R (on the application of Said Aitjilal) v Secretary of State for the Home Department ((EEA Regulations – deportation - reassessment -regulation 24(5)) [2016] UKUT 00563 (IAC)

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

The Queen on the application of Said Aitjilal

Applicant

v

Secretary of State for the Home Department

Respondent

Before:

The Honourable Mr Justice McCloskey, President
The Honourable Mr Justice Garnham

Application for judicial review: substantive decision

Having considered all documents lodged and having heard the parties' respective representatives, Ms C Hulse, of Counsel, instructed by A & A Solicitors, on behalf of the Applicant and Mr R Kellar, of Counsel, instructed by the Government Legal Department, on behalf of the Respondent, at a hearing at Field House, London on 08 November 2016.

Neither a decision to make a deportation order nor a notice of intention to make a deportation order triggers the two year period specified in regulation 24(5) of the EEA Regulations. The two year period begins upon the making of the deportation order itself.

Garnham J

Introduction

1. This is the judgment of the Tribunal. It contains the full reasons for our brief

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pronouncement at the conclusion of the hearing that the appeal is dismissed.

2. This case raises the question whether the Secretary of State is required, at the date of signing a deportation order, to consider whether an EEA national, in respect of whom a decision to make a deportation order was made more than two years ago, remains a threat.

The History

3. The Applicant is a national of Morocco. He entered the United Kingdom in January 2001 on a tourist visa but then remained without leave. In March 2003 he married a French national and, in April 2004, was granted leave as the spouse of an EEA national. The Applicant and his wife were divorced in 2009. The Applicant has since married again, under Islamic law, to another Moroccan national who has lived in the United Kingdom since 2002. They have four children.

4. The Applicant has a number of previous criminal convictions, including for theft and motoring matters. More materially for present purposes, he was convicted on 10 October 2010 of six counts of handling stolen goods, ten counts of possessing or controlling false ID documents, two counts of attempting to remove criminal property from the United Kingdom and one count of acquiring or using or possessing criminal property. He was sentenced to three years and six months' imprisonment. He has since been assessed as being at medium risk of reoffending.

5. On 24 January 2012 Secretary of State notified the Applicant that she was considering whether his deportation would be justified and invited his observations. He responded and the Secretary of State considered that response and the other material available to her. By letter dated 7 March 2013 she notified her initial decision. She decided that the Applicant's deportation was justified under the Immigration (European Economic Area) Regulations 2006 (the "EEA Regulations") and under the Human Rights Convention. On 8 March 2013 the Applicant was served with a "reasons for deportation" letter and a notice of intention to deport. The letter indicated that the Applicant had a right of appeal against the decision under Regulation 26 of the EEA Regulations.

6. On 29 March 2013, at the expiry of the custodial term of his sentence, the Applicant was detained by the Secretary of State under immigration powers as a person served with a notice of decision to make a deportation order whose detention had been authorised by the Secretary of State. On 15 March 2013 he lodged an appeal against the decision to deport. On 29 May 2013 he was granted bail by an immigration judge. On 16 August 2013 his appeal against deportation was dismissed by the First-Tier Tribunal. Permission to appeal to the Upper Tribunal was refused. On 17 October 2013 the Applicant made representations seeking the revocation of the deportation order, although, on the Secretary of State's account, no such order had been made by that date. Further representations were made on 12 May 2014.

7. On 25 August 2015 a deportation order was signed on behalf the Secretary of State pursuant to section 5(1) of the Immigration Act 1971 and the Applicant's detention was authorised. The Secretary of State set out her reasons for detaining him thereafter in a letter dated 3 September 2015. By letter dated 16 September 2015 the Secretary of State provided her reasons for maintaining the decision to deport and served a copy of the deportation order. It is that decision which is the subject of challenge in these proceedings.

8. On 16 October 2015 the Applicant was detained pending removal. These judicial review proceedings were commenced on 27 October 2015.

The Legislative Scheme

9. Section 3 (5) and (6) of the Immigration Act 1971 ("the 1971 Act") identify the circumstances in which a person is liable to deportation from the United Kingdom:

> *"(5) A person who is not a British citizen 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) another person to whose family he belongs is or has been ordered to be deported.*
>
> *(6) Without prejudice to the operation of subsection (5) above, a person who is not a British citizen shall also be liable to deportation from the United Kingdom if, after he has attained the age of seventeen, he is convicted of an offence for which he is punishable with imprisonment and on his conviction is recommended for deportation by a court empowered by this Act to do so."*

The Secretary of State is given power to make deportation orders by Section 5(1) of the 1971 Act:

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

10. Council Directive 38 of 2004 was adopted on 29 April 2004. It provides for the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. Articles 27, 28 and 33 are relied on in these proceedings.

