Upper Tribunal
(Immigration and Asylum Chamber) **Appeal No RP/00043/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 July 2016	**On 12 July 2016**

Before

THE HONOURABLE MR JUSTICE WARBY
UPPER TRIBUNAL JUDGE RIMINGTON

Between

ABDIHAMID AHMED MOHAMED
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A A Khan of Counsel, instructed by Thompson & Co Solicitors
For the Respondent: Mr E Tufan, a Home Office Presenting Officer

DECISION AND REASONS

The Appeal

1. This is an appeal by a foreign criminal in a deportation matter. The case also raises an issue about the revocation of refugee status.

Background

2. The appellant was born in August 1975, and is therefore now 40 years of age. He comes from Hargeisa in Somaliland. In 1987 Hergeisa was part of

Somalia. The appellant came to the UK at that time. He has been here ever since. He has been recognised as a refugee. During his residence in the UK however he took to drink and acquired a number of criminal convictions, including for offences of violence. By 2014 he had made 26 appearances before the court for offences going back to 2001. Thirteen were for theft or shoplifting, but there were also offences of violence and threats of violence.

3. On 6 March 2014 in the Crown Court at Blackfriars the appellant pleaded guilty at the first reasonable opportunity to an offence of robbery. This was a street robbery in which he tried to snatch a mobile phone from a young woman in the early hours of the morning. The case was adjourned for sentence.

4. Doubtless, the purpose of adjourning was to allow a pre-sentence report (PSR) to be obtained. It has been assumed, we believe rightly, that in the process an assessment of the appellant was made using the OASys tool. This is a familiar tool used to assess the reasons for offending and offender risk. Its conclusions commonly form part of the pre-sentence report. The defendant and his lawyers will be provided with the PSR but not, ordinarily, the OASys report.

5. On 10 April 2014 the appellant was sentenced by HHJ Pillay to 2 years' imprisonment. He was released from prison on 20 February 2015, but has been in immigration detention since then with a view to his deportation to Hargeisa.

6. On 2 July the Secretary of State revoked the appellant's refugee status, on the grounds that the circumstances in which he came to be recognised as a refugee had ceased to exist. On the same day the Secretary of State made a deportation order against the appellant on the grounds that he was a foreign criminal whose deportation was conducive to the public good. The Secretary of State proceeded on the basis that s 32 of the UK Borders Act 2007 applied.

7. The appellant appealed to the FTT against these decisions. At a hearing on 8 January 2016 Judge Ievins refused to grant an adjournment and proceeded to hear the appeal on its merits. On 29 January 2016 Judge Ievins promulgated a decision dismissing the appeal on its merits.

8. The appellant put forward four grounds of appeal, the first of which is a contention that the refusal to adjourn was wrong in law and unfair. On 19 April 2016 Upper Tribunal Judge Finch granted permission to appeal on all grounds.

Legal principles

9. Revocation of the appellant's asylum is governed by paragraph 339A of the Immigration Rules which provided at the time, so far as relevant:

> "A person's grant of asylum ... will be revoked ... if the Secretary of State is satisfied that ... (v) he can no longer, because of the circumstances in connection with which he has been recognised as a refugee have ceased

to exist, continue to refuse to avail himself of the protection of the country of nationality."

10. The remainder of the legal framework with which we are concerned on this appeal has been considered by the Court of Appeal very recently in *NA (Pakistan) v SSHD* [2016] EWCA Civ 662.

11. S 32 of the UK Borders Act 2007 is set out in full in para [5] of *NA*. It is sufficient for present purposes to say this. The section places on the Secretary of State a duty to make a deportation order in respect of anyone who is a "foreign criminal" within the meaning of s 32(1). That definition includes those, such as the appellant, who are not British citizens and have been sentenced to imprisonment for more than 12 months. The duty to make a deportation order is subject to exceptions specified in s 33 of the 2007 Act. By s 33(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."

