Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/04777/2021
PA/52128/2021; UI-2022-000217

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On: 27 May 2022	**On: 22 July 2022**

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DOM
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr P Deller, Senior Home Office Presenting Officer
For the Respondent: Mr R Toal, counsel instructed by Wilsons LLP

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Andrew, heard on 20 January 2022. Permission to appeal was granted by First-tier Tribunal Judge Rodger on 2 March 2022.

Anonymity

2. An anonymity direction was made previously and is reiterated below given the respondent's mental health concerns.

Background

3. The respondent entered the United Kingdom during November 2002 and applied for asylum shortly thereafter. Following a successful appeal, the respondent was recognised as a refugee, on 17 March 2004. On 4 April 2014, the respondent was convicted of possession of Class A drugs with intent and sentenced to five years and 6 months imprisonment. There were also several earlier, less serious, convictions.

4. A deportation order was signed on 12 October 2016 and the respondent's challenge to his removal was ultimately unsuccessful, with his appeal rights becoming exhausted on 6 November 2018 following a decision by Upper Tribunal Judge Hanson.

5. The respondent made a series of further submissions, based on Article 3 concerning his mental health as well as Article 15(c) of the Qualification Directive, which were rejected by the Secretary of State under paragraph 353 of the Rules. After the respondent was granted permission to proceed with his most recent judicial review application, the matter was settled by consent and the respondent was served with a decision dated 28 April 2021, refusing to revoke the deportation order.

6. In the decision of 28 April 2021, the Secretary of State came to the same conclusions as the Upper Tribunal did in dismissing the respondent's appeal on 25 October 2018, in that she rejected his claim that being returned to Somalia would breach his rights under Article 3 ECHR or the Article 15(c). It was considered that the respondent's family in the UK and his clan could support him in Somalia and that the risk of suicide and self-harm could be minimised.

The decision of the First-tier Tribunal

7. At the hearing before the First-tier Tribunal, the only matter relied upon was Article 3. The judge heard evidence that the respondent had been admitted to hospital under the Mental Health Act as he had failed to take his medication and failed to engage with the Mental Health team. That the respondent had an underlying psychotic illness was documented in an additional psychiatric report, the content of which was unchallenged. The judge found that the respondent, if removed to Somalia, would find himself living in inhuman and degrading conditions.

The grounds of appeal

8. The grounds of appeal argued that the judge materially erred in her assessment of the respondent's circumstances on return to Somalia and in allowing the appeal. In the grounds, it is submitted that the First-tier Tribunal failed to have regard to the decision in *OA (Somalia)* CG [2022]

UKUT 000333 (IAC) which was promulgated after the hearing, but before the decision of the First-tier Tribunal was promulgated.

9. In addition, the judge was criticised for placing weight on the psychiatric report, for accepting the oral evidence of the respondent's niece and for departing from the findings of the Upper Tribunal. Reference was made to various headnotes from *OA (Somalia)*.

10. Permission to appeal was granted on the basis that there was an arguable error of law through no fault of the judge because *OA (Somalia)* was promulgated before the decision of the First-tier Tribunal was promulgated.

11. The respondent's skeleton argument, received on 25 May 2022 in which the appeal was opposed, and it was argued that there was no arguable error of law. It was stated that *OA (Somalia)* did not appear on the Upper Tribunal's list of current CG cases until 9 March 2022, well after the decision of the First-tier Tribunal was promulgated. Therefore, it was not a CG case that the Tribunal had to apply. In addition, the respondent served notice under Rule 15(2A) of the Upper Tribunal (Procedure) Rules 2008 to adduce evidence to address the grounds of appeal, particularly in respect of the interpretation of paragraphs 12.2 and 12.3 of the Tribunal Practice Directions.

The hearing

12. I heard submissions from both representatives which are summarised here. Mr Deller acknowledged the point made in Mr Toal's skeleton argument, as an interesting procedural and legal point. He argued that regardless of the Practice Directions point, the decision in *OA (Somalia)* had been published before the First-tier Tribunal decision was promulgated. The decision was heavily anticipated and common-sense dictates that it must have immediate effect or uncertainty would be caused by waiting for the current CG list to be updated. Mr Deller acknowledged that Mr Toal was right to say that the Secretary of State's grounds did not address *OA (Somalia)* but it must be the case that the findings in *OA (Somalia)* were capable of making a difference. He stood by the principle in *NA (Libya)* [2017] EWCA Civ 143 in that if a CG decision was not followed, this was a material error.