Article 27 provides as follows:

> *"1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family*

members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

2. *Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures. The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted..."*

11. Article 28 of the Directive provides:

"1. *Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.*

2. *The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.*

3. *An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they: (a) have resided in the host Member State for the previous ten years; or (b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989."*

By Article 33:

"1. *Expulsion orders may not be issued by the host Member State as a penalty or legal consequence of a custodial penalty, unless they conform to the requirements of Articles 27, 28 and 29.*

2. *If an expulsion order, as provided for in paragraph 1, is enforced more than two years after it was issued, the Member State shall check that the individual concerned is currently and genuinely a threat to public policy or public security and shall assess whether there has been any material change in the circumstances since the expulsion order was issued."*

12. The Directive was implemented by the EEA Regulations,[1]. Part 4 (Regulations (19

[1] It is to be noted that the 2006 Regulations will be repealed as of 1 February 2017 by the Immigration (European Economic Area) Regulations 2016/1052

to 21) provides for the exclusion and removal of EEA nationals and their family members. As under the previous Directives, EEA nationals and their family members can be excluded on grounds of public policy, public security and public health. Regulation 2 defines the expression "*EEA decision*". It means, insofar as material for these proceedings, a decision under the 2006 Regulations that concerns "*…(c) a person's removal from the United Kingdom*".

13. Regulation 19 deals with exclusions and removals from the United Kingdom. It enables the Secretary of State to remove certain EEA nationals from the United Kingdom:

> "*(1) A person is not entitled to be admitted to the United Kingdom by virtue of regulation 11 if his exclusion is justified on grounds of public policy, public security or public health in accordance with regulation 21.*
>
> *(1A) A person is not entitled to be admitted to the United Kingdom by virtue of regulation 11 if that person is subject to a deportation or exclusion order, except where the person is temporarily admitted pursuant to regulation 29AA ….*
>
> *(1B) If the Secretary of State considers that the exclusion of an EEA national or the family member of an EEA national is justified on the grounds of public policy, public security or public health in accordance with regulation 21 the Secretary of State may make an order for the purpose of these Regulations prohibiting that person from entering the United Kingdom…*
>
> *(3) Subject to paragraphs (4) and (5), an EEA national who has entered the United Kingdom or the family member of such a national who has entered the United Kingdom may be removed if–*
>
> *(a) that person does not have or ceases to have a right to reside under these Regulations;*
>
> *(b) the Secretary of State has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with regulation 21; or*
>
> *(c) the Secretary of State has decided that the person's removal is justified on grounds of abuse of rights in accordance with regulation 21B(2).*
>
> *(4) A person must not be removed under paragraph (3) as the automatic consequence of having recourse to the social assistance system of the United Kingdom.*
>
> *(5) A person must not be removed under paragraph (3) if he has a right to remain in the United Kingdom by virtue of leave granted under the 1971 Act unless his removal is justified on the grounds of public policy, public security or public health in accordance with regulation 21.*"

Regulation 21 deals with decisions taken on public policy, public security and public health grounds. It provides in material part:

*"(1) In this regulation a "*relevant decision*" means an EEA decision taken on the grounds of public policy, public security or public health.*

(2) A relevant decision may not be taken to serve economic ends.

(3) A relevant decision may not be taken in respect of a person with a permanent right of residence under regulation 15 except on serious grounds of public policy or public security.

(4) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who –

(a) has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or

(b) is under the age of 18, unless the relevant decision is necessary in his best interests, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989.

(5) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, be taken in accordance with the following principles –

(a) the decision must comply with the principle of proportionality;

(b) the decision must be based exclusively on the personal conduct of the person concerned;

(c) the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;

(d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;

(e) a person's previous criminal convictions do not in themselves justify the decision.

(6) Before taking a relevant decision on the grounds of public policy or public security in relation to a person who is resident in the United Kingdom the decision maker must take account of considerations such as the age, state of health, family and economic situation of the person, the person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin…"

14. Regulation 24 deals with persons subject to removal. It provides, insofar as material:

"(3) Where a decision is taken to remove a person under regulation 19(3)(b), the person is to be treated as if he were a person to whom section 3(5)(a) of the 1971 Act (liability to deportation) applied, and section 5 of that Act (procedure for deportation) and Schedule 3 to that Act (supplementary provision as to deportation) are to apply accordingly.

