



Neutral Citation Number: [2022] EWCA Civ 1657

Case No: CA-2022-000797

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM The Upper Tribunal
Upper Tribunal Judges Kebede, Frances and Stephen Smith
RP/00102/2015

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 December 2022

Before :

LADY JUSTICE SIMLER
and
LORD JUSTICE WILLIAM DAVIS

Between :

OA (SOMALIA)
- and -
SECRETARY OF STATE FOR THE HOME
DEPARTMENT

Appellant

Respondent

Ronan Toal and Gemma Loughran and Ubah Dirie
(instructed by **Wilson Solicitors LLP**) for the Appellant
William Hansen (instructed by **GLD**) for the Respondent

Hearing date: 6 December 2022

Approved Judgment

This judgment was handed down remotely at 11.00am on 15 December 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Simler and Lord Justice William Davis:

This is the judgment of the court.

1. The appellant is a citizen of Somalia. He is now aged 34. He came to the UK in 2002 where his mother already had leave to remain having been granted asylum. Within a short time of his arrival the appellant also was granted asylum and indefinite leave to remain. Between 2003 and 2014 the appellant was convicted on a regular basis of various criminal offences. He was sentenced to a period of custody on several occasions. He was convicted in 2014 of burglary. A sentence of 16 months' imprisonment was imposed.
2. Following this conviction the Secretary of State for the Home Department ("SSHD") notified the appellant of a decision to deport him as a foreign criminal. In 2015 the SSHD revoked the appellant's refugee status and refused his human rights appeal. The appellant appealed against the decision to deport him. His case was that the decision put the SSHD in breach of her obligations under the Refugee Convention and the European Convention on Human Rights ("ECHR"). Before his appeal was heard, the appellant was convicted of carrying a bladed article and was sentenced to 12 weeks' imprisonment.
3. The First-Tier Tribunal ("F-TT") heard the appeal on 5 April 2018. The decision and reasons were promulgated on 9 May 2018. The appeal was allowed both on the basis that the appellant fulfilled the requirements of the Refugee Convention and because there was a real risk that his rights under Article 3 of the ECHR would be breached were he to be returned to Somalia.
4. The SSHD appealed against the decision of the F-TT. The submission was that the F-TT had made errors of law which vitiated the decision. On 22 August 2018 the Upper Tribunal allowed the SSHD's appeal. It directed that the decision should be remade by the Upper Tribunal. By a decision promulgated on 29 January 2019 the Upper Tribunal re-made the decision and dismissed the appellant's appeal against the deportation order.
5. The appellant applied for and was granted permission to appeal to the Court of Appeal against the decision of 29 January 2019. Before any hearing of the appeal took place, the parties came to terms. The SSHD agreed that the appeal should be allowed. The parties requested the court to set aside the decision of 29 January 2019 and to remit the matter to the Upper Tribunal for a fresh decision. The consequent order was made in October 2019.
6. The case came before the Upper Tribunal again in February 2020. A decision was promulgated on 7 April 2020. Once more the Upper Tribunal (Mrs Justice McGowan and UTJ Kebede) concluded that the F-TT decision contained errors of law and that the decision had to be set aside. The Upper Tribunal ordered that the case should be listed before the Upper Tribunal to re-assess and make proper findings on the appellant's circumstances in the event of a return to Somalia and to consider, in the light of those findings, the risk to the appellant in the context of the Refugee Convention and the ECHR. A case management review hearing was ordered to permit consideration of whether the appeal was suitable for country guidance. Thereafter it was decided that country guidance was appropriate.

