Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number HU/20060/2018 (V)

THE IMMIGRATION ACTS

Heard by *Skype for Business*	**Decision & Reasons Promulgated**
On 27 January 2021	**On 15 February 2021**

Before

UT JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

A Q D I

Respondent

For the Appellant: *Ms X Vengoechea, Advocate, instructed by Livingstone Brown, Solicitors*
For the Respondent: *Mrs R Pettersen, Senior Home Office Presenting Officer*

DETERMINATION AND REASONS

1. Parties are as above, but the rest of this determination refers to them as they were in the FtT.

2. The appellant is a citizen of Somalia. He came to the UK in 2002, at the age of almost 22. The essentials of his immigration and criminal history are set out in the decision of FtT Judge Farrelly, promulgated on 8 October 2019, allowing his appeal.

3. There have been some complexities of procedure since then, which it is not necessary to detail. Any extensions of time required for filing submissions, or for other purposes, are granted.

4. For present purposes, the further relevant materials, which should be read with this determination, are:

   (i) The SSHD's grounds of appeal to the UT, filed on 14 October 2019: – One, misdirection of law (failure to identify and apply criterion of very compelling circumstances); Two, misdirection and inadequacy of reasons on integration in the UK; and Three, misdirection and inadequacy of reasons on integration in Somalia.

   (ii) Grant of permission by FtT Judge Neville, dated 25 February 2020.

   (iii) Appellant's rule 24 response, dated 24 March 2020, submitting no error of law on any of the 3 grounds.

   (iv) Submissions for the SSHD dated 23 April 2020, asking for the decision of the FtT to be set aside.

   (v) Submissions for the appellant, filed on 28 April 2020, responding to the above.

5. Parties agreed that there should be an oral hearing. The technology enabled that to take place effectively by remote means. There was a technical hitch such that it was not possible to make a recording. Parties agreed that could be dispensed with.

6. Representatives made helpful and focused submissions, based on the materials above. The SSHD asked for the decision of the FtT to be set aside, while the appellant argued that it should stand.

7. I indicated that I would reserve my decision on error of law, and sought submissions on what should follow, if the decision were to be set aside. Ms Vengeochea, having taken instructions, asked the UT to proceed immediately to remake the decision, based on all the evidence which had been placed before the FtT. There was no application on either side to add to those materials. Mrs Pettersen was content for any fresh decision to be approached in that way.

8. Further submissions on remaking the decision were brief, as all relevant matters had been canvassed in the "error of law" discussion. I reserved my decision on both aspects.

9. The immigration rules provide as follows:

   Deportation and Article 8

   A398. These rules apply where:

(a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention;

(b) a foreign criminal applies for a deportation order made against him to be revoked.

398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

(a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;

(b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or

(c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

399. This paragraph applies where paragraph 398 (b) or (c) applies if –

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British Citizen; or

(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case

(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

399A. This paragraph applies where paragraph 398(b) or (c) 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.

10. The statutory scheme in part 5A of Nationality, Immigration and Asylum Act 2002 includes section 117C:

> **Article 8: additional considerations in cases involving foreign criminals**
>
> (1) The deportation of foreign criminals is in the public interest.
>
> (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
>
> (3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
>
> (4) Exception 1 applies where—
>
> (a) C has been lawfully resident in the United Kingdom for most of C's life,
>
> (b) C is socially and culturally integrated in the United Kingdom, and
>
> (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
>
> (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
>
> (6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.
>
> (7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

11. It is undisputed that the appellant is a foreign criminal subject to deportation under those provisions, which can be resisted only if he meets one (or both) exceptions, or shows "very compelling circumstances, over and above" those exceptions.

12. The appellant does not advance any case under the "family life" exception.

13. The appellant accepts that the FtT's decision cannot be read as holding that the "private life" exception was made out, and that the question is

whether the FtT found there to be very compelling circumstances over and above that exception.

14. The SSHD says that such a conclusion is simply absent from the decision, and that it made no findings on the facts capable of supporting the outcome.

15. Ms Vengoechea realistically acknowledged that the layout of the decision might be thought not to follow the scheme of statute and the rules. She argued that the position was more complex than the SSHD maintained, and that the judge had identified factors which justified his conclusion. She referred to the appellant's problems with alcohol; mental health issues; the precarious existence awaiting him in Somalia; lack of clan support; lack of financial support; his offending, being at the lower end; lack of improvement in general conditions in Somalia; poor mental health provision, indeed, absence of even basic care; difficulties of relocation in Somalia; all such that the FtT had been entitled to find very compelling circumstances, over and above the exceptions. Even if the FtT's approach was "non-linear", that was in effect what it had done, and no error of law was disclosed.

Error of law.

16. I accept the submission that it does not matter whether the legal tests have been recited, if the substance of the decision justifies the outcome.

17. Ms Vengeochea did her best to promote such a reading, but it cannot reasonably be detected.

18. The judge says at [30] that he seeks "to apply the check list principle suggested in the case law". It is not clear what he means by that, but he then proceeds to a wide-ranging exercise. At [36] he says that he has "sought to balance all the various factors", and at [39] he concludes that deportation would be "disproportionate … bearing in mind [the appellant's] integration here and the obstacles he would face on return".

