



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: DA/01300/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 6 November 2015**

**Decision and Reasons
Promulgated
On 2 December 2015**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR MOHAMED MUMIN MOHAMED
(NO ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Mr Staunton, Senior Home Office Presenting Officer

For the Respondent: Ms Peterson, Counsel

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

No anonymity order was made by the First-tier Tribunal. I find that no particular issues arise on the facts of this case that give rise to the need for a direction. For this reason no anonymity direction is made.

DECISION AND REASONS

Background

1. This is an appeal by the Secretary of State. For ease of reference, I refer below to the parties as they were in the First-Tier Tribunal albeit that the Secretary of State is technically the Appellant in this particular appeal. The Secretary of State appeals against a decision of First-Tier Tribunal Judge Talbot promulgated on 18 December 2014 (“the Decision”) allowing the Appellant’s appeal against the Secretary of State’s decision dated 20 June 2014 to make a deportation order against him under section 5(1) Immigration Act 1971 on the basis that his presence in the UK is not conducive to the public good (section 3(5)(a)).
2. The background facts so far as it is necessary to recite them at this stage are that the Appellant who is a national of Somalia arrived in the UK from Kenya in June 2002 aged ten years with his mother and younger sister. Prior to that, from the age of five years to ten years, he lived in Kenya. He is now aged twenty-three years. He was granted indefinite leave to remain with his family in January 2008 and the remainder of his family (mother, siblings and their children) are now British citizens. The Appellant married his wife on 28 November 2014. She is of Somali origin but now has indefinite leave as a refugee. He met his wife towards the end of 2013, they formed a relationship from August 2014 and he proposed to her in September 2014.
3. The Judge dismissed the Appellant’s appeal on protection grounds and there is no challenge to that decision. He allowed it however on human rights grounds, finding that the Appellant has “no ties” to Somalia and, taking account of the Appellant’s private life in the UK and relationship with his family and wife outside the Rules, finding that there were compelling circumstances also to outweigh the public interest so that the appeal was allowed also on Article 8 grounds outside the immigration rules (“the Rules”).

Error of law decision

4. The Respondent challenges the Decision on the basis that the Judge applied the wrong version of the Rules. The Secretary of State’s decision pre-dates the changes to the Rules on 28 July 2014. The hearing of the appeal and Decision both post-date the changes to the Rules by a considerable margin (December 2014). The Court of Appeal in YM (Uganda) v Secretary of State for the Home Department [2014] EWCA Civ 1292 makes clear at [39] that the version of the Rules to be applied is the version in force as at the date of the hearing before the Tribunal. The same position applies in relation to section 117 Nationality, Immigration and Asylum Act 2002 (“section 117”).

5. In this case, there is no dispute that the Judge applied the previous version of the Rules in relation to the Appellant's private life at [28] of the Decision by applying a test of "no ties". The Judge also applied the previous version of the Rules when considering the Appellant's relationship with his spouse in finding that he could not consider that relationship under the Rules as the Appellant had not lived in the UK for a sufficient period (of 15 years) [28]. Conversely, the Judge did indicate at [29] that he was required to and did apply section 117A-D.
6. In granting permission to appeal, Upper Tribunal Judge Macleman indicated that the Judge may have fallen into error due to a failure by the representatives to bring the amendments to the Rules to the attention of the Judge. Ms Peterson for the Appellant very fairly pointed me to the fact that both parties had in fact made submissions that the post 28 July 2014 version of the Rules applied. She accepted very fairly that the Judge made an error of law but submitted that it was not material as, based on his findings as to the extent of the Applicant's private life and his relationship with his wife, the same outcome would be reached. She also pointed out that the Judge applied section 117 which is to a similar effect to the post 28 July 2014 version of the Rules. Further, the Judge made findings in relation to compelling circumstances outside the Rules to which the same considerations would now apply.
7. Mr Staunton submitted that when the Judge considered compelling circumstances in the instant case he should (per Secretary of State for the Home Department v AJ (Angola) [2014] EWCA Civ 1636) have considered the case "through the lens of the new rules themselves". If the Judge had not considered the correct Rules then it could not be said that he considered the case correctly through that lens. He also submitted that, in considering whether there were compelling circumstances to allow the appeal outside the Rules, the Judge erred in failing to accord the proper weight to the public interest and therefore finding that the factors in this case were sufficiently compelling to outweigh the public interest. In relation to the case under the Rules, he submitted that the test of "no ties" is different to that of "very significant obstacles"; one looks to the current position and the other to the future possibility of integration in the deportee's home country.
8. Ms Peterson submitted that there would in fact be a difference in treatment of the Appellant's relationship with his wife due to the change in the Rules as there is no longer a requirement that a person be in the UK for 15 years preceding the date of decision in the current paragraph 399 of the Rules. That led me to question whether the Appellant's relationship was formed at a time when he was here unlawfully or precariously and I was told that it was not. He was granted indefinite leave to remain in 2008. Having looked at the evidence, however, I find that Ms Peterson's submission is not correct. The relationship was formed in August 2014. The notice of liability to