13. Mr Toal relied upon his skeleton argument. In addition, he submitted a copy of Practice Direction 12 as well as copies of the first page of a series of previous Somali CGs which were downloaded from the Upper Tribunal website on the day of the hearing, but which were removed from the current CGs case list as they had been superseded. He argued that if PD 12.2 was read in isolation all the obsolete CG cases would need to be treated as CG but this outcome was avoided by the provisions in 12.3 of the need to be conversant with the current CG cases. It was a draconian consequence to set aside a decision where a judge was not at fault. Mr Toal posed the question whether judges were expected to search all new

published UT cases just in case they were bound. The provisions in 12.3 were a sensible outcome in having a list of current CGs so that a judge and representatives could appraise themselves. He emphasised that there was a month between the promulgation of the decision of the First-tier Tribunal and the publication of OA on list of current CG cases and therefore there was no error of law.

14. Mr Toal's alternative submission was that even if there was an error of law, it was not material. He addressed each one of the criticisms of the decision of the First-tier Tribunal decision and I will discuss them in my reasons below. Essentially, he submitted that if the judge was required to consider *OA (Somalia)*, the judgement would have been the same.

15. In reply, Mr Deller drew my attention to PD 12.4, submitting that it there was no need to have regard to the list in question, owing to the requirement to follow a clear and applicable CG case. He further argued that there was no reference in the second sentence of 12.3 to the current CG list. In terms of Mr Toal's submissions on materiality, Mr Deller backed away from the *Devaseelan* ground but argued that the issues should be argued at a hearing if a material error of law was found. By way of clarification Mr Deller confirmed that, in his view, the failure of the judge to follow *OA (Somalia)* was so seismic an error, by itself, that it could not survive.

16. Mr Toal responded further by drawing my attention to the use of the term 'current' in both parts of 12.3 as well as the use of the term '*apparently applicable'* before the term CG in 12.4 supported his argument. He added that the newness point would lead to cases being missed and this was all the more important that the current CG list was maintained and readily available for judges. This was not a point which arose in *NA (Libya)* where it was common ground that the CG was applicable.

17. At the end of the hearing, I reserved my decision on the error of law and give my reasons below.

Decision on error of law

18. It is argued on behalf of the respondent that the First-tier Tribunal was not required to take account of *OA (Somalia)* and therefore there was no error of law.

19. The decision under appeal was promulgated on 10 February 2022, whereas the decision in *OA (Somalia)* was promulgated and published on 2 February 2022. On 9 February 2002, it was added to the Upper Tribunal's list of Country Guidance decisions. On 9 March 2022, that updated list of CG decisions was published on the Upper Tribunal's website, as confirmed in an email from an Upper Tribunal lawyer dated 11 March 2022 to the respondent's representatives.

20. Reliance was placed on the Practice Directions by both representatives. The relevant provisions being as follows.

> 12.2 A reported determination of the Tribunal, the AIT or the IAT bearing the letters "CG" shall be treated as an authoritative finding on the country guidance issue identified in the determination, based upon the evidence before the members of the Tribunal, the AIT or the IAT that determine the appeal. As a result, unless it has been expressly superseded or replaced by any later "CG" determination, or is inconsistent with other authority that is binding on the Tribunal, such a country guidance case is authoritative in any subsequent appeal, so far as that appeal:
>
> (a) relates to the country guidance issue in question; and
>
> (b) depends upon the same or similar evidence.
>
> 12.3 A list of current CG cases will be maintained on the Tribunal's website. Any representative of a party to an appeal concerning a particular country will be expected to be conversant with the current "CG" determinations relating to that country.
>
> 12.4 Because of the principle that like cases should be treated in like manner, any failure to follow a clear, apparently applicable country guidance case or to show why it does not apply to the case in question is likely to be regarded as grounds for appeal on a point of law.

21. In *NA (Libya)*, it was held that the First-tier Tribunal was seized of an appeal until its decision was promulgated and that failure to consider a CG decision promulgated prior to the promulgation of the First-tier Tribunal decision was an error of law.

