impact on the final determination at the present appeal, but those grounds need to be considered by the First-tier Tribunal.

38. The First-tier Tribunal's determination contains errors on points of law. I set it aside. I remit the case to the First-tier Tribunal under s.12(2) of the Tribunals, Courts and Enforcements Act 2007. I make no directions as to the constitution of the Tribunal, but I direct that the appellant's first ground of appeal be determined in accordance with this determination.

C M G OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 4 July 2014