



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005774
First-tier Tribunal No: RP/00156/2018

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 26 April 2023

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

MHK
(Anonymity Order made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms E Fitzsimons, instructed by Wilson Solicitors LLP
For the Respondent: Ms S Lecointe, Senior Home Office Presenting Officer

Heard at Field House on 17 March 2023

DECISION AND REASONS

1. The appellant appeals, with permission, against the decision of the First-tier Tribunal dismissing his appeal against the decision to refuse his protection claim following the making of a deportation order against him. The appeal was allowed on human rights grounds under Articles 3 and 8 and the Secretary of State has been refused permission to appeal that decision.

2. The appellant is a national of Somalia born on 18 July 1991. He claims to have arrived in the UK in approximately 2001, at the age of 10 years. On 23 March 2003 he made an application for leave to remain as the dependent of his aunt, but the application was refused on 1 July 2004. On 18 June 2006 he made an asylum claim in his own right and was recognised as a refugee on 13 November 2006 and granted leave until 13 November 2011. He made an out of time application for settlement as a refugee on 1 November 2013 and was granted indefinite leave to remain in the UK on 17 March 2014. Following a conviction on 22 September 2016 for being concerned in supplying Class A drugs (cocaine and heroin) and possessing an offensive weapon in public, he was sentenced on 6 April 2017 to a total of two years and 10 months' imprisonment.

3. On 22 April 2017 the appellant was notified of the respondent's intention to exclude him from the protection of the Refugee Convention on section 72 grounds, and he was invited to rebut the presumption that the crimes for which he had been convicted were particularly serious and that he constituted a danger to the community, in accordance with section 72(6) of the Nationality, Immigration and Asylum Act 2002. He made written representations on 3 May 2017, referring to his family life with his sister and her children, his eye problems and learning disabilities and the fact that he was pressurised into the offence which led to him going to prison.

4. On 18 January 2018 the appellant was notified of the respondent's intention to cease his refugee status under Article 1C(5) of the Refugee Convention and paragraph 339A(v) of the immigration rules on the basis that the circumstances in connection with which he had been recognised as a refugee had ceased to exist. The respondent noted that the appellant had been granted refugee status as a member of the Ashraf minority clan, but considered that that was no longer a basis upon which he would be at risk and that the overall security situation in Mogadishu had improved. On 9 February 2018 the respondent notified the UNHCR of the intention to revoke the appellant's refugee status. Written representations were received from the UNHCR in response, on 26 February 2018, recommending that cessation was not appropriate.

5. On 27 September 2018 the respondent signed a Deportation Order against the appellant under section 32(5) of the UK Borders Act 2007 and made a decision on 28 September 2018 to refuse his protection and human rights claim. In that decision the respondent certified that the presumption in section 72(2) of the NIAA 2002 applied to the appellant and that Article 33(2) of the Refugee Convention applied such that the Convention did not prevent his removal from the UK. The respondent also considered that paragraph 399A(v) of the immigration rules and Article 1C(5) of the Refugee Convention applied to the appellant and that his refugee status had therefore ceased, in light of the changed circumstances in Somalia in general, and for minority clan members, as set out in the case of MOJ & Ors (Return to Mogadishu) (Rev 1) (CG) [2014] UKUT 442. The respondent considered that the appellant would not face an Article 3 risk of harm on return to Somalia. Furthermore, it was considered that he did not qualify for humanitarian protection but that he was excluded from a grant of humanitarian protection in any event, under paragraph 339D of the immigration rules, as a result of his conviction and sentence. As for Article 8, the respondent considered that the appellant could not meet the requirements of paragraph 399A of the immigration rules on the basis of his private life and that he would be able to re-integrate in Somalia. The respondent concluded that there were no very compelling circumstances outweighing the public interest in the appellant's deportation.

6. The appellant's appeal against that decision was heard on 20 June 2022 by Judge Beach and Judge Hone in the First-tier Tribunal. The judges heard from the appellant and his sister. The judges noted that the appellant was registered as blind and had limited eye-sight in one eye, and that he had been assessed as having Borderline Intellectual Functioning and as being intellectually and cognitively impaired. They noted his claim that he had been forced to deal drugs in order to pay off a drug debt and that when he was arrested, he had had on him a golf ball in a sock which he said that he had in order to protect himself from people coming after him to enforce the debt. He claimed to have no contact with his family in Somalia, but to have a daughter in the UK with his former partner whom he saw regularly after being granted contact by the family court. The appellant's sister gave evidence that she had last spoken to her family in Somalia 2005 and had had no connections with her family there since her mother died.

