



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/02464/2016

THE IMMIGRATION ACTS

Heard at Field House
On 24 May 2018

Decision & Reasons Promulgated
On 9 July 2018

Before

THE HONOURABLE LORD UIST
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE PERKINS

Between

A--- M--- S--- F---
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms B Jones, Counsel instructed by Polpitiya & Co Solicitors
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 we make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant. Breach of this order can be punished as a contempt of court. We make this order because this appeal concerns a claim for international protection and there is invariably a possibility in cases of this kind that publicity will itself create a risk to the appellant's safety.

2. Regrettably this appeal has been delayed. It is an appeal against a decision of the First-tier Tribunal on 28 December 2017 dismissing the appellant's appeal against a decision of the respondent on 18 February 2016 refusing to revoke a deportation order made against him but the deportation order was made as long ago as 19 March 2009. The appeal came before the First-tier Tribunal on 9 September 2016. The First-tier Tribunal allowed the appeal under the Immigration Rules, on humanitarian protection grounds and on human rights grounds with reference to Article 8 of the European Convention on Human Rights but that decision was set aside by Upper Tribunal Judge Gill because it was wrong in law and was remitted to the First-tier Tribunal. Judge Gill directed the First-tier Tribunal to re-make the decision on humanitarian protection and human rights grounds. The (clearly inappropriate, see paragraph 5 below) decision to allow the appeal under the Immigration Rules was part of the "Article 8" decision and therefore set aside with it.
3. The First-tier Tribunal re-made the decision dismissing the appeal with reference to Article 3 of the European Convention on Human Rights and humanitarian protection in a decision promulgated on 28 December 2017. Permission to appeal that decision was given because there seems to have been no finding under Article 8 of the European Convention on Human Rights and because the decision to dismiss the appeal on humanitarian protection and Article 3 grounds was arguably wrong.
4. There has been an application to admit further evidence under Rule 19(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008. The evidence is apparently pertinent to background evidence that was not available when the case came before the First-tier Tribunal. That only becomes relevant if we find there has been an error of law.
5. The decision that is the subject of this appeal was made on 18 February 2016 and it is therefore a little surprising that there was any suggestion at any stage that the appeal could be allowed under the Immigration Rules. It cannot. The more restrictive grounds of appeal introduced by the Immigration Act 2014 were fully in force by the time the decision that is subject to appeal in this case was made.
6. Although this is an appeal brought by the claimant we find it helpful to go directly to the Secretary of State's skeleton argument because there Mr Jarvis conceded that the First-tier Tribunal erred in not making "express findings on 399A and 398 of the Rules (and s.117C of the NIAA 2002) but contends that this did not make a material difference on the basis that the judge's assessment of the claim under Article 3 of the ECHR was sound.
7. It follows therefore that it is clear that the First-tier Tribunal erred. We have to ask ourselves if that mattered. At the risk of being trite, we would regard an error as immaterial if it could not have made a difference to the outcome.
8. We look now at the decision of the First-tier Tribunal promulgated on 28 December 2017.
9. The decision that is the subject of the appeal was made on 18 February 2016. It is apparent from the opening paragraphs of the "Decision to Refuse a Protection Claim and a Human Rights Claim" that on 23 April 2009 during the course of an interview the appellant asserted that his deportation from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention. In a letter of 15 January 2015 he reiterated that claim and added that it would breach the United Kingdom's obligations under the European

Convention on Human Rights. The Decision says “this claim is being treated as a request to revoke the deportation order signed against you”.

