



IAC-AH-CJ-V1

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

Appeal Number: DA/01983/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 21 January 2016**

**Decision and Reasons Promulgated  
On 4 April 2016**

**Before**

**UPPER TRIBUNAL JUDGE KOPIECZEK**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**and**

**AHMED DAHIR ALI**

Appellant

Respondent

**Representation:**

For the Appellant: Mr D Clarke, Home Office Presenting Officer  
For the Respondent: Mr A Fouladvand, Legal Rep, MAAS

**DECISION AND REASONS**

1. This appeal comes back before me following a hearing on 21 September 2015 following which I decided that the First-tier Tribunal had erred in law in its decision, and set its decision aside. That error of law decision is attached as an annex to this decision. It is convenient to continue to refer to the parties as they were before the First-tier Tribunal.

2. To reiterate, the appellant is a citizen of Somalia born on 4 October 1990. He appealed to the First-tier Tribunal ("FtT") against a decision of the respondent dated 16 October 2014 to make a deportation order against him under the automatic deportation provisions of the UK Borders Act 2007 ("the 2007 Act"). That decision followed the appellant's conviction for an offence of blackmail, for which he was sentenced to twelve months' imprisonment in a young offenders' institute.
3. The First-tier judge ("FtJ") dismissed the appeal on asylum and human rights grounds, and with reference to Articles 2 and 3 of the ECHR. As I indicated in the error of law decision, there has been no cross appeal on behalf of the appellant in relation to those conclusions, and they are to stand. The re-making of the decision is concerned with the extent to which an Exception to the automatic deportation provisions applies, not only in terms of the appellant's purported reliance on EU rights but also in relation to any other Exceptions to the automatic deportation provisions, insofar as raised in the grounds of appeal to the FtT.
4. After preliminary discussion in relation to the appellant's reliance on EU rights, Mr Fouladvand indicated that the appellant's aunt, Suad Ismail, would give evidence.

*The oral evidence before the Upper Tribunal*

5. In examination-in-chief Ms Ismail adopted her most recent statement prepared for the hearing on 21 January 2016, albeit that the witness statement was undated.
6. In cross-examination she was asked about what evidence she had of her Dutch citizenship prior to 2004. She said that her passport, issued on 15 May 2014, (produced at the hearing before me) was a renewal of her passport. Her first passport was issued to her in the Netherlands in 1998.
7. In re-examination she said that when the appellant's mother was alive she (the witness) was in the Netherlands and she sent money to her.
8. When the appellant came to the UK in 2004, she herself was homeless in Cardiff, living in a hostel. The appellant was living in London. When the council gave her accommodation she brought the appellant to live with her because he had difficulties with the other aunt. He was a teenager and would come back late, for example. She looked after him when he came to her house.
9. Since coming to live with her he has never lived independently, although he did go to prison, and he was in hospital for a hip replacement.
10. In re-cross-examination Ms Ismail said that when the appellant was first living with his other aunt he was dependent on her because he was living with her. As to whether he was dependent on her, Ms Ismail, when he was in prison, she used to send him money to be put into his account so that he could buy toiletries and have money to phone them.

11. As to the evidence before the FtT in terms of other relatives providing financial support for him when he was in Somalia, she said that she only knows that she was the one who sent him money. She then said that there was also her brother in Canada who sent him money. As to the money that she sent, the appellant's mother was always trying to come out of Mogadishu but her husband wanted to stay there. On one occasion she sent \$2,000, in 1995. Her brother in Canada was sending too much money, on several occasions. Once he sent \$4,000 for the appellant's mother and children to leave Mogadishu.
12. In further re-examination she repeated that she became a Dutch citizen in 1998. She said that since then she had been the main provider for the appellant, his sister and the appellant's mother. She was sending money to them for their living expenses. From 1998 until today he had not been supported by anyone else.
13. In answer to a question from me she said that as regards the financial support from her brother in Canada, they all supported them together. Her brother in Canada went there before the civil war started. In 1996 he got married so financial support was difficult for him.