22. Mr Toal argued that *NA (Libya)* did not apply because there was a delay in *OA (Somalia)* being published in the list of current CG cases on the UT's website and that only current CG cases are to be followed by the First-tier Tribunal. I do not accept that submission. There is no reference in 12.2 of the Practice Directions to indicate that it is only cases which are included in the current CG cases list that are authoritative. The conclusions in *NA (Libya)* clearly indicate, for instance at [24], that once a CG case is promulgated and published, in circumstances where the First-tier Tribunal remains seized of an appeal, a failure by the First-tier Tribunal to consider is likely to be regarded as grounds for appeal on a point of law.

23. The Court of Appeal made no reference to a CG case first having to be published on the list of current CG's before it was authoritative, only that it be '*published and promulgated*.' It is not in dispute that the decision in *OA (Somalia)* was both promulgated and published over a week prior to the decision and reason in the respondent's appeal. I also note that the respondent in this appeal and the claimant in *OA (Somalia)* are both represented by the same firm of solicitors and therefore there was unlikely to be any legal uncertainty.

24. What is said at 12.3 of the Practice Directions about the list of current CG cases is no more than a proffering of information as to where representatives can find relevant CG cases. I do not accept the submission that paragraphs 12.2 and 12.3 of the Practice Direction have to be read as meaning that only 'current CG cases', i.e. those that have been published on the Tribunal's list, have the status of CG decisions that must be taken into account.

25. I therefore conclude that the First-tier Tribunal inadvertently made an error of law in failing to consider the decision in *OA (Somalia)*. I find that this error was not material for the following reasons.

26. Mr Deller submitted that failing to take account of a CG decision was a material error of law, without more. Indeed, he did not respond to Mr Toal's submissions on materiality, other than to express that he did not support the *Devaseelan* point made in the grounds. There is no support for Mr Deller's view of materiality in *NA (Libya*). It is apparent that the issue of materiality in *NA(Libya)* involved an analysis of whether the First-tier Tribunal decision was consistent with the new CG case.

27. In the instant appeal, I find that there was no inconsistency between the judge's findings based on the earlier CG case of MOJ and the conclusions in *OA (Somalia)*.

28. Mr Toal's submissions before me addressed all the remaining matters raised in the grounds of appeal and were subject to no challenge on behalf of the Secretary of State.

29. The Secretary of State criticised the judge for accepting the medical opinion of a consultant psychiatrist, that the respondent's mental health would deteriorate on return to Somalia. Firstly, I note that the Home Office Presenting Officer made no challenge to the medical evidence. Secondly, the grounds assert that there is no evidence from the mental health practitioners who were treating the respondent, yet the medical report refers to having read the GP records, the medical records of the detention centre, as well as the report of the psychiatrist who had previously reported on the respondent's mental health. Furthermore, the psychiatrist summarised the respondent's previous medical reports and referred frequently to it in his report.

30. The next complaint made is that there was a failure by the judge to take account of headnote 15 of *OA (Somalia)*, where it is stated that there is some mental health provision in Mogadishu as well as the availability of means-tested anti-psychotic medication. Contrary to what is asserted in the grounds, at [24] the judge did take account of the availability of psychiatrists in Mogadishu, noting the WHO report relied upon by the Secretary of State in which it was said that there were only three psychiatrists working in mental health facilities in Somalia. There is no indication given in *OA (Somalia)* of any further provision than this. Indeed *OA (Somalia)*, at paragraph 350, refers only to a single doctor practising

psychiatry in Mogadishu. The Secretary of State's complaint also fails to engage with the facts of this case, in that it is not based on a lack of medication but the respondent's non-compliance with his medication regime in the United Kingdom and the impact upon him of being removed. This much can be seen at paragraph 107 of the psychiatric report. The judge's findings at [24] and [27] set out her concerns which include that chaining mentally ill people was common, according to the background information referred to in the decision letter. While *OA (Somalia)* mentions that in the Habeb Public Mental Health Hospital there is a no chains policy, it does not address the chaining of those with mental health issues outside of a hospital setting. During the hearing, I was referred to no aspect of the judge's decision which was inconsistent with the findings in *OA (Somalia)*.