7. The appeal was heard over six days in June 2021 by UTJs Kebede, Frances and Stephen Smith. The decision was promulgated on 24 January 2022. Paragraphs 24 to 356 of the decision were concerned with country guidance. Paragraphs 357 to 467 of the decision related to the appellant's individual case. The Upper Tribunal remade the decision of the F-TT. The appeal was dismissed on all grounds.
8. The appellant applied to this court for permission to appeal on 8 separate grounds. His application was adjourned to an oral hearing before a two judge court. This is our judgment in relation to that application.
9. This is a second appeal. To give permission we would have to be satisfied that one or more of these grounds had a real prospect of success and that an important point of principle or practice arose. Alternatively, we would have to be satisfied that there was some other compelling reason for this court to hear the appeal.
10. In considering the application for permission we have read the relevant decisions of the Upper Tribunal – 7 April 2020 and 24 January 2022 – and the original decision of the F-TT. We also have read the detailed written submissions filed in relation to the application. We have heard oral submissions from Mr Ronan Toal on behalf of the appellant and Mr William Hansen on behalf of the SSHD.
11. The first of the written grounds of appeal was a challenge to the decision of 7 April 2020. It was said that the Upper Tribunal erred in law when it set aside the decision of the F-TT in relation to the risk of a breach of the Article 3 rights of the appellant. At the outset of his oral submissions Mr Toal abandoned that ground. We need say no more about it. Save in one respect the original decision of the F-TT is no longer a live issue.
12. The respect in which the decision of the F-TT remains relevant concerns the findings of fact in that decision in relation to the appellant's personal position. In the decision of 7 April 2020, the Upper Tribunal concluded that the errors of law made by the F-TT required the findings of the F-TT to be set aside in their entirety. The Upper Tribunal was explicit as to the outcome, namely there should be a re-assessment of the appellant's circumstances in the event of a return to Somalia and consideration of the risk on such return in the light of those findings. In advance of the resumed hearing which led to the decision of 24 January 2022 the appellant argued that it would be oppressive to require him to revisit issues where the findings of the F-TT had not been impugned. The Upper Tribunal did not agree. It concluded, as a matter of case management, that the findings of fact made by the F-TT had been set aside in their entirety. That was the express conclusion reached in April 2020.
13. In his oral submissions in support of Ground 2 Mr Toal argued that proper examination of the errors of law identified by the Upper Tribunal in April 2020 meant that there had been no error made in relation to findings of fact about the appellant's history and personal circumstances. Only the findings infected by the errors of law should have been remade. He relied on *HF (Algeria) v SSHD* [2007] EWCA Civ 445 at [23] to [27]. We do not find this fact-specific decision on an issue of case management of particular assistance. We must apply the general principle applicable where it is suggested that an appellate court should overturn a case management decision of a competent tribunal. The question is whether the decision is plainly wrong in the sense of being outside the generous ambit where reasonable decisions-makers may disagree. We note the

following. First, some of the evidence called before the Upper Tribunal in June 2021 was, inevitably, up to date evidence about the appellant's personal position and would have been difficult to assess in the absence of evidence from the appellant himself. Even if some facts had been preserved, they would have had to be reassessed in light of the latest evidence at the date of the hearing in any event. Second, the findings of the F-TT vis-à-vis the appellant's personal position were in more than one respect equivocal at best. Third, the error of law decision was made expressly on the basis that the F-TT judge had failed "to give clear and proper reasons for reaching the conclusions she did about the appellant's circumstances on return to Somalia..." All of those matters justified the case management decision in relation to preserved findings of fact. It was well within the ambit of a reasonable decision maker. For what it is worth, we would have made the same decision. Accordingly, the surviving ground relating to the 7 April 2020 decision and the subsequent case management decision has no real prospect of success. It certainly involves no important point of principle or practice.