#### *Submissions*

14. Mr Clarke submitted that the appellant is not able to rely on Exception 3 under s.33 of the 2007 Act (breach of rights under EU treaties), having regard to Recital 6 of the Citizens' Directive (Directive 2004/38/EC) and the decision of the Upper Tribunal in *Rose (Automatic deportation - Exception 3) Jamaica* [2011] UKUT 00276 (IAC), at [15]-[17]. It was submitted that the appellant is not entitled to rely on regulations 19 and 21 of the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations") because he is not a family member and the Directive expressly distinguishes between family members and other family members. This is reflected in regs 7 and 19. The appellant needs to be a family member for those provisions to apply. In order to be regarded as a family member he would need to be issued with a family permit and meet reg 8(5). In order to meet reg 8(5) or 8(2) he needs to satisfy reg 17(4).
15. Furthermore, the appellant needs to be able to establish prior dependency or membership of a household, and present dependency or membership of the household. I was referred to the decision in *Dauhoo (EEA Regulations - reg 8(2))* [2012] UKUT 79 (IAC). The appellant would need to show a continued connection between him and the sponsor.
16. In any event, he did not join the sponsor until 2005. Prior to that he had been dependent on the aunt that he lived with. Following the decision in *Lim (EEA - dependency)* [2013] UKUT 00437 (IAC) at [20], the dependency needs to be for a person's essential needs. Given that the appellant was serving a term of imprisonment, it is difficult to see how the support she provided was for his essential needs.

17. Furthermore, the evidence on the issue was confusing. It was not clear that the other brother in Canada ceased providing financial support. The evidence before the FtT was that there were other relatives providing support. There is no clear evidence of the financial support provided to the appellant.
18. Under reg 8(2)(c) the appellant would need to establish that he continues to be dependent. (*Dauhoo* at [12]).
19. In relation to an argument raised at the start of the hearing (before me) in terms of the appellant having an outstanding application from April 2007 for leave to remain, it was submitted that that matter is dealt with in the decision letter. Furthermore, because of the deportation decision, any leave is invalidated.
20. As regards the Immigration Rules, the appellant is not able to rely on paragraph 399A because he has not been lawfully resident in the UK for most of his life. Furthermore, he is not socially and culturally integrated in the UK, taking into account his criminal offending.
21. Additionally, there would not be very significant obstacles to his integration into Somalia having regard to the decision in *MOJ & Ors (Return to Mogadishu) Somalia CG* [2014] UKUT 00442 (IAC), in particular at [349].
22. So far as the appellant's health is concerned, the latest piece of medical evidence dates back to 2009. The appellant would need to demonstrate that he would not be able to integrate in Somalia.
23. Under paragraph 398(c) the appellant would need to demonstrate very compelling circumstances over and above those in paragraphs 399 and 399A. No such circumstances are apparent.
24. The public interest needs to be taken into account, that public interest being expressed through primary legislation in the UK Borders Act 2007 and through the Immigration Rules.
25. Mr Fouladvand relied on his skeleton argument. It was submitted that the appellant had made an application for further leave to remain on 30 April 2007, that application remaining outstanding.
26. So far as EU rights are concerned, there was circumstantial evidence that proved that the appellant's aunt was already a Dutch citizen when the appellant came to the UK. There was evidence that they used to live as a family unit previously, and that she used to send money for the children's upkeep. HMRC records show that the appellant is a member of her household. There is ample evidence to show that he is the family member of an EEA national. His aunt is a qualified person exercising Treaty rights. There is circumstantial evidence to confirm that her nationality was obtained in 1998, coming to the UK for employment.

