



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/01913/2014

THE IMMIGRATION ACTS

Heard at Field House
On 13 January 2016

Decision Promulgated
On 8 February 2016

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

JAMA IBRAHIM AHMED

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms N. H. Mallick, Counsel instructed by Asghar & Co. Solicitors

For the Respondent: Mr C. Avery, Home Office Presenting Officer

DECISION AND REASONS

Background

1. The appellant entered the UK on 01 January 1992 with Indefinite Leave to Enter as the dependent of a refugee. He was 16 years old on arrival in the UK. The appellant's immigration and criminal history is set out in some detail in the reasons for deportation letter and need not be repeated in full for the purpose of this particular appeal save to say that he was convicted of a number of offences. The most serious of these was a conviction for manslaughter in 1995, for which he was sentenced to 18

months detention in a Young Offenders Institution. In 2001 he was sentenced to two years and nine months imprisonment for robbery and aggravated vehicle taking. In 2007 the appellant was convicted of possessing a firearm with intent, for which he received a sentence of 9 years imprisonment and was recommended for deportation.

2. On 26 September 2009 the respondent served a notice of liability to automatic deportation, which prompted the appellant to claim asylum. The respondent refused the application on 10 May 2011. The appellant appealed the decision but the respondent withdrew the underlying immigration decision before the appeal was determined because it had not been served with a deportation decision.
3. On 18 October 2012 the respondent wrote to the appellant. The relevant part of the letter is as follows:

“I am writing to inform you that the Secretary of State has taken note of your conviction on 27 November 2007 at Kingston-Upon-Thames Crown Court for Firearms (other than poss/use offensive weapon). The Secretary of State takes a serious view of your conduct and, in the light of your conviction, she has given careful consideration to your immigration status and the question of your liability to deportation.

In all the circumstances, however, the Secretary of State has decided not to take any deportation action against you on this occasion but you should clearly understand that the provisions of the Immigration Act 1971 as amended by the Immigration and Asylum Act 1999 relating to deportation continue to apply to you. Under these provisions a person who does not have the right of abode is liable to deportation if the Secretary of State deems his deportation to be conducive to the public good or if he is convicted of an offence and is recommended for deportation by a court.

I should warn you therefore that if you should come to adverse notice in the future, the Secretary of State will be obliged to give further consideration to the question of whether you should be deported. If you commit a further offence, and are over 18 years of age, the Secretary of State would also need to consider the automatic deportation provisions of the UK Borders Act 2007. You should be aware that under such circumstances, the Secretary of State may be legally obliged to make a deportation order against you.

In view of the Secretary of State’s decision not to take deportation action on this occasion you will be released on Monday 22 October 2012. You are expected to report to your offender manager in line with conditions of your licence.”

4. A Criminal Casework Directorate file note dated 18 October 2012 shows that the respondent chose not to pursue deportation in light of the decision in *AMM & Others (conflict; humanitarian crisis; FGM) Somalia* [2011] UKUT 445, which acknowledged the humanitarian crisis in southern and central Somalia at that time [pg.246-247 AB]. The information provided by the appellant in the deportation questionnaire was that he was born in Mogadishu. As such, the respondent concluded that the appellant’s

removal would breach Article 3. This is the reason why deportation was not pursued in October 2012.

5. A copy of an internal UKBA email dated 16 November 2012 shows that it subsequently came to light that the appellant may have originated from Las-Anod in the northern Sool region of Somalia. In the absence of any new information to the contrary, the region has been deemed safe for some time. As such, the respondent reviewed the case and decided that it was necessary to conduct a further interview to clarify the issue.
6. On 06 December 2012 a further asylum interview was conducted. On 23 January 2014 the respondent issued the appellant with a further notice of liability to deportation and gave him the opportunity to rebut the presumption that he had committed a serious crime and that his presence in the UK constituted a danger to the community (section 72 – Nationality, Immigration and Asylum Act 2002). The applicant sought to challenge the decision, including the delay in determining his asylum claim, by way of an application for judicial review.
7. In a letter dated 05 February 2014 the respondent gave reasons to the appellant’s representatives to explain why deportation was being reviewed:

