



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/06992/2019

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre
On 16 March 2020

Decision & Reasons Promulgated
On 7 April 2020

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

F. M. N.
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr C Bates, Senior Presenting Officer

For the Respondent: Mr Q Ashu, Solicitor, Hazelhurst Solicitors

DECISION AND REASONS

Introduction

1. The appellant in this appeal will be referred to as the Secretary of State throughout this decision and reasons and the respondent is referred to as the claimant.
2. This is an appeal by the Secretary of State against a decision of Judge of the First-tier Tribunal Dilks ('the Judge') sent to the parties on 21 October 2019 by which the claimant's appeal against the decision not to allow her to remain in the United

Kingdom was allowed on human rights (article 8) grounds. The claimant's appeal on international protection and human rights (article 3) grounds was dismissed by the Judge.

3. Designated Judge of the First-tier Tribunal Manuell granted the Secretary of State permission to appeal on all grounds.

Anonymity

4. The Judge issued an anonymity direction and neither representative requested that it be set aside. The direction is confirmed at the conclusion of this decision.

Background

5. The claimant is a national of Somalia and is presently aged 69. She entered the United Kingdom on 12 October 2015 using a false passport and claimed asylum on 6 November 2015. The Secretary of State refused her application for international protection by a decision dated 29 April 2016 and the claimant's appeal was subsequently dismissed by the First-tier Tribunal by means of a decision dated 30 January 2017 (PA/09520/2016). Judge of the First-tier Tribunal Brunnen accepted that the appellant had previously been an MP in the Transitional Government of Somalia and had continued to be active in civil society, particularly in seeking to promote the interests of women. Judge Brunnen found that at the time of the appeal the claimant did not enjoy such profile as to be targeted following her retirement into private life and so dismissed her international protection appeal. The medical evidence before Judge Brunnen identified that the claimant was 'approaching' end-stage renal failure. Judge Brunnen determined as to the article 3 appeal:

'The evidence in the present case does not deal with the availability in Mogadishu of treatment appropriate to the appellant's needs or her ability to obtain such treatment. Further, it does not deal with the consequences of her being without treatment. Without evidence on these issues I cannot find that the circumstances described in Paposhvili apply to her. In the absence of such evidence, she cannot succeed under article 3 on the basis of her illness.'

6. The claimant submitted further representations on 23 March 2019 which were accepted by the Secretary of State to constitute a fresh claim for the purpose of paragraph 353 of the Immigration Rules. The respondent refused to grant the claimant leave to remain in this country by way of a decision dated 25 June 2019, which is the subject of this appeal.

Hearing before the FtT

7. The appeal came before the Judge sitting in Manchester on 11 October 2019. She accepted that the claimant engaged in *sur place* political activities in the United Kingdom as a member of MNDE but determined that the claimant would not be considered to be anything other than an ordinary civilian on return to Somalia with no connection to the security forces, any aspect of government or official

administration or to any NGO or international organisation. The Judge concluded as to the international protection claim:

- '57. Having found that the appellant would be 'an ordinary civilian' on return, I consider that all of the other issues on return were considered by Tribunal Judge Brunnen. There is no evidence to show that the appellant has any close relatives in Mogadishu. In view of her age and poor health, Tribunal Judge Brunnen considered that it was unlikely that the appellant would be able to support herself from employment or self-employment. However, having been chosen by the Rahanweyn as one of their representatives, and having worked on their behalf for many years, Tribunal Judge Brunnen considered it highly likely that she would be able to draw on her clan associations for assistance. With regard to the passage of time since Tribunal Judge Brunnen's decision I consider that even though it is now nearly 5 years since the appellant left Somalia, given what is accepted about the work that she did for her clan, I find it reasonably likely that she would still have this clan support. Similar, although it is now nearly 5 years since she left Somalia in December 2014, I find that the position is as found by Tribunal Judge Brunnen that the appellant will not have lost touch with its culture or lost her ability to speak the indigenous languages. For these reasons I find as Tribunal Judge Brunnen that the appellant has not shown that she could not re-establish herself as an ordinary citizen in Mogadishu.
58. With regard to the principles in HJ (Iran) and the issues raised in the appellant's witness statement at paragraph 15, I have find (sic) that the activities she has taken part in as part of the MNDE group do not put her at risk on return to Somalia taking into account the country guidance in the case of MOJ and therefore I find that even if she does continue with these activities on return to Somalia then this would not put her at risk of persecution.'