27. As to the evidence of the exercise of her Treaty rights, she is in receipt of Employment Support Allowance ("ESA"), which is provided to someone who has retained the right to reside. She was previously a worker and a jobseeker. Employment Support Allowance is for those who are seeking employment.
28. I was also referred to reg 6(2)(a) of the EEA Regulations in terms of the appellant's aunt's inability to work through illness or accident. As to the evidence in support of that contention, it was accepted that there was no direct medical evidence. It was repeated that it was relevant that she was in receipt of ESA. It was thus submitted that the appellant's aunt has a permanent right of residence, having exercised Treaty rights for five years. In that context I was referred to documents in the appellant's bundle, and her oral evidence was relied on.
29. It was further submitted that the appellant had established that he has been dependent on his aunt since 1998 and since he arrived in the UK. Thus, the evidence shows he is a family member of an EEA national.
30. In terms of whether there is any distinction to be made between other family members and family members for these purposes, I was referred to the Immigration Directorates' Instructions ("IDI's") an extract of which is at page 9 of the skeleton argument, the suggestion on behalf of the appellant being that there is no distinction between them.
31. Furthermore, the respondent must establish that the appellant is at risk of reoffending. If the appellant's aunt is an EEA national and if it is accepted that the appellant is a member of her household, the appellant's deportation is not in accordance with the respondent's policy (as in the IDI's).
32. Generally, it was submitted that it was relevant to take into account that the appellant came to the UK when he was 13 or 14 years of age. He has become integrated into UK society, and is more English than Somali. His appearance is also more English than Somali. There is no risk of him reoffending. He has shown remorse and is aware of the problems his offending has created for his family.

*My assessment*

33. I do not consider that there is any merit in the contention that the appellant has outstanding an application for further leave to remain. This is a matter that is referred to at [37] of the respondent's decision dated 16 October 2014. In that paragraph it refers to the application for further leave to remain on 30 April 2007, and the assertion in that application that the country situation in Somalia is such that the appellant would be persecuted if returned, particularly as he is an orphan. The decision goes on to deal with the appellant's claim to be at risk of persecution on return and rejects it. Thus, although the decision is on the face of it a deportation decision, it does deal with the application made in 2007.
34. Furthermore, s.5(1) of the Immigration Act 1971 provides that a deportation order made against a person invalidates any leave to enter or remain in the UK given to

him before the order is made or while it is in force. On that basis, an application for further leave to remain is unable to survive the invalidation of the leave itself; there would be no leave to be varied.

35. In either case, I am not satisfied that there is any merit in the contention that the appellant has an application outstanding that requires a decision from the respondent.
36. The appellant relies on Exception 3 to s.33 of the 2007 Act, namely that his removal would breach his rights under the EU treaties. In this respect the appellant relies on the EEA Regulations, and his relationship to his aunt Ms Suad Ismail.
37. In that regard it is not asserted that the appellant is a family member within the meaning of reg 7 of the EEA Regulations. He does not qualify as such. The appellant's case in this respect is put on the basis that he is an extended family member within the meaning of reg 8(2). This in turn depends on the appellant establishing that he was dependent on his aunt, Ms Suad, when she was a Dutch national and when he was in Somalia, and that he continues to be dependent on her or is a member of her household.
38. In the error of law decision I found that the FtJ erred in law in his assessment of the issue of dependency, and also in terms of the extent to which the appellant's aunt was exercising Treaty rights at the date of the hearing before the FtT (see [20]).
39. Furthermore, as was pointed at [15] of the error of law decision, the evidence before the FtT did not reveal when the appellant's aunt obtained her Dutch citizenship. I stated at [16] that the date on which the appellant's aunt obtained Dutch citizenship is a crucial factor to be determined on the issue of dependence when the appellant was in Somalia. In that same paragraph I concluded that where it is reasonable to expect documentary evidence of a fact to be provided, and where such evidence could reasonably be obtained, it ought to be produced.
40. The evidence before me did not advance this aspect of the appellant's appeal at all. Putting aside the fact that no further documentary evidence in that regard was filed and served in advance of the resumed hearing, all that was provided in documentary terms at the resumed hearing was Ms Ismail's Dutch passport showing a date of issue of 15 May 2014. Although she said in evidence that that was a renewal of her passport, and that she obtained her citizenship in 1998 when she was issued with her first passport, there was no evidence to support that assertion.
41. This is a matter which was clearly flagged up as an important issue prior to the resumed hearing. I do not accept the submissions made on behalf of the appellant to the effect that there was "circumstantial evidence" to confirm that Ms Ismail obtained her Dutch citizenship in 1998. This is a matter that can and should have been resolved by concrete evidence. I am not satisfied that the evidence does establish that Ms Ismail obtained her Dutch citizenship in 1998.