31. The Secretary of State contends that the psychiatrist's opinion that the respondent's mental health was likely to deteriorate owing to substance misuse, with reference to headnote 16 of *OA (Somalia)* which referred to the unavailability of hard drugs, as well as the availability of soft drugs, including cannabis. The medical evidence before the judge was that the respondent's substance issues were not with hard drugs but with cannabis. At paragraph 107 of the report, it stated that he was likely to suffer from 'high levels of drug seeking behaviour,' owing to experiencing stress both in the United Kingdom as well as if returned to Somalia and that this would lead to a likelihood of a serious or substantial deterioration in his psychotic illness., increase in vulnerability and a high risk of self-harm and suicide.

32. It was asserted in the grounds that the judge failed to follow the *Devaseelan* guidelines and failed to give adequate reasons for departing from the decision of the Upper Tribunal. At this juncture, I note that Mr Deller declined to rely on this aspect of the grounds during his oral submissions. I will nonetheless address this issue for completeness.

33. In the grounds it was stated that the judge erred in accepting the evidence of the respondent's niece regarding future financial support where that evidence had been rejected by the Upper Tribunal in an earlier decision. I do not accept that there was any such failure by the judge. The judge both directed herself properly regarding *Devaseelan* and summarised the previous findings at [8] of the decision and reasons. At [19-20] the judge reached adequately reasoned findings on the evidence of the respondent's niece which she was wholly entitled to reach. Looking at the earlier findings at [24], made following a hearing which took place in 2018, it is apparent that there was little more than, as the judge put it, a 'bare assertion' that there was no family in Mogadishu and that the niece could not financially support the respondent. By contrast, on this occasion, the judge noted that the niece provided a detailed account of the circumstances of the respondent's family in the United Kingdom and a full explanation as to why none of them would be in a position to offer financial support to the respondent. The judge did not err in accepting the account given of the current circumstances of the respondent's family.

34. The grounds place further reliance on headnote 5 and paragraph 260 of *OA (Somalia)*, the Secretary of State submitting that the respondent could contact his extended family or clan members in Somalia. The difficulty with this ground is that no account is taken of the basis of the respondent's Article 3 claim. That claim is best summed up in the psychiatric opinion at paragraph 107, where it is stated that '*he would be unable to seek out accommodation, find employment or take care of himself, even if work and financial support was provided for him, given his psychotic mental state would impair his ability to engage with others…'*

35. It is asserted that the First-tier Tribunal erred on the availability of accommodation on return, referring to headnotes 7, 10 and 13 of *OA (Somalia)*. Again, the somewhat brief ground did not engage with the facts of the case nor consider whether there were particular features or characteristics which applied.

36. The judge did not err in finding at [21] that in order to obtain (non-hotel) accommodation, the respondent would require an income as well as a guarantor and there was a real risk that he would not be in a position to obtain work owing to his mental state and that he would be unable to provide a guarantor. Those findings are consistent with headnote 9 of *OA (Somalia)*. It is not argued that the judge made any error in finding at [22] that that the respondent had no nuclear family and that a clan would not help with livelihood.

37. The reference in the grounds to headnote 7 of *OA (Somalia)*, regarding the limited support available from the Facilitated Returns Scheme, is unexplained. It is obvious that such temporary provision would be inadequate to meet the respondent's needs given his vulnerable mental state.

38. Headnote 10 of *OA (Somalia)* refers to durable positive change in some IDP camps but confirms that the conditions in the worst camps would be 'dire' on account of '*overcrowding, the prevalence of disease, the destitution of their residents, the unsanitary conditions, the lack of accessible services and the exposure to the risk of crime.'* Furthermore headnote 13 of *OA (Somalia)* urges a '*careful consideration of all the circumstances*' where there are particular features or characteristics that mean there were substantial grounds to conclude that there is a real risk of a breach of Article 3. *OA (Somalia)* states that such cases were likely to be rare, a point made by the judge at [27], where she found that the respondent's case, owing to the cumulative factors listed, was one of the '*few cases in which to return him to Somalia will cross the high threshold for there to be a breach of Article 3*.'

39. No material error of law has been identified. The judge would have undoubtedly reached the same conclusion even if the decision in *OA (Somalia)* had been before her. The appeal is dismissed.

Decision

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

The decision of the First-tier Tribunal is upheld.

Direction Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the respondent is granted anonymity. No-one shall publish or reveal any information, including the name or address of the respondent, likely to lead members of the public to identify the respondent. Failure to comply with this order could amount to a contempt of court.

Signed: T Kamara Date: 30 May 2022
Upper Tribunal Judge Kamara

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