make a deportation order was made on 20 June 2014. It is the case in law that the Appellant's indefinite leave would not be cancelled by deportation until the deportation order is signed (which has not yet occurred) but in my view, by the fact of notice of liability to deportation having been given, it cannot be said that the Appellant's status was not precarious when he entered into the relationship. I find therefore that he could not meet paragraph 399 even on the current position and accordingly I would still need to consider the Appellant's relationship with his wife outside the Rules, taking into consideration of course that he is unable to meet the Rules based on that relationship.

9. I have considered [29] to [39] of the Decision, where the Judge considers the case outside the Rules. The Judge has directed himself to relevant case law, in particular SS (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 550. He has properly directed himself to the need for a "very strong claim". The Judge has properly taken into account section 117 and has considered the nature and seriousness of the Appellant's offence in particular. The Judge notes that the crime of street mugging, which the Appellant committed in 2009, was serious and involved violence. Against that, he notes that the Appellant was a juvenile at the time of the offence, that this was the only offence which he committed and that this was due to peer pressures which no longer exist (due to his move from Scotland to London). He therefore regards the risk of re-offending as low. The Judge also has regard to the fact that all of the Appellant's family members are in the UK and that, although the relationship is not one of sufficient dependency to form family life, this forms part of the Appellant's private life and that his ties are strong. The Judge also accepts that the Appellant's wife could not return with him to Somalia as she is a recognised refugee from that country. As such, his marital ties if he were deported would be "utterly disrupted".
10. The Judge allowed the appeal "on human rights grounds (Article 8)". It is not clear from that conclusion whether the Judge found that the Appellant fell within the exceptions to deportation in particular in paragraph 399A or whether he allowed the appeal on the basis that there were compelling circumstances over and above the exceptions. In that regard, the conclusion and also [28] of the Decision, where the Judge indicates that the Appellant "falls within the ambit of paragraph 399A" are ambiguous and it remains unclear as to the basis on which the appeal was allowed. If my decision as to whether there is an error of law were constrained to considering the Judge's reasoning on the basis of whether there are very compelling circumstances beyond paragraph 399A, I would be satisfied that there is no error of law. However, mindful of the ambiguity in relation to the basis on which the appeal was allowed and the fact that the Judge could only go on to consider compelling circumstances once he had properly considered the exceptions in paragraphs 399 and 399A, I am satisfied

that the Decision does involve the making of a material error of law. Accordingly, I set aside the Decision.

11. I indicated at the end of the hearing that if I were to find a material error of law, I proposed to go on to re-make the decision based on the submissions made at the hearing and on the evidence before me, which now includes evidence that the Appellant's wife is pregnant with their first child and is due to give birth in February 2016. It was agreed that none of the Judge's findings of fact are in dispute, that there is no issue as to credibility of the Appellant or his witnesses and that no further oral evidence is required. I therefore go on to re-make the decision taking into account the findings made and all the evidence before me.