42. That conclusion alone is sufficient to dispose of the contention that the respondent's decision amounts to a breach of the appellant's EU rights. As explained in *Dauhoo*, in order for the appellant to establish that he is an extended family member he would have to prove prior dependency and present dependency, or prior membership of a household and present membership of a household, or prior dependency and present membership of a household, or prior membership of a household and present dependency. He does not assert that he was a member of Ms Ismail's household prior to arrival in the UK, and in the light of my conclusions to the effect that it has not been established when Ms Ismail obtained her Dutch citizenship, he is not able to establish prior dependency on an EEA national.
43. In any event, the evidence in support of the suggestion that there was dependency on Ms Ismail whilst the appellant was in Somalia was not credible as to dependency. Ms Ismail said in evidence that she used to send money to the appellant's family, for the appellant and others, when he was in Somalia. She said that it was only her who sent him money, then stating that there was a brother in Canada who used to do the same, sending too much money on several occasions and on one occasion sending \$4,000. In answer to a question that I asked, she said that the brother in Canada and she were supporting him together. In re-examination she then said that her brother in Canada married in 1996 and therefore providing financial support was difficult for him.
44. Aside from the difficulty in reconciling those features of the evidence in terms of financial support, it is also to be remembered that the evidence from the appellant before the FtT was that he was supported by his aunt as well as relatives in the United Arab Emirates. This was a matter referred to in submissions on behalf of the respondent before the First-tier Tribunal, as recorded at [49] of that decision. Lest there be any doubt about the appellant's evidence in this respect in terms of financial support being provided by others as well as his aunt whilst he was in Somalia, it is to be noted that the FtJ repeated that evidence at [56], stating that the appellant's evidence was that he was supported by his aunt and by relatives in the UAE.
45. The significance of that evidence given to the FtT is that it reinforces what in my judgement is the inconsistency over the extent of which the appellant's aunt was providing financial support for the appellant.
46. There is furthermore, another obstacle in the way of the appellant's reliance on EU rights. Mr Clarke submitted that as an extended family member, if the appellant is such, he is not able to resist deportation under the EEA Regulations on that basis, regs 19 and 21 and the Citizens' Directive distinguishing between family members and extended family members. The respondent's submission in this regard is supported by reference to the decision in *Rose* which makes it clear that the scope of the safeguards against expulsion which the Citizens' Directive affords to family members does not include "other family members" (that is extended family members). Thus, Exception 3 to the automatic deportation provisions cannot be relied on by an extended family member.

47. Whilst I am not bound by the decision in *Rose*, I find its reasoning persuasive and I too conclude that the appellant is not able to rely on Exception 3, for the same reasons.
48. There is no merit in the argument on behalf of the appellant advanced with reference to the IDI's, a very limited extract of which is reproduced at page 9 of the appellant's skeleton argument. The argument on behalf of the appellant in this respect is to the effect that the IDI's make no distinction between family members and other family members. However, the extract that has been copied is at paragraph 7.4 of the IDI's, consisting of some six lines. The rest of the IDI's have not been provided. Furthermore, the basis for the argument seems to be reliant on the section heading, which is "EEA nationals & their family members". The subheading is "Deportation of EEA nationals and family members". That is hardly any basis from which to advance the argument made on behalf of the appellant, aside from the fact that the IDI's are not always a reliable guide to what the law actually is (see *Mahad v Entry Clearance Officer* [2009] UKSC 16).
49. In order to resist deportation therefore, the appellant must come within the Immigration Rules at 398–399A. These provide as follows:
- “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.”

50. So far as paragraph 399 is concerned, it is not suggested that the appellant has a partner or children in the UK. Accordingly, the appellant is not able to rely on paragraph 399.

51. It was eventually conceded on behalf of the appellant before me that he is not able to meet the requirements of paragraph 399A(a) in terms of having been lawfully resident in the UK for most of his life. That is sufficient to mean that the appellant is not able to rely on paragraph 399A as a whole either.

52. I do not detect from the appellant’s skeleton argument any suggestion that the appellant is in fact able to meet the requirements of paragraph 399A in any other respect. Even if he were able to establish that he had been lawfully resident in the UK for most of his life, he would also have to establish that he is socially and

culturally integrated in the UK and that there would be very significant obstacles to his integration into the country to which it is proposed he is deported.

