



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: DA/00645/2013

**THE IMMIGRATION ACTS**

Heard at Field House  
On 9<sup>th</sup> October 2013

Determination Promulgated  
On 26<sup>th</sup> November 2013

Before  
UPPER TRIBUNAL JUDGE JORDAN  
UPPER TRIBUNAL JUDGE ROBERTS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR ANDREW CHRISTOPHER BURKE  
(ANONYMITY DIRECTION NOT MADE)

Respondent

**Representation:**

For the Appellant: Mr T Wilding, Home Office Presenting Officer  
For the Respondent: Mr A Vaughan, Counsel instructed by Rodman Pearce Solicitors

**DETERMINATION AND REASONS**

1. Andrew Christopher Burke is a citizen of Jamaica born 3<sup>rd</sup> February 1974. Although he is the Respondent in the appeal before the Upper Tribunal for ease of reference we shall refer to him as the Appellant and the Secretary of State as the Respondent. This is the Respondent's appeal against the decision of a First-tier Tribunal (Judge Cockrill

and Mr D R Bremmer JP) allowing the Appellant's appeal against the Respondent's decision to make a deportation order under Section 32(5) UK Borders Act 2007 (Automatic deportation).

2. The First-tier Tribunal allowed the Appellant's appeal, after hearing submissions on a preliminary point, as "not in accordance with the law".

### **Background**

3. The Appellant claims he arrived in the UK in June 1989 and asserts that he was granted indefinite leave to remain in December 1989. This is unconfirmed as the Respondent has no evidence of this.
4. In May 1993 the Appellant was convicted at South West Magistrates Court on several charges of obtaining property by deception, theft and handling and was given a conditional discharge of twelve months. In June 1998 he was convicted of a serious drugs related offence concerning the importation of Class A controlled drugs and was sentenced to ten years imprisonment.
5. Following that conviction the Respondent issued a decision making a deportation order against him under Section 3(5) of the Immigration Act 1971 (Conducive deport). That decision was dated 29<sup>th</sup> October 2001. The Appellant successfully appealed that decision in November 2002.
6. Matters did not rest there however because in March 2005 the Appellant, whilst still on licence for the conviction gained in June 1998, was convicted of conspiracy to import Class A controlled drugs and breach of licence. He received a sentence of fourteen years imprisonment for the drugs offence and a separate sentence of 772 days imprisonment for the breach of licence; to be served consecutively to the fourteen year term.
7. The Respondent duly notified the Appellant on 26<sup>th</sup> January 2013 of her decision to deport him under Section 32 of the UK Borders Act 2002. The Appellant appealed that decision and raised Article 8 ECHR grounds.

### **First-tier Tribunal Hearing**

8. The hearing came before the First-tier Tribunal on 26<sup>th</sup> June 2013 at Kingston Crown Court. At that hearing those representing the Appellant submitted a preliminary point that the Respondent's decision to apply automatic deportation proceedings under the 2007 UK Borders Act was unlawful and accordingly the deportation order was not in accordance with the law. The Tribunal Found that the decision was not in accordance with the law by virtue of the UK Borders Act 2007 (Commencement No 3 and Transitional Provisions) Order 2008 which states that Section 32 does not apply to a person "who **has** been served with a notice of decision to make a deportation order under Section 5 of the Immigration Act 1971 before 1<sup>st</sup> August 2008". The Tribunal concluded therefore that the first deportation order which was made against the Appellant in 2002 meant that the Secretary of State by virtue of the

application of the transitional provision, was excluded from making a further deportation order in 2008 and thus allowed the Appellant's appeal as being not in accordance with the law.

9. In coming to their decision the First-tier Tribunal stated,

*"The issue is whether or not the deportation order that was made in this case is in accordance with the law. We have had our attention drawn to the transitional provision which have been quoted above. It seems to us that the way in which the order is drafted at 3(ii) is such that there are not any qualifications at all...As a simple matter of fact this Appellant was served with such a notice of a decision to make a deportation order under Section 5 of the Immigration Act 1971 before that relevant day which was 1<sup>st</sup> August 2008. Therefore it would appear that the Appellant is indeed caught by that provision...We think it is important though to repeat the point that there are no restrictions, limitations, qualification whether as to time or indeed any other aspect. Our duty is to interpret those provisions in a natural and sensible way and we make the point again that paragraph 1 to the 2008 order does not apply therefore to someone such as this Appellant given his particular circumstances".*

### **The Permission Stage**

10. The thrust of the grounds seeking permission is that the First-tier Tribunal misinterpreted the transitional provisions which simply say that automatic deportation does not apply to a person who **has** been served with a notice of decision to make a deportation order as of 1<sup>st</sup> August 2008. The word 'has' clearly indicates a notice with ongoing effect. To say otherwise would offend against Parliament's intention and the natural reading of the language of the order.
11. Permission was granted by First-tier Tribunal Judge Nicholson on 5<sup>th</sup> August 2013 in these terms;

*"The grounds contend that the Tribunal erred in its interpretation of the transitional provisions, that the word "has" in the provisions clearly indicates a deportation order with ongoing effect, that the first deportation order which followed the conviction in 1998 had no ongoing effect after the Appellant's appeal against that order was allowed and that in consequence the second decision was in accordance with the law.*

*The transitional provisions were intended to exclude the application of Section 32 to deportation proceedings in process. It is clearly arguable that the provisions did not affect the proceedings, which are the subject of this appeal, as the deportation order in those proceedings had not been served by the relevant date. Permission is accordingly granted".*

### **The Hearing Before the Upper Tribunal**

12. Before us both representatives made submissions. Mr Wilding's submission broadly followed the lines of the grounds seeking permission. He emphasised that the word 'has' which is contained in paragraph 3(ii) must refer to a deportation order with ongoing effect otherwise it would lead to the illogical position that any foreign

criminal who had successfully argued their case and won an appeal before a Tribunal in the past, but then commits another offence is safe from automatic deportation being invoked. That cannot have been Parliament's intention. In order to add to his argument Mr Wilding handed in to us a copy of the Guidance given to senior caseworkers. That re-emphasised the Secretary of State's position that unless there is an **ongoing** appeal, then deportation proceedings under Section 32 is the appropriate Section under which to bring deportation action.