“Although your client was informed that the Secretary of State had made a decision not to pursue deportation action against your client in October 2012, further information has come to light in which your client’s Article 8 of the ECHR claim can be reconsidered. There is evidence in the form of a ‘Declaration of Identity for Visa Purpose’ document in which your client’s place of birth is stated as Lasanod in Puntland, Somalia. This conflicts with various other documentation on file where your client has stated he is from Mogadishu. On the basis that your client has materially misrepresented facts in relation to the area of his origin and background to the Home Office, he is considered to have come to further adverse notice and as such the Home Office will be reviewing your client’s asylum claim and in turn his liability to deportation.”
8. In a decision dated 05 September 2014 (served 01 October 2014) the respondent refused the asylum claim and decided to make deportation order. The appellant had a right of appeal to the First-tier Tribunal. The judicial review proceedings fell away because the appellant had an alternative remedy.
9. A panel of the First-tier Tribunal including First-tier Tribunal Judge Robertson and Mr Getlevog (“the panel”) dismissed the appeal in a decision promulgated on 11 March 2015. The most pertinent section of the panel’s findings is as follows:

“33. In order to establish that this letter [18/10/12] resulted in a legitimate expectation on the part of the appellant that deportation action would not be pursued in the future, the appellant would have to establish (i) that the respondent made a clear and unambiguous representation; (ii) that the appellant relied on it to his detriment; and (iii) no overriding public interest existed which could defeat the expectation or promise or assurance devoid of any relevant qualification (*GC (legitimate expectation –*

entry clearance) (*Romania*) [2005] UKAIT 0142 and *Mehmood* (*legitimate expectation*) [2014] UKUT 00469 (IAC).

34. Firstly, in the letter of 18 October 2012, the respondent makes clear to the appellant that he "...should clearly understand that the provisions of the Immigration act 1971 as amended by the Immigration and Asylum Act 1999 relating to deportation continue to apply to you." She does not confirm that the adverse attention must necessarily arise from further criminal offending; she could have done so expressly by stating that the decision will be reviewed if the appellant commits any further offences. The term 'adverse attention' is unqualified. Further, the document referred to at para 31 above provides sufficient reasons as to why the decision must be reviewed."

35. The argument based on legitimate expectation therefore falls at the first question. Either the evidence set out in the ID document as to the birth of the appellant is false or the information provided by him during the hearing was false. In either case, it was open to the respondent to view it as information which brought the appellant to her 'adverse notice' and to review the decision, putting the appellant to proof to establish his claim."

36. The content of paragraph 2 of the letter of 18 October 2012 is more in the nature of a concession; that being not to pursue deportation action. As such, it is open to the respondent to withdraw it, as established in *NR (Jamaica) v SSHD* [2009] EWCA Civ 856."

10. The appellant seeks to appeal the First-tier Tribunal decision on the following grounds:
- (i) The panel erred in concluding that there was no legitimate expectation. The appellant continues to assert that a clear and unambiguous representation was made in the letter dated 18 October 2012.
 - (ii) The panel erred in failing to consider section 33 of the UK Borders Act 2007.
 - (iii) The panel failed to give consideration to Article 31 of the Refugee Convention.

Decision and reasons

11. After having considered the grounds of appeal and oral arguments I satisfied that the First-tier Tribunal decision did not involve the making of an error on a point of law.
12. Ms Mallick submitted that it was clear that the respondent should have had the relevant information before her relating to the appellant's place of birth when a decision was made not to pursue deportation proceedings on 18 October 2012. She criticised the First-tier Tribunal for failing to consider whether the further evidence the respondent relied upon was sufficient to justify departing from the clear promise made in that letter. She argued that the First-tier Tribunal was wrong to conclude that the letter dated 18 October 2012 did not make a clear and unambiguous representation. The appellant understood the letter differently and considered that it made a clear promise that deportation action would not be taken. She argued that the information relating to his place of birth was not sufficient to amount to 'adverse notice'. In analysing the first part of the test the First-tier Tribunal should have considered what information the respondent had on 18 October 2012.