53. In terms of social and cultural integration, the appellant is said to have arrived in the UK in 2004. However, he started his offending in 2006 and has been repeatedly offending since that date up to 2013. His offences have included offences of dishonesty, handling stolen goods and theft from a vehicle in 2006, various offences of possessing controlled drugs, both class A and class B, robbery, a public order offence, obstructing police, and various offences of breach of court orders, and failure to surrender to bail.
54. It is said on behalf of the appellant in the skeleton argument that he has achieved various qualifications, being B-TEC and NVQ qualifications in business, travel, tourism and IT and has hopes of obtaining other qualifications. He is said to have been employed as a caretaker for nine months previously. He has sought other employment. It is also said that since July 2013 he has been a participating member of the Horn of Africa Youth Association in West London and has been involved in the youth sporting activities within that organisation. He is said to have had positive reports from that organisation.
55. However, notwithstanding what is said about the appellant's expressions of remorse for his offending, I cannot see that it is established that he can be said to be socially and culturally integrated in the UK in the light of his offending, which is the opposite of integration, putting himself outside society's norms. He has been convicted on thirteen occasions of a total of 25 offences. The evidence before the FtT recorded at [26] was that the appellant had done some volunteering. He had however, never worked as such in the UK, at least according to the evidence before the FtT, although I note again what is asserted in the skeleton argument about his having worked for nine months as a caretaker.
56. In terms of very significant obstacles to integration in Somalia, the findings of the FtT which are not infected by the error of law are to the following effect. The appellant has no family members in Mogadishu and the evidence established that the appellant's parents had died, and at best his father is presumed dead. The judge concluded that the appellant would be returning to Somalia alone, having left at a very young age. He would not have any network of people available that he could call upon on his return.
57. However, the appellant does have family members in the UK who are able to support him. Putting aside the judge's findings about the support the appellant received when he was in Somalia, it is at least the case that he has his aunt in the UK who has been supporting him here. There is no reason to believe that she would not be able to provide at least some support for him were he to return to Somalia.
58. The appellant's asylum appeal was dismissed by the FtT, as was his appeal on human rights grounds with reference to Articles 2 and 3. In *MOJ* it was found as follows:

“344. The economic revival of Mogadishu can be described only as remarkable, considering what is known about conditions in the city since the civil war began in 1991. Each of the expert witnesses has addressed this in their evidence that we have considered above. It is perhaps well described by a report of the New York Times of April 2012:

“But people here are sensing the moment and seizing it. More than 300,000 residents have come back to the city in the last six months..... The economic boom, fuelled by an infusion of tens of millions of dollars, much of it from Somalis flocking home from overseas, is spawning thousands of jobs that are beginning to absorb young militiamen eager to get out of the killing business...”

An international agency referred to in Dr Mullen’s report is recorded as saying:

“Mogadishu is now a ‘buzz’, people are going around minding their own business and there is an increasing freedom of movement for everyone.”

...

349. ...The evidence is of substantial inward investment in construction projects and of entrepreneurs returning to Mogadishu to invest in business activity. In particular we heard evidence about hotels and restaurants and a resurgence of the hospitality industry as well as taxi businesses, bus services, drycleaners, electronics stores and so on. The evidence speaks of construction projects and improvements in the city’s infrastructure such as the installation of some solar powered street lighting. It does not, perhaps, need much in the way of direct evidence to conclude that jobs such as working as building labourers, waiters or drivers or assistants in retail outlets are unlikely to be filled by the tiny minority that represents “the elite”.

59. There is no reason to believe that the appellant would not be able to take advantage of the “economic boom” referred to in *MOJ*. It is also to be borne in mind that the appellant is accepted to be from a majority clan, which is relevant to the potential for mechanisms of support on return.
60. Although the appellant’s evidence before the FtT was that he broke his hip in 2007 and could not walk for several months, it is not suggested that any health issues are relevant to the extent to which he could integrate on return.
61. The appellant lived in Somalia until he was almost 14 years of age, and will be familiar with the language and customs of Somalia. I am not satisfied that the evidence establishes that there would be very significant obstacles to his integration into Somalia.
62. Given that the appellant is not able to meet the requirements of paragraphs 399 or 399A, he must establish that there are very compelling circumstances over and above those described in those paragraphs in order to resist deportation under the Rules.