8. The claimant has not cross-appealed this element of the Judge's decision.
9. In considering the article 3 claim before her based upon the claimant's medical condition, the Judge observed objective evidence placed before her that confirmed a centre for kidney dialysis has been operative in Mogadishu since 2015. The Judge further noted medical evidence confirming that the claimant suffers from end-stage renal failure and receives dialysis treatment three times a week. Medical evidence confirms that the claimant is required to continue with such treatment on a long-term basis until she receives a kidney transplant. In dismissing the article 3 appeal the Judge determined:

- '70. The Upper Tribunal has decided in EA & Ors (Article 3 medical cases – Paposhvili not applicable) [2017] UKUT 445 that the test in Paposhvili was not a test that it was open to the tribunal to apply by reason of its being contrary to judicial precedent of GS (India). In SSHD v PF (Nigeria) [2019] EWCA Civ 1139 the Court of Appeal have further commented that N is still binding authority to Supreme Court level. In N [2005] UKHL 31 the Court of Appeal said that the test in this sort of case was whether the claimant's medical condition had reached such a critical stage (i.e. the claimant was dying) that there were compelling humanitarian grounds for not removing

him to a place which lacked the medical and social services which he would need to prevent acute suffering while he was dying. The fact that he would be deprived of medical treatment which would otherwise prolong his life is not the main consideration.

71. I find that there is no material change in the appellant's medical condition since the determination on 30 January 2017 but the Court of Appeal has since confirmed that the test in Paposhvili is not a test that is open to the tribunal to apply. The letter from Professor Mitra dated 9 April 2019 confirms that the appellant currently remains well and that she does feel tired after dialysis but is otherwise self-caring and independent and I find that the appellant is not at such a critical stage as envisaged in N and that the appellant cannot succeed under article 3 on the basis of her illness.'

10. The Judge allowed the appeal on article 8 grounds determining:

- '77. Mr Ashu submitted that the appellant would need to pay for her dialysis. I have no evidence before me on the likely cost of the dialysis treatment three times a week. Mr McBride submitted that the treatment may be expensive, that we don't know, but importantly it was available. It may be possible to have dialysis in Mogadishu, but I need to consider whether it is likely that the appellant would be able to access this. The information handed to me by Mr Ashu from Wikipedia on healthcare in Somalia starts with the statement that; 'Healthcare in Somalia is largely in the private sector'. I note that the information in paragraph 92 of the asylum decision does not include information relating to whether the appellant would have to pay privately for this treatment although it does say that 'in the past only the wealthy with the financial means to travel abroad were able to seek treatment.
78. Given the information before me I find it is likely that the appellant would be required to pay for her treatment in Somalia. The appellant could avail herself of the assisted voluntary return scheme but as Mr McBride stated this would only assist her in the short term.
79. Beyond that it was found by Tribunal Judge Brunnen that the appellant would have clan support but the headnote to MOJ states that; '...Clans now provide, potentially, social support mechanisms and assist with access to livelihoods...'. Whilst the appellant's clan may provide the necessary support for her to live in Mogadishu, I find it is unlikely that this support would extend to funding the cost of weekly dialysis for the appellant.
80. By an asylum support decision dated 28 May 2019 the appellant has been found to be destitute. I accept from this that it is unlikely that the appellant's family would be able to support her in Mogadishu. The appellant's evidence is that her family have never supported her in Somalia or in the UK.
81. I find therefore that it is likely that the appellant would not be able to access the medical treatment that she needs in Mogadishu and I find that without that treatment the appellant would become very unwell and would likely die.
82. For these reasons I find that it has been established that the appellant would face very significant obstacles to her integration in Somalia and that

she meets the requirements of Paragraph 276ADE of the Immigration Rules.'

Grounds of Appeal

11. The Secretary of State's grounds are short, running to eight paragraphs, a number of which are summary or descriptive in nature. The key paragraphs detail:

- '2. The judge finds at [82] that the appellant's inability to pay for medical care in Somalia would constitute an 'insurmountable obstacle' to her reintegration and therefore meeting the requirements of Paragraph 276ADE
3. While the judge has examined the appellant's medical issues and dismissed them under article 3, the judge has considered the exact same factors and allowed them under article 8 instead, which, it is submitted, is an error of law
4. ...
5. It is further submitted that the judge has failed to consider section 117B and the obvious public interest considerations in this case. The appellant's entire stay in the UK has been an unlawful one - having spent only four years in the UK and the majority of her life in Somalia - and cannot therefore be afforded any weight in an overall proportionality assessment.
6. There are no findings on the appellant's financial independence, but it is clear that her intention in the UK is to avail herself of NHS services, at a cost to the public purse.
7. It is submitted that these factors represent weighty factors in the proportionality assessment to be conducted by the judge, and in overlooking them, the judge has arrived at a flawed conclusion that renders the entire determination unsafe.'