…

(5) Where such a deportation order is made against a person but he is not removed under the order during the two year period beginning on the date on which the order is made, the Secretary of State shall only take action to remove the person under the order after the end of that period if, having assessed whether there has been any material change in circumstances since the deportation order was made, he considers that the removal continues to be justified on the grounds of public policy, public security or public health…"

15. Regulation 24A provides, in material part:

"(1) A deportation or exclusion order shall remain in force unless it is revoked by the Secretary of State under this regulation.

(2) A person who is subject to a deportation or exclusion order may apply to the Secretary of State to have it revoked if the person considers that there has been a material change in the circumstances that justified the making of the order.

(3) An application under paragraph (2) shall set out the material change in circumstances relied upon by the applicant and may only be made whilst the applicant is outside the United Kingdom.

(4) On receipt of an application under paragraph (2), the Secretary of State shall revoke the order if the Secretary of State considers that the criteria for making such an order are no longer satisfied."

Regulation 25 deals with appeals against EEA decisions. It provides by paragraph (1) that

"Subject to the following paragraphs of this regulation, a person may appeal under these Regulations against an EEA decision."

The Competing Arguments

16. Permission to bring judicial review proceedings was granted by order dated 26 February 2016 on the single ground that it was "*arguable whether the respondent is required to consider on the date of signing a deportation order if the EEA national remains a present threat*".

The competing arguments in this case may be briefly stated.

On behalf of the Applicant, Ms Hulse relies on Articles 27, 28 and 33 of Directive CE/38/2004. She argues that under Article 33 of the Directive, if an expulsion order is to be enforced more than two years after it was issued a Member State is

required to check whether an individual remains a genuine threat to public policy or public security and to assess whether there has been any material change in the circumstances since the expulsion order was issued.

17. Ms Hulse submits that the issuing and service of the "reasons for deportation" letter and the notice of intention to deport constitutes the issuing of an expulsion order, that more than two years elapsed between the issuing of that decision and its proposed enforcement by means of the deportation order and that therefore the Secretary of State was required to, but has not, carried out the requisite checks. Accordingly, she argues, the proposed deportation is in breach of the Directive.

18. It is further argued on the Applicant's behalf that he is entitled to a decision in a form which would generate a statutory appeal.

    Finally, Ms Hulse points out that the Applicant had been present in the United Kingdom from January 2001, a period in excess of 10 years in March 2013 at the time of the notice of intention to deport. Accordingly, she says that, pursuant to Article 28(3) of the Directive (and Regulation 21(4)), he could only be removed on imperative grounds of public security and no such grounds have been shown here.

19. Mr Kellar, on behalf of the Secretary of State, contends, in summary, that the governing provisions are the Regulations, that English law recognises a distinction between a notice of intention to deport and the making of a deportation order and that Art 33 applies to the deportation order itself, not the reasons for deportation letter. Accordingly, he submits that the two year period did not begin to run until 25 August 2015.

    Mr Kellar disputes that there is any appeal still open to the Applicant. He submits that in calculating the period of ten years under Regulation 21 (4) no regard should be had to any period spent in prison.

Discussion

20. This case therefore raises three issues.

21. The first issue, and the one most vigorously argued by Ms Hulse, is that the Secretary of State was obliged to assess whether there had been any material change in the Applicant's circumstances since the notice of intention to deport was issued and whether the expulsion continued to be justified. Second, it was argued, somewhat faintly, that the Applicant was entitled to an appealable decision at the time the deportation order was made. And third it was submitted that the Applicant's length of residence in the United Kingdom means that removal can be justified only if imperative grounds of public security are established. Before we address these grounds it is necessary to say something about the implementation of the Directive and the nature of deportations in English domestic law.

The Implementation of the Directive

22. The 2004 Directive has been brought into force in domestic English law by the 2006 Regulations. That is plain from the terms of the Regulations themselves, and the Explanatory Note to the Regulations says so expressly. Ms Hulse chose to concentrate her arguments almost exclusively on the terms of the Directive but in our view, the arguments in the case fall to be tested primarily against the Regulations. We would add, however, that the position is would be no different if the Directive were to be regarded as directly effective and requiring no implementing action by Member States.

Expulsion Orders and Deportation Orders

23. It is well established in English immigration law that the following are to be distinguished, each having separate juridical effects and consequences:

    (a) a decision to make a deportation order; and

    (b) a deportation order, with its accompanying statement of reasons.

    Decision (a) is preparatory, or preliminary, to the deportation order. It constitutes a notice of the executive's intentions. It is a notification of the "minded to act" variety familiar in several spheres of public law, such as housing, compulsory and town and country planning. And it is equally clear that the deportation order is the executory step which carries into effect the proposals and intentions intimated by the preceding notification, which takes the form of an initial, or preliminary, decision.