63. Whilst not specifically directed to this issue, submissions made on behalf of the appellant were in terms of the suggestion that there was no risk of reoffending, and that the appellant had shown remorse for his offences. The skeleton argument on behalf of the appellant again does not make specific submissions in terms of the requirement of very compelling circumstances. A number of factors are relied on in other respects, including that the appellant has spent his formative years in the UK, and that his only remaining family, being his sister, paternal and maternal aunts and uncle, are also in the UK. It is said that he has built connections with the UK and formed strong ties and a network of friends. It is said that his offences were “Due to youth indiscretion and naivety”.
64. It is also highlighted that the appellant has been living with his aunt and sister in the UK for a number of years and that the appellant’s sister particularly relies on him for support. His removal would affect his family in the UK in an emotional sense. I note that it is said in the skeleton argument at [19d.] in the penultimate sentence that the appellant’s family rely on him as the only male in the family “to provide essential care and support as his mother is blind”. That is a surprising suggestion since the evidence before the FtT, accepted by the judge, was that his parents are dead. Indeed, the skeleton argument also refers at [18], and again at [19] more than once to his mother and other family being dependent on him and his intention to care for his mother, yet also, at [9] for example, refers to his having lost both his parents.
65. All that aside, I cannot see how his family in the UK could rely on him in any sense at all given his repeated offending.
66. In summary, I am not satisfied that there is anything in the evidence which demonstrates the very compelling circumstances over and above paragraphs 399 and 399A which would suggest that the appellant’s appeal under the Immigration Rules should be allowed.
67. In the circumstances of this appeal, the Immigration Rules are a complete code (see *MF v Secretary of State for the Home Department* [2013] EWCA Civ 1192).
68. Nothing in the evidence reveals any basis from which to go on to consider Article 8 in a freestanding assessment. In those circumstances, it is not necessary to consider the factors set out in s.117C of the Nationality, Immigration and Asylum Act 2002, which in any event mirrors the Immigration Rules on deportation.
69. In all the circumstances, I am not satisfied that the appellant has established that any Exception to the automatic deportation provisions of the UK Borders Act 2007 applies. The appeal must therefore be dismissed.

#### *Decision*

The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision is set aside. I re-make the decision, dismissing the appeal.

ANNEX



IAC-FH-NL-V1

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

Appeal Number: DA/01983/2014

THE IMMIGRATION ACTS

**Heard at Royal Courts of Justice  
On 21 September 2015**

**Decision & Directions Promulgated**

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**Before**

**UPPER TRIBUNAL JUDGE KOPIECZEK**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**AHMED DAHIR ALI**

Respondent

**Representation:**

For the Appellant: Mr S Walker, Senior Home Office Presenting Officer  
For the Respondent: Mr A Fouladvand, Legal Representative from MAAS

## DECISION AND DIRECTIONS

1. The appellant in these proceedings is the Secretary of State. However, for convenience I refer to the parties as they were before the First-tier Tribunal.
2. Thus, the appellant is a citizen of Somalia born on 4 October 1990. He appealed to the First-tier Tribunal against a decision of the respondent dated 16 October 2014 to make a deportation order under the automatic deportation provisions of the UK Borders Act 2007. That decision followed the appellant's conviction for an offence of blackmail, for which he was sentenced to twelve months' imprisonment in a young offenders' institute.
3. First-tier Tribunal Judge Adio, after a hearing on 23 February 2015, allowed the appellant's appeal on the basis that an exception to the automatic deportation provisions applied, that exception being in terms of Section 33(4) namely that the appellant's removal would breach his rights under the EU treaties. That conclusion followed the judge's assessment of evidence which he found established that the appellant is an extended family member of an EEA national namely his aunt, said to be a Dutch citizen.
4. According to the determination, an application was made to amend the grounds of appeal to include reliance on Community Law. The First-tier Judge allowed the grounds to be amended, notwithstanding the lateness of the application and the objection on behalf of the respondent to the late amendment.
5. The judge concluded, in summary, that the appellant had established, through the evidence of his aunt Ms Suad Ismail, that he was dependent on her when he was in Somalia and that he is presently a member of her household and still dependent on her. He found that she obtained Dutch citizenship in 1998, before the appellant left Somalia.
6. The respondent's grounds of appeal complain about the late application to amend the grounds, arguing that it is not clear from the determination whether the Presenting Officer was given any opportunity to cross-examine the witness on the issue of dependence, the matter having been raised during the course of submissions. It is argued that the respondent has, or may have been, deprived of a fair opportunity to test evidence directly material to the decision to allow the appeal and that the judge's handling of proceedings was so unfair that the decision with reference to the EEA Regulations cannot stand.
7. During the course of submissions before me, Mr Fouladvand said that he had raised the issue of the appellant's reliance on Community Law at the start of the hearing before the First-tier Tribunal. However, he was not able to produce any contemporaneous notes of evidence that were actually taken during the course of the hearing, as distinct from what he described as a "sketchy" manuscript note of what seems to have been preparation for the hearing. Mr Walker referred to a 'minute'