7. The judges noted that there was a decision from the NRM finding there to be reasonable grounds that the appellant was a victim of modern slavery and that it was being argued for the appellant that his offending was bound up with his exploitation and status as a victim of trafficking. They had regard to a report from Elizabeth Flint, an expert in trafficking, who concluded that the appellant was a victim of trafficking as he had been exploited into drug dealing, but they nevertheless concluded, having considered the sentencing remarks of the Crown Court Judge who sentenced the appellant, that his offending was considered to be particularly serious. However, in light of the conclusions in an OASys report and in the report of a clinical psychologist, Dr Boucher, who had assessed the appellant, they did not consider that he represented a present danger to the community and they accepted that the presumption in section 72 had been rebutted. As for the revocation of the appellant's refugee status, the judges concluded that there had been a durable and fundamental change in circumstances in Somalia such that the appellant was no longer eligible for refugee status or humanitarian protection.

8. The judges then went on to consider Article 3. They accepted that the appellant was no longer in contact with his family in Somalia and that both parents were deceased, that there were no clear links to the Somali diaspora, that the appellant did not speak Somali and that he would not be able to rely on remittances from the UK. They found that his mental and physical vulnerability was significant as he had limited eyesight and was susceptible to being manipulated because of his Borderline Intellectual Functioning. They found that as a result of his mental and physical vulnerability he would have very limited employment opportunities and would face difficulties in accessing social and community links via his minority clan. They found that he would be manipulated into quickly spending the money to which he would be entitled from the facilitated return scheme or that it would be taken from him and that he would not get the benefits from that which other returnees had. They considered that, as a victim of trafficking, he would be vulnerable to further exploitation, abuse and manipulation and that he would not fit in easily in Somalia due to his vulnerabilities, his lack of cultural knowledge of Somalia and his inability to speak the language. The judges concluded that the appellant was therefore likely to face a risk of treatment which was contrary to the provisions of Article 3, that he had a real fear of being re-trafficked and that his removal would breach Articles 3 and 4. The judges found, with regard to Article 8, that the family and private life exceptions to deportation were not met, although they found that the appellant was socially and culturally integrated into the UK and that there were very significant obstacles to his integration into Somalia. However they concluded that there were very compelling circumstances over and above the exceptions and they allowed the appeal on human rights grounds, although dismissing his protection appeal.

9. Permission to appeal against that decision was sought by both parties. The Secretary of State was refused permission in the First-tier Tribunal and the Upper Tribunal, but the appellant was granted permission. Permission was granted on two grounds: that the appeal should have been allowed on refugee grounds in light of the judges' findings on the appellant being a victim of trafficking and at risk of being re-trafficked; and that the judges had failed to refer to the expert report from Mary Harper. Permission was granted on both grounds.

10. The matter then came before me.

Hearing and Submissions

11. In response to my enquiry, Ms Fitzsimons confirmed that there had now been a 'conclusive grounds' decision, in January 2023, which was a negative decision. She said that that decision was being challenged.

12. Ms Fitzsimons submitted that, on the findings made by the judges, having identified risks amounting to persecution on the basis of the appellant's status as a victim of trafficking and as a vulnerable person, and having found that he would be at risk of being re-trafficked in breach of Article 4, they should have allowed the appeal under the Refugee Convention as well as allowing it on human rights grounds. She referred to country guidance confirming that trafficking victims could be members of a particular social group and she relied upon the decision in DH (Particular Social Group: Mental Health) Afghanistan [2020] UKUT 223 as establishing that it was not necessary for both limbs of the test to be met, namely sharing an innate characteristic and having a distinct identity in the relevant country. She submitted that the appellant fell under the first limb as he could not change having cognitive impairment and having been trafficked in the past. He had been exploited into criminal activity and was at risk of being socially isolated and exploited in Somalia. There would not be protection available to him from the State in Somalia. That was what the judges had found at [79] and [80].

13. Ms Lecointe relied on the respondent's rule 24 response. She submitted that the appellant had not shown that he was a member of a particular social group and relied upon the fact that he had not received a positive NRM decision.

Discussion

14. The difficulty for the Secretary of State in opposing the appellant's grounds is that her own grounds of appeal have been rejected and that those grounds, to a large extent, formed the basis of her rule 24 response to the grant of permission to the appellant. The Secretary of State's grounds sought to challenge the judges' findings on Articles 3 and 4 on the basis that there had been an error of law in their findings as to the support available to the appellant in Somalia and as to the risk of the appellant being re-trafficked. Given that permission was refused to appeal on those grounds, the judges' findings at [70] to [80], and in particular the conclusions at [79] and [80], on the lack of support in Somalia, the risk of being exploited and abused and the fear of being re-trafficked, are all preserved. I reminded Ms Lecointe of that when she sought initially, in her submissions, to re-argue the matters raised in her grounds, and advised her that essentially it was only the challenge at [6] of the rule 24 response which was open to her to argue in so far as the trafficking issue was concerned.