19. Earlier in his decision, the judge found that the appellant has not been here for most of his life, that his degree of integration in the UK is weak, and that obstacles to integration do not reach the level required by the private life exception. He has referred to nothing which does not fall within that exception.

20. The SSHD's grounds and submissions are not merely a disagreement with the FtT's evaluation of the evidence. They disclose that judge has fallen into the error off deciding the appeal by engaging in a free-ranging proportionality exercise, as if that had no limits set by the rules and by statute. His conclusions cannot be read as respecting those parameters.

21. The decision falls to be set aside.

Remaking the decision: (i) the private life exception.

22. The appellant has lived in the UK for over 18 years. He is aged 41 and has not lived here "for most of his life".

23. The appellant's residence from 2003 to 2010 was not lawful, so he falls further short of the residence requirement.

24. The appellant claimed to have learned English, and the respondent's decision accepted that ability; but it emerged in the FtT that his command of the language, even after all these years, is poor.

25. The appellant's persistent and escalating criminal record goes against his degree of integration in the UK.

26. The appellant said he was once in a (fairly brief) relationship with a UK citizen. Although, at highest, that did not come near the family life exception, it might have contributed to private life and to integration. However, his latest evidence is that the relationship had ended.

27. The appellant vaguely claims to have worked, at times, but he has provided no evidence of any significant employment history, or of any other positive contribution he has made while living here.

28. The appellant has not accepted and assumed the culture, core values, customs, and social behaviour of the UK. His social and cultural integration is minimal.

29. The appellant says that on return he will have no clan support, but he failed in previous proceedings to establish that he is from a minority clan, so there is no reason to think that feature will make his reintegration any more difficult.

30. Ms Vengoechea referred to evidence and case law on difficulty in relocating away from Mogadishu, due to the activities of Al-Shabab; but the appellant is from Mogadishu.

31. The appellant refers to a history of alcohol abuse, but with no current problems, and has been abstinent for some time. There is nothing to support this as a significant difficulty in reintegration.

32. The appellant provides a report by Dr Jeremy M Stirling, consultant psychiatrist, prepared following a 60-minute examination on 3 June 2019. Dr Stirling opines that the appellant likely suffers from a mental disorder, possibly but not definitely PTSD, and alternatively from "generalised anxiety disorder with PTSD symptoms"; which is very likely to get worse in Somalia because he "would be returning to an environment he perceives as life-threatening".

33. The appellant had no treatment or medication prior to the psychiatric report. Although the report recommends assessment and therapy, he has not sought treatment since.

34. The report does not doubt the appellant's account of his past experiences in Somalia. It is not its function to do so. It is undermined, to some extent, by the appellant's failure to establish that account.

35. Mental health facilities in Somalia are scant. However, the evidence does not show that the appellant is likely to suffer through lack of access to such facilities, as he does not take advantage of them even where they are available.

36. The psychiatric report and other evidence do not support a finding that the mental health aspect of the case discloses a "very significant obstacle" to reintegration.

37. The appellant would have the benefit of a package of assistance from the respondent to help him to settle back into Somalia. Even if relatively modest, and not long term, that is of some significance.

38. The third element of the private life exception is not essentially concerned with general difficulties of life in the receiving country, as explained by Moore-Bick LJ in *Kamara v SSHD* [2016] EWCA Civ 813 at [14]:

> In my view, the concept of a foreign criminal's "integration" into the country to which it is proposed that he be deported, as set out in section 117C(4) and paragraph 399A, is a broad one. It is not confined to the mere ability to find a job or to sustain life while living in the other country. It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use. The idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life.

39. The appellant resists the prospect of reintegrating in Somalia, and that might entail some difficulty; but he would be an insider rather than an outsider.

40. To succeed on the private life exception, the appellant needs to meet all of requirements (a), (b) and (c). He falls well short on each one.

Remaking the decision: (ii) "very compelling circumstances, over and above" the private life exception.

41. In this exercise, all matters continue to weigh in the balance; but there must be something additional.

42. The general difficulties of life in Somalia were relied upon as obstacles to integration. They do not qualify the appellant for any other form of

protection and are not at a level to constitute "very compelling circumstances".

43. I notice only one other aspect said to support the appellant which does not fall within the private life exception: his offending, although serious, was at the lower end of the deportation scale. I accept that as a corollary of section of 117C(2) the public interest in deportation is not at its highest. However, I do not consider that can constitute a circumstance over and above the exception. The facts which bring the appellant into the scheme of deportation cannot also give him a way out of it.

44. Alternatively, even if the relatively low level of offending is relevant, it does not constitute "very compelling circumstances".

Conclusion.

45. The deportation of the appellant, being a foreign criminal, is in the public interest. He accepts that the family life exception does not apply. He has not shown that he meets the private life exception. He has not shown very compelling circumstances over and above that exception.

46. The decision of the FtT having been set aside, the decision substituted is that the appeal, as originally brought to the FtT, is dismissed.

47. The FtT made an anonymity direction. It is not clear that one is required, but the matter was not addressed in the UT. Anonymity is maintained herein.

Hugh Macleman

2 February 2021
UT Judge Macleman

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.