



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-UI-2022-005530
On appeal from: PA/00827/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 28 May 2023

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

M M A B
(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr Chris Avery, a Senior Home Office Presenting Officer
For the Respondent: Mr Ronan Toal of Counsel, instructed by Wilsons Solicitors
LLP

Heard at Field House on 27 April 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the claimant has been granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the claimant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. The Secretary of State challenges the decision of First-tier Judge Veloso allowing the claimant's appeal against her decision on 26 March 2021 to maintain a deportation order and to refuse him international protection or leave to remain on human rights grounds, and in a supplementary decision on 1 August 2022, to maintain her position despite his HIV-positive status.

The claimant is a citizen of Somalia.

2. The main basis of the claimant's case is first, that he fears Al-Shabaab on return, and second, that his HIV positive status would result in ill-treatment engaging Article 3 ECHR.
3. For the reasons set out in this decision, I have come to the conclusion that [conclusion and outcome].

Procedural matters

4. **Vulnerable claimant.** The claimant is a vulnerable person by reason of his HIV- positive status and also because he is a former victim of trafficking. He is entitled to be treated appropriately, in accordance with the Joint Presidential Guidance No 2 of 2010: Child, Vulnerable Adult and Sensitive Appellant Guidance. No adjustments were asked for at the hearing, and he did not give evidence.
5. **Mode of hearing.** The hearing today took place face to face.

Background

6. The claimant entered the UK on 30 March 2014 and applied for asylum. He was unsuccessful and was appeal rights exhausted on his initial asylum appeal on 3 June 2015.
7. The claimant is a foreign criminal. Between November 2015 and January 2016, he committed 5 offences and received 3 convictions for offences against his partner, with whom he was living in her public house. He stabbed her on the side of her head, and then refused to call the ambulance or emergency services for about three hours after that offence. While on bail, the claimant forced his estranged partner to withdraw her statement, and then attacked her again.
8. On 25 July 2016 at Bradford Crown Court the claimant was convicted of wounding and inflicting grievous bodily harm and assault by beating. He was still young: 20, 21 or 24 (the records before the sentencing judge differed). The Judge treated him as over
 21. He was sentenced to 40 months for grievous bodily harm and 4 months for the beating, to be served consecutively, together with a restraining order prohibiting contact with his victim and prohibiting indefinitely his entry into the county of South Yorkshire. There was no additional penalty for the bail breach.
9. On 29 September 2016, the Secretary of State served the claimant with notice of decision to deport and a section 120 notice. He did not respond, and on 29 November 2016, the deportation order was made, and served on him 3 days later. He made a further international protection claim. When his sentence expired on 5 February 2018, the claimant remained detained under immigration powers.
10. On 31 July 2018, the claimant's further submissions on protection and human rights grounds were refused, but not treated as a paragraph 353 fresh claim. The Article 8 ECHR element of the claim was certified clearly unfounded. There followed further protection claims, a rule 35 torture claim, and a modern day

slavery claim. The claimant remained detained. The Secretary of State eventually made another appealable decision on 26 March 2021.

11. The claimant's HIV-positive status was communicated to him in detention on 23 June 2021. The Secretary of State accepted that the HIV issue was a new matter and consented to its inclusion in the matters before the First-tier Judge for decision.

First-tier Tribunal decision

12. The First-tier Judge allowed the claimant's appeal. She took the 2015 decision of First-tier Judge Bradshaw as her *Devaseelan* starting point and dismissed the Refugee Convention appeal. She recorded that the claimant's Counsel accepted that he had committed a section 72 'particularly serious crime', but considered that the claimant himself had not yet accepted responsibility for his actions.
13. The Judge accepted that the claimant's mother had been killed, his uncle had died, and his three sisters had been kidnapped, but not that Al-Shabaab was responsible for any of those events. The Judge accepted that the claimant had no surviving family in Mogadishu, where he had lived until the age of (approximately) 14 before coming to the UK. The claimant's fear of Al-Shabaab was not objectively well-founded and his Article 3 claim based thereon fell with the Refugee Convention claim, on the facts found.
14. Judge Veloso then dealt with the HIV element of the claim. After considering the country evidence on the treatment of persons living with HIV/AIDS, the Judge concluded that the Article 3 standard was met and allowed the appeal on human rights grounds.
15. The Secretary of State appealed to the Upper Tribunal.