13. It is not argued that the panel's self-direction was wrong in law. The panel quite clearly referred to the correct principles and the relevant case law [33]. The grounds of appeal, as argued, are a disagreement with the panel's conclusions, which could only amount to an error of law if their findings were irrational or were not open to them on the evidence.
14. The third paragraph of the letter dated 18 October 2012 gave two warnings. Firstly, that if he should come to "adverse notice in the future" the respondent would give "further consideration" to whether he should be deported. Secondly, if he committed a further offence, the respondent may be obliged to consider deportation under the UK Borders Act 2007. Those two statements were disjunctive. There would be no point in making the first statement if it meant the same thing as the second. The letter did not unambiguously state that further deportation action would only be taken if he committed a further criminal offence. In my assessment it was open to the panel to conclude that 'adverse notice' did not necessarily arise solely as a result of further criminal offending.
15. No doubt it was frustrating for the appellant that the matter was deemed suitable for review. The respondent could and should have had access to the conflicting information relating his place of birth. But whether the decision-maker had the information before her on 18 October 2012 is irrelevant to the question of whether the respondent made a clear and unambiguous representation. While it is true to say that the letter made a clear statement that a decision had been made not to deport him at that time it also provided two clear caveats. It might well be that the appellant read it to mean that no further action would be taken unless he committed a further criminal offence but the phrase "adverse notice" was sufficiently wide to encompass any number of public interest issues that might give rise to a review of the decision.
16. It is not arguable that the respondent was not entitled to review the case in light of the conflicting places of birth. That information was material to an assessment of whether the appellant could be removed from the UK without a breach of his human rights. At the time when the decision was made not to pursue deportation action in October 2012 the respondent was satisfied that removal to Mogadishu would amount to a breach of Article 3 of the European Convention in light of the country guidance in *AMM (Somalia)*. The fact that new information came to light that suggested that the appellant might originate from an area of Somalia where removal might be possible was material to a proper assessment of the outstanding asylum claim.
17. When the respondent gave reasons for reviewing the decision in February 2014 it was open to her to conclude that one or other of the conflicting pieces of information about his date of birth was likely to be a misrepresentation. Given that the First-tier Tribunal concluded that the appellant was likely to have been born in Las-Anod but moved to Mogadishu at a very young age, it might be that he genuinely believed that he was born in Mogadishu. However, at the date when the respondent decided to review the application there was sufficiently important evidence to prompt a review of the decision on public interest grounds. The appellant committed a particularly serious offence for which he was sentenced to a period of 9 years in prison. The

public interest in deportation is undoubtedly strong. The only reason why the respondent decided not to pursue deportation action in October 2012 was because she thought he could not be removed to Mogadishu. The further information that came to light clearly raised the possibility that removal could be effected to another area of Somalia without breaching Article 3. Undoubtedly it was open to the respondent to conclude that the conflicting information, which suggested falsity in one document or another, was sufficient to amount to 'adverse notice' and that significant public interest issues were involved to justify a review of the decision.

18. By the date of the First-tier Tribunal appeal the Upper Tribunal had issued up to date country guidance in the case of *MOJ & Others (Return to Mogadishu) Somalia* CG [2014] UKUT 00442. The effect of the guidance is that, absent special circumstances, there is currently no generalised risk on return to Mogadishu. The panel made fully reasoned findings relating to risk on return that have not been appealed.
19. In my assessment it was open for the First-tier Tribunal to conclude that no clear and unambiguous representation was made in the letter dated 18 October 2012. The panel gave sustainable reasons for concluding that the first limb of the test was not met. It was not necessary for the panel to go on to consider whether there were public interest concerns to justify departing from the representation. For the reasons I have already outlined there was sufficient justification to do so: (i) given the evidence that came to light and (ii) the strong public interest in deportation in light of very serious nature of the crimes.
20. It is clear that the respondent had power to make a deportation decision. The question of legitimate expectation could only go to the proportionality of the decision. No doubt it was deeply frustrating to the appellant to be told he would not be deported, and that after further delay, the respondent decided to review the position when making a decision in relation to his outstanding asylum claim. But in the circumstances of this particular case there is no error in the First-tier Tribunal's assessment of the letter 18 October 2012, which did not make a clear and unambiguous representation that deportation would only be reviewed if he committed a further offence.
21. The grant of permission to appeal was limited to that ground but I allowed Ms Mallick to make submissions on the other two grounds. However, I find that they are without merit.
22. The second ground of appeal relates to section 33 of the UK Borders Act 2007, which outlines exceptions to automatic deportation under section 32 of the same act. The most commonly relied upon is "Exception 1", in cases where it is asserted that removal in pursuance of the deportation order would breach a person's rights under the European Convention or the Refugee Convention. It is quite clear that the panel carried out a detailed and thorough assessment of protection and human rights issues in assessing the lawfulness of deportation. It is immaterial if no specific reference was made to section 33.

23. The third ground of appeal relates to Article 31 of the Refugee Convention. This is also immaterial to a proper assessment of the appeal. Article 31 prohibits Contracting States from imposing penalties on account of a person's illegal entry. In this case the appellant entered the UK with valid leave to enter. The respondent did not dispute that initial entry clearance was lawful but merely highlighted the fact that the information provided with the application contradicted other information, which prompted a review. It is not arguable that this could be described as a penalty imposed on the appellant "on account of their illegal entry".
24. For the reasons given above I conclude that the First-tier Tribunal decision did not involve the making of an error on a point of law. The decision shall stand.

DECISION

The First-tier Tribunal decision did not involve the making of an error on a point of law

The First-tier Tribunal decision shall stand

Signed 
Upper Tribunal Judge Canavan

Date 03 February 2016