12. The Immigration Rules contain provisions as to how the Secretary of State will determine whether paragraph (a) of this Exception applies. The relevant paragraphs of the Rules are paragraphs 398 to 399A, as they stood at the time of the FTT Judge's decision in this case. Those provisions are set out in full in paragraph [9] of *NA*. Paragraph 398(b) concerns a person such as this appellant, who has been sentenced to at least 12 months imprisonment but less than 4 years. That is a category of person described by the Court of Appeal in *NA* as a 'medium offender'. The effect of paragraph 398(b) is that the public interest in the deportation of a medium offender may be outweighed where certain specified conditions are met. The specified conditions are set out in paragraphs 399 and paragraph 399A. If those conditions are not met, the public interest will only be outweighed where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

13. The only specified condition relevant in this case is in paragraph 399A, which reads as follows:

> "399A. This paragraph applies where paragraph 398(b) … applies if –
>
> (a) the person has been lawfully resident in the UK for most of his life; and
>
> (b) he is socially and culturally integrated in the UK; and
>
> (c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported."

Paragraph 399A therefore contains three cumulative requirements.

14. As to the exception in s 33(2) of the 2007 Act, concerning breach of the Refugee Convention:

    (1) Article 33(2) of the Refugee Convention excludes persons from protection if they are a danger to the community.

    (2) Section s 72(2) of the Nationality Immigration and Asylum Act 2002 applies for the purpose of the construction and application of that exclusion. S 72 contains a series of presumptions about those matters. Those presumptions are rebuttable.

    In this case, the effect of s 72 and the appellant's conviction and sentence for robbery was that he was presumed to be a danger to the community within the meaning of Article 33(2). That presumption is rebuttable.

15. For deportation purposes the Immigration Rules are a complete code but Part 5A of the 2002 Act contains provisions which can affect the application of the 'Exceptions' in s 32 of the 2007 Act when considering paragraph 398, that is, whether there are very compelling circumstances over and above those falling within paragraph 399A of the Rules. In doing so, the tribunal must consider the seriousness of the criminality and certain factors set out in s 117B. By virtue of Section 117C (2) the more serious offence committed by the foreign criminal, the greater the public interest in his deportation. The effect of s 117C(3) is that as a 'medium offender' the appellant is someone whose deportation is required by the public interest unless Exception 1 or 2 applies. Exception 1 is set out in s 117C(4). It matches paragraph 399A of the Rules, setting the same three criteria. It applies where the appellant has been lawfully resident in the United Kingdom for most of his life, he is socially and culturally integrated in the United Kingdom, and there would be very significant obstacles to his integration into the country to which it is proposed he would be deported.

The Determination

16. The FTTJ reached the following conclusions.

    (1) First, that the Secretary of State had established that para 339A(v) of the Rules applied, because circumstances in Somalia had changed hugely since 1987 and the appellant would not be at risk in any way if he was returned.

    (2) Secondly, that the presumption provided for by s 72(2) of the 2002 Act applied: the appellant was presumed to have been convicted of a particular[ly] serious crime and to constitute a danger to the community of the UK. The presumption had not been rebutted by the appellant.

    (3) Thirdly, that the Secretary of State had been right in her application of s 32(5) of the UK Borders Act 2007. Mandatory deportation applied, and the case did not fall within the exceptions. Deportation would not breach either the Refugee or Human Rights Conventions.

17. The finding that deportation would not breach the Refugee Convention followed from the Judge's first conclusion. The finding so far as human rights are concerned was that applying the provisions I have cited, and having regard to the governing authorities, the appellant did not enjoy a family life with anyone in the UK. So far as private life is concerned, this was slight but deportation would involve an interference engaging Article 8. The interference, however, was proportionate to the legitimate aims of preventing crime or disorder and maintaining immigration control.

The grounds of appeal

(i) ***Refusal of an adjournment***

18. At the sentencing hearing in April 2014 his Counsel mitigated on the basis that his offending history was due to the use of intoxicating substances. The sentencing judge recorded this as follows:-

> "… It is the insight of Mr Cholera that he advances before me the course of your criminality, namely abusing alcohol and abusing the substance Khat; all too frequently these courts see the consequences of addiction to those drugs, both of those, alcohol and Khat.…"

19. Having recorded this point, the Judge proceeded to sentence without apparently attaching weight to it, on the following basis:

(1) The Judge noted that the courts had previously sought to avoid custodial sentences, but the appellant had failed to respond. As late as April 2013 he had been given community orders or suspended sentences. Yet he had proceeded to commit this offence. The Judge concluded that imprisonment was inevitable.