24. In our judgment, a deportation order in domestic law is a species of expulsion order as that expression is used in the Directive. It is the executory step which carries into effect the expulsion of the person concerned from the territory of the member state. An expulsion order is not, however, the equivalent of a notice of intention to make a deportation order, or a notice of the reasons for making a deportation order or even a decision to make a deportation order. These are all steps preparatory to the making of the final order pursuant to which the person concerned is to be deported, none of which has any equivalent in the Directive.

Restrictions on Expulsion Orders

25. Regulation 24 (5) faithfully reproduces article 33 <u>in relation to a deportation order</u>. It requires the Secretary of State, in the case of a person against whom a deportation order has been made, but who has not been not removed during the two year period beginning on the date of the order, to assess whether there has been any material change in circumstances since the order was made and whether the removal continues to be justified. But there is no equivalent restriction in respect of a decision to make a deportation order or notice of intention to make a deportation order in the Directive. Unsurprisingly, as a result, there is no such restriction either in the Regulations.

26. Accordingly in our judgment it cannot be said, on the facts of this case, that there has been a breach of either the Directive or the Regulations by reason of a failure to conduct a reassessment under Regulation 24(5). We consider that the two year period specified in Regulation 24(5) was not triggered until the deportation order was made on 15 August 2015.

Appeals and Revocations

27. Pursuant to regulation 19(3)(b), a decision to make a deportation order, and not the deportation order itself, is a relevant decision for the purposes of regulation 21. Such a decision attracts a right of appeal. The Applicant exercised that right of appeal in this case. That appeal was dismissed and the Applicant became appeal rights exhausted on 8 October 2013. There is no right of appeal against the deportation order itself.

28. Regulation 24A deals with revocation of deportation orders. It provides that a deportation or exclusion order remains in force unless it is revoked. A person who is subject to deportation order may apply to the Secretary of State to have it revoked if there has been a material change in circumstances, but such an application may only be made whilst the Applicant is outside the United Kingdom. It follows that the Applicant has exhausted his appeal rights and he can only seek a revocation of the deportation order from abroad.

The 10 year rule

29. Article 28(3) of the Directive and Regulation 21(4) prohibit the removal of EEA nationals who have been resident for more than ten years unless imperative grounds of public security are established. However, the Applicant cannot show ten years' continuous residence in this country. He was first granted leave to remain, as the spouse of an EEA national, in April 2004. He was made the subject of deportation proceedings in March 2013, eight years and eleven months later. Of that period, as noted above, he spent fifteen months in prison.

30. In C v SSHD [2010] EWCA Civ 1406 the Court of Appeal held that time spent in prison cannot count towards the qualifying period for permanent residence under Regulation 15(1)(a) of the EEA Regulations. At [47] Longmore LJ said:

> *"Once one recognises that the purpose of according to a worker a right permanently to reside in a EU state is that of encouraging the integration of such workers into the population of the host state and that such purpose is not achieved or achievable in prison, it must follow that the worker is not legally resident in the host state as an EEA worker during the period of imprisonment and that any period, which includes that period of imprisonment, cannot be part of the necessary "continuous" period for the purpose of calculating the five years continuous legal residence necessary to acquire the right permanently to reside here."*

More recent decisions of the CJEU confirm in essence the correctness of what the Court of Appeal decided: see Onuekwere v SSHD [2014] ECR I – 0000, at [26] – [27] and [31] – [32] and SSHD v MG [2014] EUECJ – 378/12. In short, every period

of imprisonment breaks continuity and, ultimately, the requisite qualifying period is to be calculated by counting back from the date of the expulsion decision.

31. We consider that the same approach must, by logical extension, apply to the question whether ten years' continuous residence has been established. In those circumstances, we see no basis for any suggestion that the Secretary of State can only remove the Applicant if imperative grounds of public security are demonstrated.

Conclusions

32. As set out above, we conclude that there is nothing in the EEA Regulations or the Directive to prevent the making of a deportation order more than two years following a preliminary decision intimating an intention to make such order without first conducting a reassessment under Regulation 24(5). None of the Applicant's grounds of challenge is made out. For these reasons this application is dismissed.

Decision and Order

(1) The application for judicial review is dismissed.

(2) The Applicant will pay the Respondent's costs, to be assessed in default of agreement.

(3) Permission to appeal is refused as the case raises no issue worthy of consideration by the Court of Appeal.

Signed: *Neil Garnham*

THE HON. MR JUSTICE GARMHAM
SITTING AS A JUDGE OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 02 December 2016