Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/33027/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 11 July 2014	**On 24 September 2014**

Before

UPPER TRIBUNAL JUDGE ESHUN

Between

MR AA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Toal, Counsel instructed by Wilson Solicitors LLP
For the Respondent: Mr G Saunders, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Turkey, born on 1 January 1964. He appeals with leave against the decision of First-tier Tribunal Judge Kaler dismissing his appeal against the decision of the respondent made on 22 July 2013 to revoke his indefinite leave to remain under Section 76(1) of the Nationality, Immigration and Asylum Act 2002. There is no intention to

deport at present as removal directions have not been issued. The appellant has been given a grant of six months' discretionary leave in recognition of the fact that the Home Office cannot deport him at present because there are ECHR barriers to removal.

2. The grounds upon which permission to appeal was granted argued that the decision under appeal cannot be in accordance with the Immigration Rules as there is no paragraph of the Immigration Rules touching on the point and that the basis of decision to revoke leave under Section 76 of the 2002 Act should be set out in the Immigration Rules per Alvi; in the absence of criteria in the Immigration Rules, the decision was not in accordance with the law. It was also argued that there was inadequate reasoning on whether in the particular the circumstances of his case, the appellant's deportation would be conducive to the public good (a pre-requisite to the application of Section 76) and finally that the judge should have exercised a discretion herself rather than review the decision of the respondent.

3. Counsel said he was not pursuing the argument in the grounds that deportation was not conducive to public good.

4. His two main arguments were:

   (1) the Tribunal was wrong in its approach as to whether the immigration decision was in accordance with the Immigration Rules; and

   (2) the Tribunal did not deal with the issue as to whether "discretion should have been exercised differently".

5. I set out the relevant paragraphs of the determination where the Tribunal dealt with these two issues.

> "**The decision is not in accordance with the Immigration** Rules
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> 16. The Appellant's representative relied on the case of **R (on the application of Alvi) (Respondent) v Secretary of State for the Home Department (Appellant) [2012] UKSC 33**. The Secretary of State could not rely on his powers under any policy guidance unless measures had been laid before parliament. There were no Immigration Rules that made provision as to the practice which should be followed in exercising the powers conferred by section 76. Policy guidance had been laid down and 2.7 provided how that power under section 76 should be exercised.
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> 17. The Respondent's representative stated that the decision was in accordance with the Immigration Rules and the law. The power to revoke was laid in statute. What the Appellant was seeking to

argue was the removal was disproportionate under Article 8 but there was no intention to deport.

18. The Appellant's representative is seeking to extend that was said in **Alvi**. In this case, the [sic] rejected the submission that it was open to the Secretary to control immigration in a way not covered by the Immigration Rules at common law under the Royal Prerogative. They said that everything which is in the nature of a rule as to the practice to be followed in the administration of the 1971 Act must be laid before Parliament. Resort to the technique of referring to outside documents, is not in itself objectionable, but it is if it enables the Secretary of State to avoid her statutory obligation to lay any changes to the rules before Parliament. In such cases, the Occupation Codes contained general guidance for sponsors and caseworkers, but they also contained detailed information, the application of which determined whether an applicant will qualify for entry or leave to remain. That does not apply in this case. The legislation itself gives the power to revoke if certain circumstances apply.

19. I do not find that the Secretary of State acted outside the scope of the Immigration Rules. The power to revoke the Appellant's indefinite leave to remain arises from statute. The guidance is not detailed or prescriptive in nature. It does not specify any condition that must be met before an Appellant can qualify for retaining his right to indefinite leave to remain.