(2) Applying the sentencing guidelines the Judge took a starting point of 3 years, and gave full credit for the early plea of guilty so as to reduce the sentence to 2 years. That was, said the Judge the "least" sentence that could be imposed.

20. Those remarks were before the FTT Judge. It was still the appellant's case at that stage that his offending was due to alcohol and khat, but he contended that he was a reformed man. Accordingly, he argued, he was able to rebut the presumption that he was a danger to the community whose deportation was conducive to the public good.

21. The Tribunal gave case management directions for the disclosure and production of documents. In August 2015 the Tribunal gave case management directions, ordering that "The Appellant's representative must file with the Tribunal and serve upon the Respondent prior to Pre-Hearing review:- … 2 A copy of any relevant Pre-Sentence Report…" The Tribunal also ordered the appellant's representatives to file and serve "4 A copy of any Parole Report or other document relating to the Appellant's period in custody and/or release…" No such documents were filed or served. Mr Khan has been unable to explain to us why not.

22. On 29 September 2015 the Tribunal made a further direction, requiring the Secretary of State to

> "make enquiries and produce forthwith to the Tribunal, copies (if any) of:
> * Judge's Sentencing Remarks
> * Pre-Sentence Report
> * OASyS Report".

The direction also required that "If such documentation is not available, then Designated Judge Peart is to be advised by email…"

23. The Secretary of State produced some of these documents, including the sentencing remarks, but not all. The OASys report was not one of those produced. Nor, it appears, was the Designated Judge advised by email or at all that the documentation was not available. The best explanation that has been offered to us is that those responsible on her behalf were unaware of the direction. But evidently nothing was done about it by the appellant or his advisers either, until very shortly before the appeal hearing in this matter. On 6 January 2016 the appellant's solicitors emailed the Secretary of State's representatives seeking a copy of the OASys report. The reply, on 7 January 2016, was from the Probation Service. It said that the officials were prohibited from disclosing the full report, but they did provide a risk assessment. This contained the following:

> "… His addiction to alcohol appears to have been the overriding factor in his pattern of offending behaviour. In my assessment when Mr Mohamed is under the influence of alcohol he acts on impulse without thinking about the consequences of his behaviour on himself or others."

24. At the hearing the following day the FTTJ was provided with copies of the email correspondence and the risk assessment. He did not have the full OASys report. An application to adjourn was made, on the basis that the content of the OASys report might be critical to the Judge's conclusions on the issue of danger to the community. It was refused. In his Determination the FTTJ gave reasons at [4] and [5]. He said this:

> "4. At the beginning of the hearing, and after the appellant was identified, Mr Khan for the appellant applied for an adjournment. Directions had been issued on 29 September 2015 for various documents to be served by the respondent "forthwith". These were the judge's sentencing remarks, which are in the respondent's bundle, and the pre-sentence report and OASys Report which are not. According to the email exchange, probation offers were not permitted to disclose an OASys Report but the risk assessment could be sent to a secure email address (such as CJSM.) A Samson Adewole, a probation service officer, sent a risk assessment report to the appellant's solicitors on 7 January (the day before the hearing) …
>
> 5. I considered that application for an adjournment but refused it. Although the directions were sent out on 29 September 2015 the

appellant's solicitors did not seek the missing documents until a matter of days before the hearing. It was not known what the OASys Report would disclose, nor whether it would be favourable to or harmful to the appellant. The application for an adjournment was in my judgment both too late and speculative so I refused it. I am satisfied that I have all the information before me to enable me to determine this appeal justly."

25. The FTTJ went on to say:

"19 …Even though I do not have sight of the OASys Report the prospects of further offending by this alcoholic offender must surely be rather more than negligible. When the appellant is drunk he does not seem to be in full control of himself and there is obviously the potential for considerable harm to the public…

23. …. Although I do not have the OASys Report I am satisfied on the evidence before me that this appellant, who was sent to prison for two years for robbery, has been convicted of a particularly serious crime and does still constitute a danger to the community of the United Kingdom. The appellant has not succeeded in rebutting that statutory presumption…"

26. Mr Khan submits, and it is not in dispute, that when asking whether a Judge was wrong to refuse an adjournment the test is not irrationality; it is whether the refusal was unfair: *SH (Afghanistan)* [2011] EWCA Civ 128 [13]. Mr Khan submits that this refusal was unfair, for two reasons:

(1) It was wrong of the Judge, says Mr Khan, to blame the appellant for the late request for the OASys report, as the September 2015 directions imposed the obligation to produce that report on the Secretary of State and not the appellant, and the Secretary of State was in breach.

