IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000591
First-tier Tribunal No:
HU/52050/2021
IA/06541/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 08 June 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE LEWIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ALHAJI SORIE SANKOH
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Ms A Kouma of Migrant Legal Action
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

Heard at Field House on 2 June 2023

DECISION AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge Morgan signed on 9 February 2023 allowing, on human rights grounds, the appeal of Mr Alhaji Sorie Sankoh against a decision of the Secretary of State for the Home Department to refuse to revoke a deportation order.

2. Although before me the Secretary of State for the Home Department is the appellant and Mr Sankoh is the Respondent, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to the Secretary of State as the Respondent and Mr Sankoh as the Appellant.

3. The Appellant is a citizen of Sierra Leone born on 21 February 1985. The Appellant first arrived in the UK in 1994 at the age of 9, and was subsequently granted indefinite leave to remain in June 2004.

4. On 21 February 2006 the Appellant was convicted in relation to the supply of Class A drugs, and on 5 April 2006 he was sentenced to 3 years 6 months imprisonment. A deportation order was signed in 2007 on the ground that deportation was conducive to the public good. The Appellant was deported on 9 February 2008.

5. On 6 November 2019 an application was made to revoke the deportation order. It was said that notwithstanding the difficulties of relocation the Appellant had "managed to turn around his life": he had obtained a degree, was married with a child, ran his own general store, and had no further convictions. He wished to revoke the deportation order to enable him to apply for a visit visa to see his mother and siblings (all of whom are British citizens) in the UK.

6. The application was treated as a human rights claim. It was refused on 20 April 2021.

7. The Appellant appealed to the IAC.

8. The appeal was allowed for the reasons set out in the Decision and Reasons signed by Judge Morgan on 9 February 2023.

9. I note the following:

   (i) In preliminary discussions it was agreed that given the availability of materials on file including detailed written submissions, the appeal hearing would proceed by way of short submissions from the parties' representatives (paragraph 4).

   (ii) The position of the representatives is recorded in the Decision in these terms: "*The representatives both accepted that there was one matter in issue namely whether the respondent had identified strong public policy reasons justify continuing the deportation order*" (paragraph 4).

(iii) The Judge identified the relevant jurisprudence to be as set out in the case of **Smith (paragraph 391(a) – revocation of deportation order) [2017] UKUT 00166 (IAC)** (paragraph 9).

(iv) The Judge summarised the Appellant's case based on Smith to be, in essence, this: "*the respondent has failed to identify the strong public policy reasons needed to justify continuing the deportation order given that the public interest does not require the continuation of a deportation order after a period of 10 years has elapsed*" (paragraph 9, and see similarly paragraph 11).

10. The Judge accepted the submissions advanced on behalf of the Appellant. The entirety of the Judge's reasoning is this:

> "*The sole matter identified by the respondent was the original offence itself and given that 10 years had now elapsed since the deportation order there were no good reasons for continuing with the order. The original offence incurred a sentence of less than four years (the medium offender category) and there was little if any evidence before me that the appellant had either reoffended or continued to pose an ongoing risk to the public. The appellant was now well settled in Sierra Leone and had married and had a child. I am persuaded by [the Appellant's] submissions. …I am not persuaded that strong public policy reasons have been identified which would justify the continuation of this deportation order.*" (paragraph 11).

11. The Respondent applied for permission to appeal to the Upper Tribunal. In the first instance permission to appeal was refused on 27 February 2023 by First-tier Tribunal Judge Hollings-Tennant; however permission to appeal was subsequently granted by Upper Tribunal Judge Pickup on 21 April 2023. In material part the grant of permission to appeal states:

> "*3. It is arguable that the judge has erred in law by reversing the burden of proof, requiring the respondent to justify continuation of the deportation order. The Rules provide at 391 that continuation of a deportation order will be the proper course, unless 10 years have elapsed since the order was made, "when, if an application for revocation is received, consideration will be given on a case by case basis to whether the deportation order should be maintained." There is no automatic entitlement to revocation and even whether the 10 year minimum period has elapsed there needs to be careful consideration. The mere passage of time is not a sufficient reason to revoke the deportation order.*

4. It follows that it is at least arguable that the judge has assumed that the order should be discharged unless the respondent can justify its continuation.