Discretion should have been exercised differently

22. The Appellant's representative argues that the Tribunal should itself decide whether deportation is conducive to the public good. He argues that it is not. Even if it were found to be conducive, discretion should have been exercised differently. The Secretary of State had given undue weight to the fact of the Appellant's conviction and the gravity of the offence and insufficient weight to the substantial contribution he had made to the public good by giving evidence. His actions had placed him and his family in danger. They had been unable to live a free and normal life and could not maintain contact with their family and associates. They had been uprooted from their home area. The Court of Appeal had stated that the Appellant gave crucial information against *one of the most significant international criminals in the drug* world as well as another person involved in human trafficking. The decision sent the wrong message to those who were considering assisting the authorities in the same way as they would be placing their status in the UK at risk.

23. The Secretary of State is not intending to deport the Appellant; he is seeking to revoke his indefinite leave to remain. I am

therefore not considering an appeal against deportation but against a revocation of the indefinite leave to remain.

24. Nevertheless, I do find that the Appellant's deportation would be conducive to the public good. I have taken into account the guidance in numerous cases, including **EO (Deportation Appeals: scope and process) Turkey [2007] UKAIT 00062**, **RU (Bangladesh) [2011] EWCA Civ 651**, and **Masih (deportation – public interest – basic principles) Pakistan [2012] UKUT 00046**. That the Appellant is liable to deportation is not in issue.

25. 4.4 states that exceptional compelling and compassionate circumstances must be considered. The Respondent did consider these. Whilst the Appellant's partner has mental health issues, these are not serious. The Appellant has made a good recovery from his heart attack. The family has had to adjust to having to live under police protection, which must cause them anxiety. Added to that is the matter of uncertainty about the Appellant's immigration status. The Respondent gave due consideration to all the matters raised by the Appellant before deciding to revoke indefinite leave to remain. The exercise of any discretion he had was made after all the circumstances that had been placed before him were duly and properly considered.

26. The Appellant must take responsibility for the serious crimes he committed and the gravity of those offences is not nullified by his giving evidence against those further up the ladder. These were extremely serious offences, as reflected in the sentence. The Court of Appeal reduced his sentence, thereby acknowledging the substantial contribution he made, but it was still a term of 10 years, a relatively long period. The Appellant must also take responsibility for the consequences of his decision to give evidence. One of the consequences was that his sentence was cut by six years. The other consequence was that he would have to live a different sort of life to reduce the risk of harm to himself and his family. The decision to revoke his indefinite leave to remain makes no difference to that. The Appellant has no reason to expect that the Secretary of State will give him any additional benefit over and above that of a reduction in his sentence.

27. I have considered the period of discretionary leave granted by the Secretary of State to the Appellant. The guidance sets out the period for duration of such grants under Chapter 4 headed **Duration of grants of Discretionary Leave**. The normal period is one of three years. The guidance says that *There will also be some cases where the factors meriting a grant of DL are expected to be sufficiently short lived that the question arises whether to grant a short period of leave or to refuse the*

application outright whilst giving an undertaking not to remove the individual or expect them to return until the circumstances preventing their return have changed. *Such cases could arise at the decision-making stage or following an appeal*. That applied in this case and so the Appellant was given leave for six months.

28. Having considered carefully all the facts and arguments, I find that in the particular circumstances of this case that the decision is in accordance with the law and the relevant Immigration Rules. The Secretary of State has considered exercising her discretion and has determined that the decision is proportionate. I agree. There was no Article 8 appeal before me."

6. With regard to his first argument as in paragraph 4(1) above, Mr Toal submitted that Section 76 of the 2002 Act, which allows the Secretary of State to revoke an appellant's indefinite leave to remain, does not have Immigration Rules which set out how the Secretary of State would exercise that power. If there are no Immigration Rules, then it is important for the decision to be in accordance with the Rules, and the judge should have allowed the appeal.