(2) Secondly, he submits that the Judge was wrong to treat the application as speculative. Mr Khan points to *Mugwagwa (Zimbabwe)* [2011] UKUT 338to illustrate his point that an OASys report "can determine the outcome" of an appeal.

27. In our judgment Mr Khan's first submission involves a misunderstanding of the Judge's reasoning. He was not proceeding on the basis that it was the appellant's task to obtain the OASys report but rather on the footing that, the Secretary of State having failed to comply with the direction to produce, the appellant had left it too late to complain and pursue the matter. That in our view is the proper reading of the Judge's paragraph 5. It is unsatisfactory that the Secretary of State failed to comply. We agree nevertheless that for the appellant to delay for over three months before raising the matter, and then to do on the eve of the hearing is unacceptable, and at variance with the view that the document was crucial. It was not wrong or unfair to criticise the appellant for delay. If the report was such a potentially crucial document, steps should have been taken sooner than they were.

28. As it happens, although the Judge did not rely on this point, it was and remained the appellant's own obligation pursuant to the directions of August 2015 to produce the PSR. He failed to comply with that direction. There is no reason to doubt that it was in his power to do so. The document must have been in the hands of his criminal solicitors. Alternatively, he had a right to obtain it through subject access under the Data Protection Act. Had he done so, there is every reason to believe that he would thereby have put before the tribunal the substance of the OASys assessment. In the circumstances it is not necessary to consider whether subject access would have entitled the appellant to see the OASys report, though we are inclined to the view that he would have had a right to see the conclusions, even if not the full reasoning.

29. We also reject Mr Khan's second point. In substance, the Judge was saying that he saw no realistic prospect that production of the OASys report would have any bearing on the issues for his decision. We do not accept Mr Khan's submission that this approach deprived the Tribunal of relevant and potentially crucial evidence on the basis of nothing more than speculation. The Judge himself addressed the substance of that submission at [23] when he said "the offender risk assessment which has been provided by Samson Adewole does not take matters much further. The information given is surely incontestable." By this we understand him to mean that the risk assessment itself indicated what the OASys report would have said, and that it was not helpful to the appellant. We agree.

30. We note that the sentencing remarks of 2014 do not suggest that the appellant's then Counsel submitted that he was a reformed man. If the OASys report had supported that view, it would have been reflected in the PSR, and doubtless Counsel would have made play of the point. We note also that the risk assessment refers to events in 2015, and would therefore seem to post-date the PSR. It is inconceivable in our judgment that the OASys report would have been more supportive of the appellant's case than the subsequent risk assessment that was before the Judge.

31. The case of *Mugagwa* is no more than an illustration of one set of circumstances in which an OASys report made a difference on appeal. As Mr Khan was constrained to accept, the case is not authority for the proposition that an OASys report must in all cases be obtained and put before the Tribunal in order to inform the decision on danger to the community. The decision on whether such a report is needed will be fact-sensitive. We do not believe the FTT Judge's assessment in this case can be faulted.

32. The real issue on this aspect of the case was whether the appellant could rebut the statutory presumption by showing that despite his bad record of offending linked to substance abuse he was now reformed. There was, in the event, no good reason to think that the OASys report would have supported that contention. There was every reason to think that it would not.

33. We were nonetheless concerned at the Secretary of State's non-compliance with the Tribunal's order, which could have had costly

consequences. We note the explanation offered, but we also note that the September direction stated on its face that a copy had been "issued to Home Office: Presenting Officers Unit, EC4Y 8JX", and that it was partially complied with. We are not in a position to reach conclusions on the issue, but in our view the reasons for that non-compliance in this case should be investigated. It seems there may be a policy of non-disclosure of OASys reports. There may be good reasons for such a policy, but not for a blanket refusal, least of all when the court has ordered disclosure.

34. We can deal more shortly with the remaining grounds of appeal.

(ii) ***"Conclusion unsustainable"***

35. At the hearing Mr Khan abandoned this, his second ground of appeal, acknowledging that the Secretary of State's response to it was well-founded.