14. The remaining grounds challenge the decision of the Upper Tribunal of 24 January 2022. We deal first with the grounds which may be categorised at least in part as a challenge to the country guidance per se or some aspect of it. If the basis for the country guidance was flawed, there might be a compelling reason to give permission to appeal even if the outcome in relation to the appellant would not inevitably be affected. We shall refer to the number of the ground as it appears in the grounds of appeal.
15. Before we deal with the individual grounds, we emphasise that the Upper Tribunal acknowledged that Somalia is a country facing a prolonged humanitarian crisis. Extreme poverty characterises the lives of very many Somalis. The Upper Tribunal described life in Mogadishu as being replete with challenges and, in some cases, danger. As might be expected, this expert tribunal reached its conclusions against the background of a wholly realistic understanding of the realities of life in Somalia.
16. Ground 4 relates to the availability of anti-psychotic medication in Mogadishu, the appellant being someone suffering from some form of psychotic illness. The Upper Tribunal found that there was limited but nonetheless meaningful mental health provision in Mogadishu. This included the availability of appropriate medication. The criticism of the Upper Tribunal's conclusion is that it conflated notional availability and accessibility. It is argued that there was no proper basis for concluding that there was any real access to mental health treatment and medication. We find that this is simply a disagreement with the reliance placed on certain sources of evidence. The Upper Tribunal was entitled to reach the conclusions it did. The report to which it referred in its decision was part of a larger report prepared by the Danish Immigration Service and dated November 2020. A proper reading of the whole of this comprehensive report (which identified mental health treatment and medication that was available free or at modest cost) together with other findings including as to likely remittances from the appellant's mother, support the conclusions of the Upper Tribunal.
17. Ground 5 concerns the availability of employment. Mr Toal placed particular emphasis on this ground in his oral submissions. First, he argued that the Upper Tribunal disabled itself from making a proper conclusion on the issue because it said that the redistribution of internal wealth in Somalia was a topic outside its competence. Mr Toal said that the so-called "trickle down" effect had to be addressed in order to assess the prospects of the appellant obtaining employment. We disagree with that proposition. Whether the economic boom in Somalia had led to real redistribution of

wealth was not an issue which the Upper Tribunal needed to decide in order to determine the appellant's prospects of obtaining work. Second, Mr Toal took us to evidence which had been put before the Tribunal which tended to suggest that someone in the appellant's position was unlikely to find employment. He submitted that the decision had not given reasoned consideration to this evidence. Thus, it amounted to an error of law. Again, we disagree. This argument fails to take account of what was said by the Upper Tribunal at paragraph 191 of its decision:

“In order to prevent this judgment from being any longer than it already is, our summaries of the evidence and submissions have necessarily been selective, although we have sought to ensure that our summaries are representative of the position of each party, and the evidence relied upon by each. Naturally, we have considered the entirety of the evidence relied upon by the parties, and did not reach our findings until having considered all matters in this appeal, in the round, to the lower standard of proof applicable to protection appeals. We remind ourselves that, although these proceedings have been selected to give country guidance, that at their heart lies OA's individual appeal against the Secretary of State's decision to revoke his protection status and refuse his human rights claim, and it is in relation to the issues inherent to determining his appeal that we have focussed our findings.”

The Upper Tribunal had thousands of pages of evidence. A substantial body of evidence was filed by the SSHD to supplement and to meet the evidence filed on behalf of the appellant. The decision of the Upper Tribunal dealt with the issues raised by the evidence on the issue of employment in sufficient detail (including as to clan/family connections and the availability of a guarantor) to allow the reader to understand how the decision had been reached. As with the availability of medical treatment, the argument is that the Upper Tribunal conflated access to work and availability of work. We do not accept this argument. There was ample evidence put before the Upper Tribunal in 2021 to support the conclusion that there had been no durable worsening of the employment market since the country guidance given in *MOJ* in 2015. The evidence justified the guidance it gave. It was unnecessary for the guidance to go further.

18. Ground 8 relates to the proposition that the Upper Tribunal introduced a requirement of temporal proximity between a removal decision and the consequence to the returnee vis-à-vis his Article 3 rights. Such a requirement would be novel and not supported by authority. The Upper Tribunal in fact did not introduce such a requirement. It identified the need for a causal link between the decision to remove and the mistreatment said to breach the returnee's Article 3 rights. That is not controversial. Any consideration of temporality was in the context of the requirement of a causal link.
19. We are satisfied that none of the appellant's submissions relating to the country guidance is sustainable. None has any prospect of success and none provides some other compelling reason for giving permission to appeal.
20. The remaining grounds of appeal raise issues relating to specific findings in respect of the appellant's individual case.