12. The Secretary of State solely relies at [4] of her grounds, without more, upon two paragraphs from *Akhalu (health claim: ECHR Article 8)* [2013] UKUT 00400 (IAC), namely [45]- [46]:

'The correct approach is for the judge to have regard to every aspect of the claimant's private life here, as well as the consequences for her health on removal, but to have in mind when striking the balance of proportionality that a comparison of levels of medical treatment available is something that will not in itself have any real impact on the outcome of the exercise. The judge must recognise, as did Judge Saffer, that it will be a rare case that succeeds where this is an important aspect of the claimant's case.

Put another way, the consequences of removal for the health of a claimant who would not be able to access equivalent health care in their country of nationality as was available in this country, are plainly relevant to the question of proportionality. But when weighed against the public interest in ensuring that the limited resources of this country's health service are used to the best effect for the benefit of those for whom they are intended, those consequences do not weigh heavily in the claimant's favour but speak cogently in support of the public interests in removal.'

13. I observe that the consideration of article 8 in *Akhalu* is concerned with a decision of the Secretary of State predating the coming into force of paragraph 276ADE on 9 July 2012 and therefore the Tribunal was not able to consider the identification of circumstances arising within paragraph 276ADE(1)(vi) to outweigh the public interest in removal.
14. When granting permission to appeal on 27 November 2019 DJFtT Manuell provided the following reasons:
- '1. The onwards grounds dated 30 October 2019 were in time. The grounds erroneously assert that the judge allowed the appellant's asylum appeal, when it was unequivocally dismissed. The grounds go on in summary to assert that the judge should not have allowed the appellant's article 8 ECHR appeal on health grounds and failed to apply the relevant law (including section 117B of the Nationality, Immigration and Asylum Act 2002).
 2. Although this is plainly a hard case (the appellant requires kidney dialysis), the grounds are arguable, particularly as her previous appeal was dismissed and she failed to leave the United Kingdom. The judge's approach to the applicable law is arguably insufficiently rigorous and inadequate.'

Decision

15. Mr Bates on behalf of the Secretary of State candidly accepted that §§3, 4, 5, 6 and 7 of the grounds of appeal were focused upon a proportionality consideration outside of the Immigration Rules. He further accepted that the Judge did not undertake a proportionality exercise because she found that the appellant satisfied the requirements of article 8 established under paragraph 276ADE(1)(vi) of the Rules.
16. Mr Bates asked me to find that it was implicit that a challenge to such finding was made within §2 of the grounds of appeal and if I were to so find I should then find that the Judge materially erred in law by not following the guidance of the Court of Appeal in *Secretary of State for the Home Department v Kamara* [2016] EWCA Civ 813. I have considered Mr Bates' submissions with care but upon examining §2 of the Secretary of State's grounds it is abundantly clear that the paragraph simply states the basis on which the appeal was allowed by the First-tier Tribunal and does not itself constitute a ground of appeal. It is simply part of the opening summary. The paragraphs that follow are all concerned with the proportionality consideration that takes place when article 8 is examined outside of the Rules and such consideration is not part of the assessment undertaken under paragraph 276ADE. I am satisfied that the author did not draft grounds challenging the Judge's decision as to article 8 under the Rules and such a challenge cannot be implied by §2 of the grounds. Permission was not granted to the Secretary of State to challenge the Judge's decision as to the appellant meeting the requirements of paragraph 276ADE of the Rules.
17. Mr Bates helpfully accepted that if I could not read an implicit challenge as arising within §2 then the Secretary of State's grounds do not challenge the reasons for the appeal being allowed. He rightly accepted that in such circumstances the Secretary of

State's appeal must fail for the reasons confirmed by the Upper Tribunal in OK (PTA; alternative findings) [2020] UKUT 44.

Notice of Decision

18. The making of the decision of the First-tier Tribunal did not involve the making of a material error on a point of law.
19. The decision of the First-tier Tribunal is upheld, and the appeal is dismissed.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

20. Unless and until a Tribunal or court directs otherwise, F.M.N, is granted anonymity. No report of these proceedings shall directly or indirectly identify F.M.N or any member of their family. This direction applies both to F.M.N and to the Secretary of State. Failure to comply with this direction could lead to contempt of court proceedings.

Signed: *D O'Callaghan*

Upper Tribunal Judge O'Callaghan

Date: 31 March 2020

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal, I make a fee award of any fee which has been paid or is payable.

Signed: *D O'Callaghan*

Upper Tribunal Judge O'Callaghan

Date: 31 March 2020

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be received by the Upper Tribunal within the appropriate period after this decision was sent to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is in the United Kingdom at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is 12 working days (10 working days, if the notice of decision is sent electronically).
3. Where the person making the application is in detention under the Immigration Acts, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically).
4. Where the person who appealed to the First-tier Tribunal is outside the United Kingdom at the time that the application for permission to appeal is made, the appropriate period is 38 days (10 working days, if the notice of decision is sent electronically).
5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.
6. The date when the decision is "sent" is that appearing on the covering letter or covering email