Paragraph 399A of the Immigration Rules

12. In relation to the exceptions set out in the Rules, as I indicate above, only paragraph 399A is material. I find that paragraph 399 cannot avail the Appellant as, although it is accepted that his relationship with his wife is genuine and subsisting, it was formed at a stage when his presence has been precarious. The Appellant's child is as yet unborn and therefore paragraph 399(a) has no application.
13. Paragraph 399A reads as follows:-
 - "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 into the UK; and
 - (c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported"
14. There is no dispute that the Appellant meets paragraph 399A(a). He has lived in the UK for thirteen years from the age of ten years. In relation to his integration in the UK, all his family are in the UK. There is evidence that this is an extended family of four generations who all live in the UK and have made the UK their home. The Appellant has worked in the UK although was made redundant from his last job. He has faced obvious difficulties in securing employment since his release but notwithstanding that there is evidence that he has found gainful employment in three jobs since he left prison. He is now married and the couple are expecting their first child very shortly.
15. In relation to the obstacles he would face on return to Somalia, the Judge found that he spent his formative years outside Somalia. He left there aged five and spent five years in Kenya before coming to

the UK. His main language is English. The Appellant accepts that he speaks the language of Somalia albeit imperfectly. He does not read or write in Somali. He has no idea how the culture or society operates in Somalia. He has no family in Somalia that he knows of. His mother, siblings and their children are all in the UK. His father from whom his mother is divorced did live in Somalia but left Somalia with the rest of the family when the Appellant was aged five years. The Appellant has had no contact with his father or his father's family and it is therefore unclear whether they are still in Kenya, have returned to Somalia or live elsewhere.

16. The security situation in Somalia is improved. The Judge found in the Decision that there would be no real risk of a breach of Article 3 ECHR on return. The Appellant would not be forced into an IDP camp. It is nonetheless the case that the Appellant would face very real difficulties in integrating into society in Somalia. He grew up outside that country and has no family members or friends there who could assist his reintegration. Although he has been found not to be a member of a minority clan and is not therefore at risk on that account, he is unlikely to have any knowledge of how the clan system operates in Somalia given the length of time he has been out of the country and the young age at which he left. It would therefore be difficult for him to look to the majority clan for assistance in reintegration. I note the Judge's finding at [26] of the Decision that, although there may be some limited financial support available to the Appellant from family in the UK, his family here would find it difficult to send him much due to their own circumstances. The position in Somalia is not sufficient to reach the high threshold for a real risk to arise under Article 3 ECHR which is of course an absolute right. However, that is not to say that those factors may not be sufficient to meet the threshold of "very significant obstacles", particularly when coupled with other factors.
17. Taking into account as a whole the factors to which I refer above at [12] to [16] and on the basis of all the evidence before me, I find that the Appellant is socially and culturally integrated into the UK and that there would be very significant obstacles to his integration in Somalia.

Very compelling circumstances

18. In case I am wrong about that, I go on to consider the case on the basis of whether there are very compelling circumstances beyond those in paragraph 399A of the Rules which might render the Appellant's deportation disproportionate.
19. The Appellant's life with his family members and wife in the UK is not something which can be considered under paragraph 399 of the Rules. The Appellant's evidence in relation to his relationships with his mother, siblings and their children is set out at [37] of the Decision and I do not need to repeat the findings there made which are not

disputed. Although the Judge did not find those relationships to amount to family life due to the lack of dependency of the Appellant on his family members and vice versa, it is clear from the evidence there recited that the Appellant enjoys very strong ties with his family. The Appellant lives with his family as well as with his wife. He is the only adult male in the household and sees himself as the male head of the household with responsibilities for his family. There is also evidence that the Appellant makes a significant financial contribution to the family when he is in employment. I do not need to decide whether there may be a dependency which gives rise to family life as whether there is interference with the Appellant's and his family's family life or their private lives is largely irrelevant. There would be a substantial interference if he were deported. As the Judge found at [39] of the Decision, those ties would be "seriously ruptured" if the Appellant were deported.