21. Ground 3 concerns the Upper Tribunal's treatment of the evidence of Dr Galappathie, a consultant psychiatrist, who had examined the appellant in June 2021. Dr Galappathie concluded that (a) the appellant had a substance-induced psychotic disorder, (b) were the appellant to be returned to Somalia he would be at a high risk of suffering a severe deterioration in his mental health and (c) the appellant would be at high risk of returning to use of illicit drugs. In consequence, the appellant would not be able to work. The Upper Tribunal is said to have criticised the conclusions of Dr Galappathie as being based on evidence about conditions in Somalia which had little weight when in fact he had not relied on such evidence. The first point to be made about the evidence of Dr Galappathie is that inevitably it was based substantially upon what the appellant had told him. At more than one point in its decision, the Upper Tribunal made adverse findings in relation to the appellant's credibility. Moreover, it reached a view based on the presentation of the appellant in the course of the hearing that was far removed from the description of his presentation to Dr Galappathie. Those findings were relevant to the overall assessment of the psychiatric evidence. We accept that the medical records reviewed by Dr Galappathie showed a history of psychosis linked to abuse of drugs. This feature was not irrelevant but it was historic in nature. Second, Dr Galappathie gave evidence in relation to the appellant's mother and her apparent inability to give oral evidence. The Upper Tribunal pointed to significant errors which underpinned that part of his evidence so as to reduce the weight of the evidence he gave. Third, the Upper Tribunal analysed the effect of Dr Galappathie's evidence in relation to the particular circumstances of the appellant at paragraphs 445 to 450 of its decision. We consider that this analysis cannot be impugned. Given the overall consideration of the evidence of Dr Galappathie by the Upper Tribunal, any error there may have been in relation to identifying the material relied on by him cannot undermine the decision or the overall assessment of his evidence.
22. Ground 5 includes the submission that the Upper Tribunal made an erroneous finding in relation to the prospect that the appellant would find a guarantor on his return to Somalia, a guarantor being an important part of finding employment. It is said that the evidence did not support the conclusion that the appellant was not at any real risk of not being able to find a guarantor. This is a disagreement with a finding of fact. The appellant's argument is based on the expert evidence of Mary Harper. The Upper Tribunal addressed this evidence at some length. It found Ms Harper's evidence on this point to be speculative. That was a judgment open to it on the evidence.
23. Ground 6 criticises the conclusion of the Upper Tribunal in relation to the state of the appellant's drug addiction were he to be removed to Somalia. The argument is that the Upper Tribunal should not have concluded that it would be a matter of choice for the appellant as to whether he would be drug free on his return. Reliance is placed on generic material which was before the Upper Tribunal in relation to the nature of addiction to drugs, in particular heroin. We conclude that the Upper Tribunal was entitled to reach its conclusion by reference to the particular circumstances of the appellant and his drug history. Indeed, it was obliged to take that approach. The generic material was not ignored. As the Upper Tribunal stated in its decision, it had been provided with more than 11,000 pages of material, all of which it had considered. The fact that a particular report was not mentioned in the decision cannot be taken as a failure to provide reasons for the conclusions reached.

24. Ground 7 argues that the Upper Tribunal erred in law when it found that the risk of forced eviction in Mogadishu did not create a risk of inhuman or degrading treatment. Insofar as the finding was based on the proposition that violence was required for such evictions to constitute a breach of Article 3 rights, this was an error of law. Further, there was an error of law in the approach taken by the Upper Tribunal to the responsibility of government for forced evictions. It should have concluded that actions by non-state actors against whom the state could not or would not protect those being evicted would amount to a breach of Article 3 rights. We do not consider that the Upper Tribunal made any finding that violence was required for an Article 3 breach to be established. Rather, it concluded that the factual position in Mogadishu did not reach the level of severity required. The Upper Tribunal specifically considered the impact of *Paposhvili v Belgium* [2017] Imm LR 867 and *AM (Zimbabwe) v SSHD* [2020] UKSC 17 (which were concerned with medical/health issues) on living conditions and applied the broadened test set out in those authorities. The assessment was for the Upper Tribunal to make and its reasoning discloses no arguable error of law. The Upper Tribunal was also entitled to find that there was no evidence of acquiescence on the part of the state in relation to evictions by non-state actors in light of the national policies and guidelines introduced by the government to deal with evictions.
25. In the result, we are satisfied that none of the grounds provides any real prospect of success and/or involves any important point of principle or practice. The result of the decision of the Upper Tribunal was that the appellant was to be deported to Somalia. Notwithstanding the undoubted problems facing any return to Somalia as set out at paragraphs 219 to 230 of the decision, we find no other compelling reason to give permission to appeal.