(iii) ***Failure to consider evidence as to conditions in Somalia***

36. Mr Khan criticises the Judge's assessment of the applicability of paragraph 339A(v), on the ground that he "ignores the evidence by the UNHCR in the Appellant's case which clearly indicates that changes in Somalia are not fundamental or durable". This is an untenable criticism, in our judgment. Paragraph [22] of the Determination contains a careful review of the factors relevant to whether the circumstances that led to the appellant's recognition as a refugee had "ceased to exist" as required by paragraph 339A(v). So far from ignoring the UNHCR he described the substance of its report: "The UNHCR in effect urge caution and a careful assessment of all the circumstances and such an assessment has been carried out."

37. The Judge referred at [7] to the Country Guidance relating to Somaliland, including *AMM and others (Conflict; humanitarian crisis; returnees; FGM) Somalia CG* [2011] UKUT 00045 and the earlier case of *NM*. We have been referred by Mr Khan to para [126] of *NM*. The tenor of this and subsequent Country Guidance is that since 2005 it has been safe for former residents with connections with the majority clan to return. The Judge found that the appellant comes from the majority Isaaq clan, and there is no challenge to this. The Judge further found that there was no reason to suppose that the Somaliland authorities would not accept him, or that they or anyone else would persecute him. For the Secretary of State Mr Tufan submits that the UNHCR evidence relied on falls short of the standard required to warrant departure from Country Guidance. He reminds us that "cogent evidence" is required *SG (Iraq)* [2012] EWCA Civ 940. We agree.

(iv) ***Failure properly to apply the Immigration Rules***

38. The fourth and final ground of appeal concerns the Judge's decision on the applicability of paragraph 399A of the Rules. The appellant satisfies the first of the three conditions: as the Judge found, he has been lawfully resident in

the UK for most of his life, and had refugee status until 2015. The Judge found however that he was not socially or culturally integrated in the UK. Mr Khan criticises that finding, submitting that it is at odds with evidence accepted by the Judge, and a finding that was not open to him. In support of this ground, Mr Khan points to paragraph [19] where the Judge recorded the following facts: "The appellant is now 40 years old. He came to the United Kingdom when he was 11. He was educated in this country and worked here, got married here, and had three daughters…".

39. There are two main problems with this submission. First, it focuses on ~~on~~ part of one paragraph of the Determination, without regard to other aspects of the Determination which put that part in context. The Judge also made these findings:

> "19… His marriage broke down. I do not know whether he is formally divorced or not but he is certainly separated from his wife and seems to have had no contact with his daughters for many years. He has turned to drink. He has a variety of … convictions … there is an absence of support in this country. He seems to have minimal contact with his family and nobody came to court on his behalf. He is on his own. …
>
> 29… he is not socially and culturally integrated in the United Kingdom. His last years have been marred by a long history of persistent drink related offending. He has few ties in this country. …"

40. Secondly, this submission fails to take account of the nature of the test being applied. "The term integration imports a qualitative test: in order to assess whether a person 'is' socially and culturally integrated in the UK, one is not simply looking at how long a person has spent in the UK or even at whether that period comprises lawful residence": *Bossade* [2015] UKUT 415 [24]. As the Upper Tribunal made clear in the same paragraph of *Bossade,* time spent in prison may affect a conclusion on this issue. In this case, when regard is had to the full picture, as found by the Judge, it is clear that his finding that the appellant was not socially and culturally integrated cannot be faulted.

41. The third problem with this submission on behalf of the appellant is that he would need in any event to meet the third of the conditions specified in paragraph 399A. The Judge found at [29]: "On the evidence before me I am not satisfied there would be very significant obstacles to his integration into the country to which he is proposed to be deported…" That is a conclusion which is not challenged by the appellant and was clearly open to the Judge.

42. By the same token, Exception 1 in s 117C(4) does not apply, and by virtue of s 117C(3) the appellant is a 'medium offender' whose deportation is required by the public interest. There was no tenable case of 'very compelling circumstances'.

Disposal

43. For the reasons given above, this appeal is dismissed. There is no error of law in the decision of First-tier Tribunal Judge Ievins and his decision shall stand.

No anonymity direction is made.

Signed Date 7 July 2016

The Honourable Mr Justice Warby