20. The Appellant is married to a woman of Somali origin who has indefinite leave to remain in the UK as a recognised refugee. Her father was shot and killed in front of her when she lived in Somalia. She says that "the memory alone of Somalia gives me nightmares" Even though country conditions in Somalia may have changed for the better since the time she was granted status in the UK, in light of her background, she could not be expected to return to Somalia with the Appellant. I take into account that the Appellant's relationship with his wife cannot meet the requirements of paragraph 399 because his status was precarious when the relationship was formed. I take into account that the relationship is quite short lived. I take into account also that the relationship was formed after the Appellant had been made the subject of a decision to deport him. However, there is no dispute that the relationship is genuine and subsisting. The Appellant's wife says that in spite of her past experiences in Somalia she could not leave the Appellant to go to Somalia alone. That shows the genuine strength of feeling which she has for him. I doubt however that she would in fact go with him due to her past experiences particularly now that she is pregnant with their first child. She is due to give birth in February 2016. The child will be a British citizen. I take into account that the Appellant's wife has her family members and the Appellant's family members in the UK who can assist her with the new baby. However, I find that the effect of the Appellant's deportation would be, as the Judge recognised, that the relationship would be "utterly disrupted". The effect is likely to be that the Appellant's wife would be left in the UK as a single mother with a very young baby and that the Appellant would be separated from them at the very least while his child is growing up.
21. Although the Appellant could not be subject to the automatic deportation provisions in the UK Borders Act 2007 because he was a juvenile when he was convicted of the offence which rendered him liable to deportation, he is nonetheless a foreign criminal for the purposes of the Immigration Act 2014. As such, section 117 applies

with full force to my consideration of the public interest. Deportation of foreign criminals is in the public interest. The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation.

22. In this case, the offence was serious and involved violence. The Appellant has explained in his statement that he was influenced by peer pressures and due to the lack of a father figure in his life, he committed the offence in order to belong to his group of friends who he acknowledges now were a bad lot. His mother moved the family from Scotland due to her fear of the effect of the company her son was keeping but unfortunately for the Appellant and his family this came too late to avoid him committing the offence of which he was convicted. The Appellant acknowledges that his imprisonment was “well deserved” and says he has learnt a lot and has changed his life for the better. It is worth repeating what the Judge who sentenced him said in the sentencing remarks:-

“You are clearly a young man without convictions with a good family background. You have potential. You made admissions to the police. You have not been in trouble since and you were trying to do what you can by way of education. You’ve moved to London. But robbery is a most serious offence and this complainer was going about his lawful business ... there was no provocation ... for what happened to him and he was attacked, robbed and then laughed at when he sought his medication and his house keys. I am afraid that crimes of that sort simply cannot be tolerated. It can be said that those who have, as you have, clearly potential, clearly a young man who has had the benefit of a supportive family, that you have known well not to get involved in this ... but the gravity of this offence is such that the only appropriate disposal is a custodial one ... you are sentenced to 24 months detention ...”

23. The sentence was reduced on appeal to sixteen months. It is the Appellant’s only offence. I recognise also, however, that deportation is intended to have the effect of deterrence of other non-British citizens from committing similar offences: N (Kenya) v Secretary of State for the Home Department [2004 EWCA Civ 1094]. The fact that the Appellant is a very low risk of re-offending does not mean that it is not in the public interest to deport: Gurung v Secretary of State for the Home Department [2012] EWCA Civ 62. I note also case law such as AJ (Angola) and SS (Nigeria) which is all to the effect that, in order to outweigh the public interest in deportation even where the case concerns only one criminal offence requires a “very strong” Article 8 claim. Each case does however turn on its own facts and requires a fact sensitive balancing exercise between the factors involved in the appellant’s family and private life, the extent of interference with that family and private life on all concerned and the effect of the public interest.
24. I have carefully considered all of the matters set out at [19] to [23] above. The Appellant left his home country at a very young age and

has spent a number of his formative years in the UK. The country to which he would be deported is completely unfamiliar to him and integration there poses its own special problems. He is socially and culturally well integrated in the UK. He has very strong family ties to the UK. He has no family ties to Somalia. He has a young wife and soon to be born child in the UK. He committed one offence when he was a juvenile for reasons which no longer exist. He has expressed genuine remorse for that offence. He has shown every indication that he intends to move on and turn his life round. Taken individually those factors may not be sufficient to outweigh the very strong public interest in deportation of those who commit crimes in the UK. However, considered cumulatively, I find that they are sufficient to outweigh the public interest in this case. I therefore find that his deportation would amount to a breach of the Appellant's Article 8 rights.

DECISION

I allow the appeal on Article 8 grounds on the basis that the Appellant meets paragraph 399A of the Rules and that there exist very compelling circumstances in this case.

Signed 
Upper Tribunal Judge Smith

Date 20 November 2015