from the Presenting Officer at the time which indicated that the matter was in fact raised during the course of submissions.

8. I do not consider it necessary to resolve the issue of when the matter was raised, although it must be observed that at [43] of the determination it seems plain that the matter was not in fact raised until submissions on behalf of the appellant, on any view being almost at as late a stage of the proceedings as is possible to contemplate.
9. However, it is equally plain from the determination at [44] that the Presenting Officer was given the opportunity further to cross-examine any witness but indicated that he was content to rely on submissions on the point only. Those further submissions are recorded at [49].
10. There is nothing to indicate that any application for an adjournment was made on behalf of the respondent in order to deal with the new issue. Indeed, in fact nothing in the determination supports Mr Fouladvand's contention that he had also asked for an adjournment to produce further evidence in relation to the EU point.
11. Judge Adio did allow the grounds to be amended. I am not satisfied that there is any procedural unfairness in his having done so. That was a decision which was within his discretion subject to the requirements of procedural fairness. The respondent was given the opportunity further to cross-examine any witnesses and no application for an adjournment was made. The respondent was able to, and did, make submissions on the point. In this respect therefore, I am not satisfied that the First-tier Judge erred in law.
12. The respondent's grounds raise an issue in terms of inconsistency in oral evidence between the appellant's aunt and his uncle, Mr Mohamed Ismail. The inconsistency is in terms of whether they both have the same parents. Both his aunt and his uncle said that they are siblings of the appellant's mother. His aunt said that she and the appellant's mother share the same mother but not the same father. The appellant's uncle initially said that the appellant's aunt and he share the same mother and father, although changed his evidence in response to a question from the judge to state that they do not in fact share the same father.
13. At [57] it is stated that:

"I am prepared to find the Appellant's aunt credible more than the Appellant's uncle as she was the one who was very honest about the relationship between herself and the Appellant.... I therefore find that the Appellant's aunt has shown that she is a credible witness and someone who can be believed when she was prepared to be frank and honest on an issue concerning the clan membership."
14. It is not entirely clear what the relevance of the inconsistency in their parentage is, the point not having been explained in the grounds or in submissions by either party. It may be, although it is not clear, that at [57] where the judge stated that he found the appellant's aunt more credible than the appellant's uncle, there was some inconsistency in terms of the provision of financial support to the appellant when he

was in Somalia, although as I say, the matter is obscure. More pertinent however, is the complaint in the grounds about the judge's assessment of firstly, the date when the appellant's aunt acquired Dutch citizenship and secondly, in terms of the extent to which she provided financial support amounting to dependency when he was living in Somalia.