Permission to appeal

16. Permission to appeal to the Upper Tribunal was granted by First-tier Judge Hatton, for the following reasons:

"3. To successfully engage Article 3, I am mindful the Appellant is required to demonstrate a "real risk" on return to Somalia of "intense suffering" which is "serious, rapid and irreversible", as articulated at [headnote 1] of *OA (Somalia)* (CG) [2022] UKUT 33 (IAC). Whilst I note the background evidence before the Judge in the present case indicates there is widespread stigma directed towards persons living with HIV in Somalia, I am correspondingly mindful the Judge acknowledged at [52] the background evidence also indicates that those living with HIV felt safe in Mogadishu, being the place the Tribunal previously found (in 2015) that the Appellant could live a relatively normal life, especially given that he previously lived there for 14 years and also has an uncle there [34].

4. Accordingly, I accept the grounds' contention that it is unclear on what evidential basis, if any, the Judge departed from the Tribunal's previous findings thereon. I also note the Judge's decision acknowledges at [57] the background evidence confirming that HIV services are available in Somalia, expressly including anti-retroviral treatment freely provided via public hospitals in major towns, which

further indicates it is arguable the Judge erred in finding the Appellant's circumstances were capable of engaging the ratio of *OA (Somalia)* [see above]."

17. The claimant's solicitors filed a Rule 24 Reply, not engaging directly with the grant of permission to appeal, but asserting that the First-tier Tribunal decision failed to deal with challenges in his grounds of appeal to the First-tier Tribunal under Articles 4 and 8 ECHR. If the First-tier Tribunal were set aside, those claims would need to be determined.
18. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

19. The oral and written submissions at the hearing are a matter of record and need not be set out in full here. I had access to all of the documents before the First-tier Tribunal.
20. The Secretary of State's grounds of appeal assert that he could rely on his partner in the UK (who currently receives ESA and PIP benefits) getting a job and sending him money in Somalia, alternatively that his aunt here is willing to send money which might suffice to enable him to pay for medical treatment. Neither of those criticisms of the First-tier Judge is arguable.
21. However, the remaining grounds, on which permission was based, assert that the claimant's family and persons outside the family such as a landlord would not be aware of the claimant's HIV-positive status, because he would exercise discretion. The Secretary of State contends that the First-tier Tribunal erred in failing to give adequate reasons for departing from the 2015 *Devaseelan* starting point decision that the claimant would be able to lead a relatively normal life in Mogadishu.

Conclusions

22. The *Devaseelan* point is erroneous. The factual matrix advanced in 2015 related to the risk from Al-Shabaab and the First-tier Judge did not depart from that finding. The Refugee Convention and Article 3 arguments regarding the Al-Shabaab risk were dismissed.
23. The appeal was allowed on the basis of the new matter, the claimant's HIV-positive status, which was not known until 2021 and could not be the basis of any finding in the 2015 decision. In this respect, the Secretary of State's case is inconsistent with her own country information: see her 19 April 2021 Response to an Information Request entitled *Somalia: treatment for HIV*. The findings on Stigmatism at 1.3 are in line with the First-tier Judge's findings, and the findings at 1.1 about the damage to Somalia's health system support the difficulties in accessing treatment.
24. The claimant's account is that in order to be safe, he would have to lie, and maintain his lie, about his status. That would also mean not accessing treatment, as there is evidence, on which the Judge relied, that healthcare staff disclose the HIV status of patients in their care. The claimant cannot be expected to lie in order to remain safe from discrimination and abuse of the type set out in the Information Response, and in assessing international protection and risk on return, the effect of such discretion is to be disregarded: see *HJ (Iran)*

v Secretary of State for the Home Department (Rev 1) [2010] UKSC 31 at [82].

25. The Secretary of State's grounds of appeal do not reach the standard for reversing the First-tier Judge's findings of fact and credibility. They were open to her on the evidence.
26. The Secretary of State's appeal is dismissed.

Notice of Decision

27. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of no error on a point of law I do not set aside the decision but order that it shall stand.

Judith A J C Gleeson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 22 May 2023