10. It must mean that the Secretary of State was considering an application made on Refugee Convention Grounds on 23 April 2009 and on human rights grounds on 15 January 2015 to revoke the deportation order.
11. The Immigration Act 2014 (Transitional and Saving Provisions) Order 2014 at Article 2 provides that the “saved provisions” have effect and the relevant provisions do not have effect “other than” in relation to a deportation decision. The same Article at 2(2) makes it clear that “a deportation decision means a decision to make a deportation order and a decision to refuse to revoke a deportation order”. It follows therefore that the “relevant provisions” are to be considered in this case.
12. In short, we are satisfied that the more restrictive grounds of appeal apply. This is not material except to the extent that there is, or, as we find, there is not, power to allow the appeal under the Immigration Rules.
13. The First-tier Judge set out the history of the decision. The appellant is a citizen of Somalia who was born on 1 April 1987. He appeals against a decision of the respondent on 18 February 2016 refusing to revoke a deportation order made against him on 19 March 2009.
14. After the appeal had been allowed on the first occasion the Upper Tribunal ruled that the First-tier Judge had erred in allowing the appeal under Article 3 of the European Convention on Human Rights and on humanitarian protection grounds. We set out below paragraphs 3 and 4 of the First-tier Tribunal’s decision because they are particularly succinct: “
 3. The [Secretary of State’s] appeal was allowed, with some important qualifications. The Upper Tribunal Judge directed that the evidence heard (at paragraphs 12–24 of the First-tier Tribunal decision) should stand as a record of the evidence given to the First-tier Tribunal. There was no appeal and the judge did not seek to set aside the decision in respect of Section 72 of the 2002 Act, and also the refusal of the asylum claim. The case was therefore remitted to the First-tier Tribunal to re-make the decision on the appellant’s appeal, on humanitarian protection grounds and on human rights grounds.
 4. Therefore, the issue is as directed by the Upper Tribunal, to determining the consequences of the appellant’s potential return to Mogadishu in line with the Country Guidance case of **MOJ (Returning to Mogadishu) Somalia CG [2014] UKUT 00442.**”
15. The immigration history shows that the appellant arrived in the United Kingdom in August 2013 when he was 15 years old. He was given discretionary leave to remain on 1 April 2015 as the dependant of his father. His father became a naturalised British citizen on 5 October 2005. However, the appellant turned to crime. On 7 January 2008 he was convicted of three counts of possessing class A drugs at the Crown Court sitting at Isleworth and was sentenced to various terms of imprisonment making consecutive terms of three years in all. A deportation order was signed against him on 19 March 2009.
16. He remained in the United Kingdom and got into further trouble. On 14 November 2012 at the Crown Court sitting at Reading he was sentenced to concurrent terms of four years’ imprisonment for possessing a class A drug with intent to supply.
17. He claimed asylum on 23 April 2009 but his application was unsuccessful. The appellant and his father tried to persuade the First-tier Tribunal that there were no family members

- known to be living in Mogadishu. The First-tier Tribunal Judge rejected that evidence. The evidence was found to be contrived and formulaic and significantly different from the evidence given on an earlier occasion. The judge did not believe there would be no contacts available to assist the appellant. Further, the judge did not believe that the appellant's father would not be able and inclined to give some financial help. The appellant's father was in regular work and the judge said that "there is clearly sufficient there to provide limited nevertheless significant support to the appellant in Mogadishu".
18. The judge was satisfied that far from being at a disadvantage, the appellant may even be at an advantage seeking work in Mogadishu where there was an economic boom and he had transferrable skills. The judge was satisfied that the appellant was not at risk under Article 3 but made no decision on Article 8 except, possibly, a wholly unexplained reference to "dismissing the appeal on human rights grounds".
 19. The grounds supporting the application for permission were drawn by Counsel who appeared in the First-tier Tribunal, Miss Charlotte Bayati. They are, as we expect of Ms Bayati, logically and clearly presented and Mr Jarvis' skeleton argument responds to them. This has enabled us to consider the Secretary of State's arguments in reply in a way that necessarily requires consideration of the points being made by the appellant. Our reference to the respondent's skeleton argument is not an indication that we have not read the appellant's skeleton argument but rather is a reflection of the fact that it is well drawn and therefore proper consideration of the response necessarily requires a proper consideration of the appellant's case.
 20. Mr Jarvis summarised the appellant's challenge in the following way:
 - "a) the alleged deterioration of humanitarian conditions in the country as a whole;
 - b) the extent of the 'famine' in Somalia;
 - c) the escalation of attacks in Mogadishu by AS (clearly this is a reference to Al Shabab a militant Islamic group)".
 21. It was the thrust of Ms Jones' submissions that the First-tier Tribunal had not had proper regard to the background material in concluding that the appellant would be safe in Mogadishu. It is settled law that country guidance decisions should be given considerable respect and are the necessary starting point in any consideration of the safety of a country to which a country guidance decision applies. However, country guidance decisions are no more than a starting point. The outcome cannot be set in stone because situations change and it is perfectly appropriate to bring fresh evidence before the Tribunal and ask it to make a decision in a particular appeal in the light of that evidence.
 22. Ms Jones particularly drew attention to publications under the label of Refworld which appeared in the First-tier Tribunal bundle. The most recent in the main bundle was dated 9 April 2014 and referred to security problems in Mogadishu. However, when read carefully although there were some allegations of ill-discipline and some evidence of widespread fear, the targets were usually officials of the Somali authorities, such as they are. The report refers to a "flurry of terror attacks against key government and international organisations in the city". That is a serious matter for the intended targets and a serious matter for those who, tragically, suffer unintended consequential losses. We do not in any way seek to diminish the seriousness of the situation but this report does not support a conclusion of a

general decline in conditions to the point where ordinary people going about their business are not safe there. We have found nothing that justifies a conclusion that the famine or other calamity has applied in Somalia or Mogadishu in a way that would change the country guidance that has been established. This was not something that was emphasised in argument before us by Ms Jones but we agree with Mr Jarvis that it is an unsustainable contention.