7. He relied on Section 84(1) of the 2002 Act which says that *An appeal under section 82(1) against an immigration decision must be brought on one or more of the following grounds – (a) that the decision is not in accordance with immigration rules".*

He also relied on Section 86(3) of the same Act which says "*[the Tribunal] must allow the appeal insofar as [it] that - (a) a decision against which the appeal is brought or is treated as being brought was not in accordance with the law (including Immigration Rules)...* Mr. Toal submitted that this must be contrasted with the statutory provisions which they replaced in Section 19(1)(a) of the 1971 Act, which states that "*an adjudicator ... (a) shall allow the appeal if he considers that the decision or action against which the appeal is brought was not in accordance with the law or any Immigration Rules applicable to the case.*

8. Mr Toal also relied on Schedule 4, paragraph 21(1)(a) of the Immigration and Asylum Act 1999 which states *"an Adjudicator must allow an appeal if he considers that the decision or action against which the appeal is brought was not in accordance with the law or any Immigration Rules applicable to the case."* He submitted that in the current version, which is Sections 84 and 86 of the 2002 Act, reference to the words "rules applicable to the case" have been dropped. He submitted that this is a significant alternation. The result of this means that the one quality an immigration decision must possess i.e. either be in accordance with the immigration rules or the law, no longer applies. He argued that a decision taken by the Secretary of State must be in accordance with the rules and there must be rules describing how the Secretary of State will make any Immigration Decision. Mr. Toal relied on **Prajapati [1981] Imm AR 212,**

CA wherein it was held that if there is no Immigration Rules which govern the situation, it cannot be said that the decision of the Secretary of State is one which was given in accordance with the Immigration Rules. If there are no rules in accordance with the immigration decision, then the decision cannot be in accordance with the Immigration Rules. That being the case the appeal must be allowed.

9. Mr. Toal relied on the decision in **Lumba v SSHD [2011] WLR 671** which held that immigration powers are exercised through the Immigration Rules. He said this was reiterated in **R(Alvi) v SSHD WLR 2235** where it was held that Section 3(2) requires the Secretary of State to "lay before Parliament states of the rules, or of any changes in the rules, laid down by her as to the practice to be followed, although the content of the rules is a matter for her. Counsel submitted that the insistence of policies set out in the Immigration Rules is the means by which Parliament can exercise a degree of control over its own policies. As there is no Immigration Rule which sets out how the Secretary of State can exercise her power in Section 76, the judge was wrong in her finding at paragraph 19.

10. With regard to his second argument, Mr. Toal submitted that Section 76 uses the word "may". It states that the Secretary of State *may* revoke a person's indefinite leave if certain conditions apply. Section 86(3)(b) states that [the Tribunal] must allow an appeal if it thinks that discretion should have been exercised differently. Mr. Toal argued that this is what the judge should have done in this case. She should have exercised her discretion differently because it is not in the public interest to revoke indefinite leave to remain because of what the appellant had done assisting the prosecution of major criminals. The appellant was originally sentenced to sixteen years' imprisonment for his part in a conspiracy to supply drugs as the result of assisting the prosecution of major criminals, his sentence was reduced to ten years. Mr Toal submitted that the sentencing judge's approach was because of the message he sent out which was that by reducing the sentence, it would encourage others to assist in the prosecution of serious criminals. This is a clear public policy message which says that criminals should be encouraged to come out against other criminals. It chimes with the power to deport which is the message the Secretary of State wishes to send out regarding the deportation of criminals. Mr. Toal submitted that by revoking the appellant's indefinite leave to remain, the Secretary of State is sending out the wrong message because if by assisting the prosecution they are liable to be deported or have their indefinite leave taken away from them that would deter such a person from giving evidence against former criminal associates.

11. Mr. Toal argued that as a consequence the judge's finding at paragraph 26 that the appellant has no reason to expect that the Secretary of State will give him any additional benefit over and above that of a reduction in his sentence does not deal with "discretion should have been exercised differently". It has nothing to do with the benefit or the benefit being

withheld. It does not directly answer the question whether discretion should have been exercised differently.

12. Mr Saunders relied on the respondent's response to the grounds of appeal under Rule 24. Responding to the last point first, Mr Saunders submitted that from paragraph 22 onwards the judge looked at the salient facts. At paragraph 26 her message was that if an appellant becomes involved in a criminal enterprise, he would have to go to prison but if he helps in the prosecution of another criminal associate, he may well be imprisoned for a lesser period. In this case the appellant's sixteen year sentence was reduced by six years. The judge's finding does not disclose an error of law.