5. For the reasons explained above, an arguable material error of law is disclosed by the grounds."

Error of Law

12. The Judge adopted the joint position of the parties and evaluated the appeal on the basis that it was for the Respondent to identify strong public policy reasons justifying continuing the deportation order.

13. This position does not reflect the wording of the applicable Immigration Rules.

14. Paragraph 391(a) is in these terms:

"*In the case of a person who has been deported following conviction for a criminal offence, the continuation of a deportation order against that person will be the proper course:*

(a) in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of less than 4 years, unless 10 years have elapsed since the making of the deportation order when, if an application for revocation is received, consideration will be given on a case by case basis to whether the deportation order should be maintained."

15. It is clear from the rule that once 10 years has elapsed the question of whether or not a deportation order should be revoked will need to be considered on a case-by-case basis: it is thus inherent in the Rule that whilst the passage of 10 years means that the presumption of continuing the deportation order being the proper course falls away, there is no rebuttable presumption that the new proper course is to revoke – i.e. to revoke unless the Secretary of State shows justification to continue on public policy grounds. Whether or not the deportation order should be revoked after the passage of 10 years will depend upon the particular circumstances of the case – which will require balancing all factors, as set out at paragraph 390:

"*An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:*

(i) the grounds on which the order was made;

(ii) any representations made in support of revocation;

(iii) the interests of the community, including the maintenance of an effective immigration control;

(iv) the interests of the applicant, including any compassionate circumstances."

16. It is plain that the position adopted by the parties' representatives, and in turn the Judge, was derived from the case of **Smith**, and in particular this passage at paragraph 23:

> "*The fact that a period of ten years has elapsed since the making of the order creates a presumption that the order will be discharged unless, having considered the individual facts of the case, the Secretary of State considers that it continues to be in the public interest to maintain the order.*"

(This passage is echoed in the 'conclusions' summarised at paragraph 26 of **Smith**.)

17. However, **Smith** is inconsistent with obiter comments of the Court of Appeal in **SU (Pakistan) v Secretary of State for the Home Department [2017] EWCA Civ 1069** – (see paragraph 64), and has been disapproved by the Court of Appeal **EYF (Turkey) v Secretary of State for the Home Department [2019] EWCA Civ 592** – (see paragraphs 22-28. Revocation is not to be presumed after 10 years, thereby imposing a burden on the Respondent to justify continuation; each case must be considered on its merits with no presumption one way or another.

18. In such circumstances it was common ground before me that the First-tier Tribunal had proceeded on a fundamental misunderstanding of the applicable law – and necessarily that the Decision was therefore in error of law.

19. Ms Kouma sought to persuade me that the error was immaterial. However such a submission was essentially dependent upon advancing the merits of revocation – the very matter that had not been properly

considered by the First-tier Tribunal. Whilst there may well be some merit in the Appellant's case for revocation, in my judgement the error of law is so fundamental that it would be entirely inappropriate to characterise it as immaterial, or otherwise not to set aside the Decision of the First-tier Tribunal. In the circumstances I declined Ms Kouma's invitation to allow the Decision of the First-tier Tribunal to stand.

20. That being so, and it in substance being the case that there had not been a proper hearing of all of the issues, it was appropriately common ground between the parties that the decision in the appeal should be remade before the First-tier Tribunal with all issues at large.

Notice of Decision

21. The decision of the First-tier Tribunal contained a foundational error of law and is set aside.

22. The decision in the appeal is to be remade before the First-tier Tribunal, by any Judge other than First-tier Tribunal Judge Morgan, with all issues at large.

Ian Lewis

Deputy Judge of the Upper Tribunal
(Immigration and Asylum Chamber)

4 June 2023