15. The grounds at [8] refer to the appellant's aunt having produced a Dutch residence card issued in 2014 as the only documentary evidence of her status as an EEA national. However, at [47] of the determination the judge stated that the appellant's aunt had provided her Dutch *citizenship* card. In any case, it does not appear that the document that was produced revealed when she obtained her citizenship, or indeed if it was a residence card that it actually provided evidence of citizenship.
16. Although in answer to a question from the judge recorded at [48] Ms Ismail said that she became a Dutch citizen in 1998, there does not in fact appear to have been any documentary evidence in support of that answer. It seems to me that there is merit in the argument advanced on behalf of the respondent in the grounds to the effect that where it is reasonable to expect documentary evidence of a fact to be provided, where such evidence could reasonably be obtained, it ought to be produced. I consider that this has particular force in the circumstances of this appeal where there was a late amendment to the grounds, raising an entirely new point. The date on which the appellant's aunt obtained citizenship is a crucial factor to be determined on the issue of dependence when the appellant was in Somalia.
17. Furthermore, although the judge heard evidence of money having been sent by Ms Ismail to the appellant, there was evidence that other relatives also provided financial support to him whilst he was in Somalia. At [56] the judge recognised that dependency did not need to be of necessity and does not need to be whole or main but had to be economic dependency in fact. As the grounds suggest however, there was no detailed consideration of the extent to which the appellant's aunt's support was necessary, given other financial support that had been provided. In other words, there was no analysis of the extent to which he was dependent on her in terms of her support providing for his essential needs. Again, in circumstances where this matter arose very late in the proceedings, it was in my judgement incumbent on the judge to adopt a cautious approach to the analysis of this evidence.
18. Furthermore, although not specifically raised in the respondent's grounds, is the question of the extent to which the appellant's aunt is exercising Treaty rights. Mr Fouladvand accepted that in order for the appellant to qualify as an extended family member, the appellant's aunt does need to be a 'qualified person'. Mr Fouladvand said that this was a matter that was canvassed at the hearing, although there is no indication of that whatsoever on the face of the determination. It is not suggested that there was any evidence produced to support the contention that the appellant's aunt is exercising Treaty rights, or was at the time of the hearing, or that she was asked any questions on the point, or that any submissions were made on that issue.



19. The general point is raised in the respondent's grounds to the effect that the evidence before the First-tier Judge was insufficient to establish that the appellant is an extended family member of an EEA national. Consideration of that issue would necessarily include a consideration of the extent to which she was exercising Treaty rights. Although Mr Fouladvand said that prior to the hearing he had seen payslips of the appellant's aunt, no such documents appear to have been produced to the First-tier Judge.
20. In the circumstances, I am satisfied that this experienced judge did on this occasion err in law in his assessment of the issue of dependency, but also in his having failed to consider the issue of the extent to which the appellant's aunt was exercising Treaty rights at the time of the hearing. Those errors of law are such as to require the decision to be set aside.
21. The First-tier Judge dismissed the appeal on asylum and on human rights grounds with reference to Articles 2 and 3 of the ECHR. There has been no cross-appeal on behalf of the appellant in relation to those conclusions and his findings in that respect are to stand.
22. I do not consider it appropriate in the circumstances for the matter to be remitted to the First-tier Tribunal for further hearing on the outstanding issues. Accordingly, the decision will be re-made in the Upper Tribunal. That re-making will of course be concerned with the extent to which an exception to the automatic deportation provisions applies in terms of the appellant's reliance on EU rights but will also consider the extent to which the appellant is able to rely on any other exceptions to the automatic deportation provisions, in so far as raised in the grounds of appeal to the First-tier Tribunal. In other words, aside from the question of asylum and humanitarian protection and Articles 2 and 3 of the ECHR, the re-making of the decision will be at large on all outstanding issues.
23. The parties are to take careful note of the directions set out below, in particular with reference to any witness statements that it is proposed are to be relied on at the resumed hearing.

### DIRECTIONS

- (1) In relation to any witness whom it is proposed to call to give oral evidence, there must be a witness statement drawn in sufficient detail to stand as evidence-in-chief such that there is no need for any further examination-in-chief.
- (2) The appellant is to file and serve a skeleton argument which identifies all grounds of appeal relied on.
- (3) In respect of (1) and (2) above, and in relation to any further evidence relied on by either party, the same must be filed and served no later than 14 days before the next date of hearing.

- (4) No interpreter will be arranged for the hearing, unless within 14 days of these directions being sent, a request for an interpreter is made with an explanation as to why an interpreter is needed.

Upper Tribunal Judge Kopieczek

23/10/15