13. With regard to the main argument in respect of Section 76, Mr Saunders submitted that Mr Toal accepts that the grounds upon which an appellant can appeal an immigration decision under Section 82 are set out at Section 84. There are some grounds that concern the Immigration Rules and there are some that do not. The power springs from, and reflects, the Immigration Act. If there are Immigration Rules then the ground not in accordance with the Immigration Rules is available. If there are no Immigration Rules then the other ground is not in accordance with the law (Section 84(1)(c)). Section 19 of the 1971 Act and the 1999 Act make available grounds which are either not in accordance with the law or the Immigration Rules. Mr Saunders submitted that the Secretary of State had power to make the decision and properly decided it.

14. I find that the judge's decision does not disclose an error of law for the reasons I give below.

15. I find that the respondent exercised her power to revoke the appellant's indefinite leave to remain by virtue Section 76 of the 2002 Act. I agree with the judge that the legislation itself gives the power to revoke if certain circumstances apply. I find that this is because of the use of the word "may". In my humble opinion I find that the discretion is as described in subparagraphs (1)(a) and (b). Paragraph (1)(a) states *is liable to deportation, but* and subparagraph (b) states *cannot be deported for legal reasons.* I find that the use of the word *"is"* in subparagraph (a) describes the circumstances in which the respondent may exercise her power to revoke an appellant's indefinite leave to remain. In the appellant's case it is the fact that he committed a very serious offence which involved international criminals and got a hefty sentence for his part in the crime. I do not accept the argument put to the judge that Policy guidance had been laid down and 2.7 provided how that power under section 76 should be exercised. Therefore the respondent could not rely on her powers under any policy guidance unless measures had been laid before parliament. Therefore as there were no immigration rules applicable, the respondent's decision was not in accordance with the Immigration Rules.

16. I have looked at paragraph 2.7 of the Policy Guidance and it does not provide guidance in the circumstances of this appellant's case. It provides guidance to immigration officers taking a decision in certain situations. It does not provide guidance to the Secretary of State in this type of case where the Secretary of State is exercising her powers under statute which in this case is Section 76 of the 2002 Act. I therefore find that the conditions set out in Section 76(1) were met as a result of the applicant's behaviour and the Secretary of State has the power to revoke his indefinite leave to remain.

17. Under Section 82(1)(f) the appeal had a right of appeal against the respondent's decision which he exercised accordingly. Section 84 lists the grounds on which his appeal *must* (my emphasis) be brought. In his case there is no applicable immigration rule. As submitted by Mr. Toal the reference to "Rules applicable to the case has been dropped in Sections 84 and 86 of the 2002 Act. As the statute is the source of the respondent's decision, I find that the lack of an applicable immigration rule does not make her decision erroneous. I find that the case law relevant to the 1971 Act, which Mr. Toal placed reliance do not impact on the respondent's power to exercise a discretion under Section 76 of the 2002 Act.

18. The other issue is in respect of whether the discretion should have been exercised differently. I accept Mr Saunders' submission that the judge's finding at paragraph 26 does not disclose an error of law. The appellant got his sentence reduced as a result of assisting the prosecution of serious criminal associates. That was the message that was being sent out by the criminal judge which was that if you assist in the prosecution of serious criminal associates, you will get your sentence reduced. This does not mean that the Secretary of State should give him the additional benefit over and above that of a reduction in his sentence. The appellant committed a serious criminal offence. The decision to revoke his indefinite leave to remain makes no difference to the fact that he got a reduced sentence for his assistance to the prosecution.

19. I find that the judge's decision does not disclose an error of law. The judge's decision dismissing the appellant's appeal shall stand.

Signed Date

Upper Tribunal Judge Eshun