13. Mr Vaughan on behalf of the Appellant submitted that this is a matter of statutory construction and invited us to look at what the Act itself states. We think it was in this sense that Mr Vaughan said that he accepted that the phrase "*has been served*" may encompass the present but, it does not rule out the past. He said that the language is ambiguous and in essence the Appellant should benefit from any ambiguity set down. Lastly Mr Vaughan reminded us that caseworker guidance is not law.
14. Mr Wilding's responses re-emphasised what he had said previously but in addition he said that should we find there to be an error of law, he would invite us to remit the matter to a First-tier Tribunal for a fresh re-hearing, since no facts were found.

### Discussion

15. As the First-tier Tribunal determination revolves around the statutory construction of the relevant part of the transitional provisions to the UK Borders Act 2007. We set out the relevant transitional provisions as follows.

"3 (i) Subject to paragraph (2) Section 32 applies, to the extent to which it is commenced in Article 2(a) to persons convicted before the passing of that Act who are in custody at the time of commencement or whose sentences are suspended at the time of commencement.

(ii) Paragraph (1) does not apply to a person who has been served with a notice of a decision to make a Deportation Order under Section 5 of the Immigration Act 1971 before August 2008".

We reject Mr Vaughan's assertions that the wording of the commencement order is ambiguous. He accepted that the phrase *has been served* encompasses the present tense.

16. We approach this by way of an example. A person sentenced to 10 years imprisonment in the past 'has been sentenced'. The sentence imposed by the judge is an event in the past. The expression 'has been sentenced' does not indicate *when* he was sentenced. Strictly speaking it says nothing as to whether he is currently in prison or has since been released. If that same person serves his sentence and has been released and is, after release, sentenced to a further 14 years imprisonment, he *has* also been sentenced to 14 years imprisonment, in circumstances when he *had been* sentenced to 10 years before that. In this example, a clear distinction has been drawn. There has been an intervening event which renders the 10 year sentence an historic

event which does not survive into the present. So, too, if the individual dies. His death means that, prior to his death, he *had been* sentenced; the deceased cannot be described as a person who has been sentenced to 10 years imprisonment. A writer who describes an individual as a person who has been sentenced to 10 years imprisonment (by avoiding the expression 'had been sentenced') avoids implying that this is not a purely historical event. He infers that it has, or may have, an ongoing effect or, at the very least, that there has not been some intervening event which decisively places the event into history (as his release after serving the sentence or his death would).

17. It is our function to construe what Parliament intended by the expression '*a person who has been served*'. Whilst the words are capable of bearing the meaning that paragraph 1 does not apply to a person who has, *at any time in the past* been served with a notice to make a Deportation Order, it does not mean this in the context of the circumstances of the present case. Had that been the intention, Parliament could have avoided the ambiguity by saying '*has, or has been, served*' or '*has ever been served*'. It is necessary to construe the expression in such a way as to avoid absurd or irrational consequences. It would be absurd that in the circumstances of the present case, the Appellant could benefit from a perpetual prohibition on his deportation when his serial, grave offending renders the public interest in his removal more imperative, not less. Furthermore, this construction does not require the Tribunal to re-write the statute, merely to construe it in such a way as to make practical sense. Since the sense of what Parliament intended is crystal clear, we reject Mr Vaughan's assertions that the wording of the commencement order is ambiguous. He accepted that the phrase *has been served* may encompass the present.
18. We accept Mr Wilding's analysis that the word **has** clearly indicates a notice with ongoing effect and that if the intention of the commencement order was to exclude all historic claims, it would have said so.
19. Looking at the natural order of the language we are satisfied that the word **has** plainly refers to a deportation with ongoing effect, and that therefore the first deportation made against the Appellant which followed the conviction in 1998 had no ongoing effect once the Appellant's appeal against that order was allowed.
20. It follows therefore that we conclude that the First-tier Tribunal panel materially erred in reaching the decision they did, because their analysis of the commencement order is flawed. The determination of the First-tier Tribunal is set aside.
21. We did consider whether in the event of finding that the First-tier Tribunal erred we could remake the decision ourselves. However we noted Mr Wilding's submission and took into account Mr Vaughan's indication that the Appellant would wish to call evidence to show that he would be at risk on return to Jamaica.

## DECISION

22. The First-tier Tribunal's determination contains an error of law. It is hereby set aside. In accordance with the Senior President of Tribunals Practice Direction 7.2(a) we

remit this appeal to the First-tier Tribunal for a fresh rehearing. The rehearing should be before a Tribunal other than Judge Cockrill or Mr Bremmer JP.

No anonymity direction is made

**Signature**

Judge of the Upper Tribunal

**Dated**