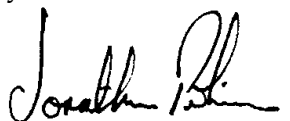
23. We also agree with Mr Jarvis that proper analysis of the evidence shows that although there had been an increase in attacks on civilians this means civilians in government or prominent employment. It does not mean “the population as a whole”. There is no reliable evidence to show a major change and the First-tier Tribunal did not err in following the guidance given. The contention that removal would be contrary to the United Kingdom’s obligations under Article 3 of the European Convention on Human Rights or contrary to Article 15(c) of the Directive is unsustainable.
24. This leaves us with the problem of the Article 8 decision. We do have to make an Article 8 decision and we do not agree with Mr Jarvis that the failure to carry out the Article 8 balancing exercise is immaterial. We will not know if the outcome would have been the same without conducting the exercise ourselves or allowing someone else to do it.
25. We have to set aside the decision of the First-tier Tribunal to the extent, and solely to the extent, that it erred by not considering the claimant’s rights under Article 8 of the European Convention on Human Rights. Given that this is what Judge Gill instructed the First-tier Tribunal to do this is regrettable.
26. We see no reason for a further hearing either before us or another Tribunal. We made it plain that all our options were open when we heard the appeal.
27. The appellant's solicitors had served further evidence by way of notice under Rule 15(2A) of the Procedure Rules and we admit that evidence. A claim relying on Article 8 has to be determined in the light of the conditions at the time the decision is made and it would therefore be wrong to exclude recent evidence. We acknowledge evidence that, partly as a consequence of the drought in the northern part of the country, conditions are becoming more challenging in Mogadishu. We do not suggest that it would be easy for the appellant to establish himself there but it is not all bad news. For example, the Country Policy and Information Note on Somalia (South and Central): Security and humanitarian situation Version 3 of July 2017 concludes rather optimistically with references to the “different mindset” of many who had returned. The Country Policy and Information Note Somalia (South and Central): Fear of Al Shabaab also of July 2017 echoes points made by Mr Jarvis. For example, at paragraph 5.2 under the heading “Al Shabaab’s Tactics” is a recognition that the group is a threat to peace and security and is involved in violence against civilians. It does not support the finding that there is a general state of risk.
28. We have considered the material. The situation is still difficult for people on return. No doubt there are some who prosper and a person with an ability to speak English and education in the United Kingdom is at an advantage compared with a person without those privileges. Nevertheless, we do not suggest that return would be other than unpleasant and difficult unless the applicant was lucky, which he may be, but we are not persuaded that there is a real risk of him coming to significant or serious harm.

29. We have to consider Section 117 Part VA of the Nationality, Immigration and Asylum Act 2002. We remind ourselves that statute determines that the maintenance of effective immigration control is in the public interest and that deportation of foreign criminals is in the public interest and the more serious the offence committed by a foreign criminal the greater the public interest is in his deportation.
30. This appellant is a foreign criminal. He has been sentenced to four years or more imprisonment and so is in the most serious category of offenders whose rights have to be considered. We do not agree that there are "very significant obstacles" to his integration into life in Somalia. There will be difficulties but that is as far as it goes. He does not satisfy the requirements of Exception 1 under Section 117C(4)(c) and he does not build his case on existing relationships so Exception 2 does not arise. Clearly, there is no question of his being able to rely on "very compelling circumstances, over and above those described in Exceptions 1 and 2" because none are identified.
31. In reaching this conclusion we accept the evidence that he does not speak Somali properly although he has some familiarity with the language. We find that he probably would get some support from his family at least to get him started and we accept he has transferrable skills. We note how he had some experience working at his uncle's restaurant. Coupled with his clear ability to speak English he has something to offer. He was born in 1987 and so is now 31 years old. He arrived in the United Kingdom aged 15, so he has just about lived half of his life in the United Kingdom, but that is not enough to entitle him to remain. He has little to give to the United Kingdom. He does seem competent to speak English and that is a favourable factor and he is probably willing to work although the evidence of that is skimpy in part because he has made himself unemployable either by being imprisoned or being not permitted to work. There is very little to put on his side in the balancing exercise and there are considerable things to put against which are identified above. We have no hesitation in considering the evidence and dismissing the appeal under Article 8. The other findings are sound and stand.
32. It follows therefore that we allow the appellant's appeal to the limited extent that we rule the First-tier Tribunal erred in law by not making a finding under the ground alleging the decision would contravene his rights under Article 8 of the European Convention on Human Rights. We have considered the evidence and we conclude for the reasons given above that it would not. We therefore substitute the decision dismissing the appeal against the Secretary of State's decision.

Notice of Decision

The First-tier Tribunal erred in law. We set aside its decision but substitute a new decision dismissing the appeal against the Secretary of State's decision.

Signed



Jonathan Perkins, Upper Tribunal Judge

Dated: 28 June 2018