15. In that challenge to the appellant's grounds, at [6] of the rule 24 response, the respondent sought to argue that the appellant had not made submissions before the First-tier Tribunal on the issue of 'particular social group' or on whether the background evidence established that victims of trafficking in Somalia formed a particular social group, and therefore the judges had not erred by failing to consider the matter. However, that was essentially one of the issues argued by the appellant before the First-tier Tribunal, in section E2 of his skeleton argument under the heading "Cessation of Refugee Status" from [45] to [72]. Although the skeleton argument made no direct reference to 'particular social group', it was argued at [47(b)] that the appellant continued to be at risk of persecution in Somalia under the Refugee Convention as a victim of trafficking and, furthermore, reliance was placed at [59] on AZ (Trafficked women) Thailand CG [2010] UKUT 118, a case specifically dealing with the issue of former victims of trafficking constituting members of a particular social group.

16. The judges considered the issue of cessation of refugee status at [57] to [69] of their decision, on the basis of the risk of the appellant being persecuted as a minority clan member and by Al-Shabaab and concluded that there was no longer a risk on that basis. They then went on to consider Article 3. However what they omitted to do was to consider whether there was a risk of persecution under the Refugee Convention on another basis, as was argued before them, namely as a victim of trafficking, as raised in the skeleton argument. In that respect I agree with Ms Fitzsimons that the judges failed to consider a material matter and therefore erred in law.

17. The next question is whether, on the findings that they made, the judges ought to have allowed the appeal under the Refugee Convention owing to the risk of persecution as a former victim of trafficking. The respondent, in arguing to the contrary in her rule 24 response, submitted that there was not a tacit conclusion that the appellant had been conclusively found to have been a victim of trafficking, since there had only been a 'reasonable grounds' decision made by the NRM. Ms Lecointe also relied upon the fact that there had since been a negative conclusive grounds decision. However, I have to agree with Ms Fitzsimons that that is not now a material or relevant consideration given that the judges found, on the evidence before them, that the appellant was a victim of trafficking and that the Secretary of State's challenge to that finding has been rejected. Their conclusion in that regard was, in any event, not reached solely on the reasonable grounds decision, but upon a consideration of all the evidence including in particular the report of Elizabeth Flint, an expert on trafficking, which they found at [79] to be persuasive.

18. Ms Fitzsimons relied upon the case of DH Afghanistan in submitting that the appellant succeeded in establishing that he was a member of a particular social group, solely on the basis of being a victim of trafficking, without the need to show how he would be perceived in society in Somalia. I note that that conjunctive approach, rather than the previous disjunctive approach requiring both elements to be satisfied, was approved in the more recent case of EMAP (Gang violence, Convention Reason) [2022] UKUT 335. It seems to me, however, that the judges' findings at [79] were sufficient to cover both parts of the test, and that they effectively concluded in those findings that the test was met and that the appellant had established that he was a member of a particular social group. Other than submitting that the appellant had not shown that he was a member of a particular social group because he had not received a positive conclusive grounds decision from the NRM, Ms Lecointe was unable to offer any reasons as to why that was not the case and why a conclusion that he was a member of a particular social group was wrong.

19. Accordingly, taking the conclusion reached by the judges at [79] together with their findings at [80], I have to agree with Ms Fitzsimons that the judges essentially acknowledged that the appellant was at risk of persecution for a Refugee Convention reason and ought therefore to have allowed the appeal on protection, as well as human rights, grounds.

20. In light of the above there is no need for me to consider the second ground of appeal in relation to the judges' failure to refer to the expert report of Mary Harper. Ms Fitzsimons did not make any submissions on that ground at the hearing before me. In any event I consider there to have been no material error on the part of the First-tier Tribunal in that regard, largely for the same reasons as provided in the rule 24 response at [4]. That was a separate issue from the trafficking issue and has no bearing on the discussion and findings above.

Notice of Decision

21. The making of the decision of the First-tier Tribunal involves a material error on a point of law, with respect to the decision to dismiss the appellant's protection appeal. The decision to dismiss the appellant's protection appeal is accordingly set aside and is re-made by allowing the appeal on all grounds.

Anonymity

The anonymity direction made by the First-tier Tribunal is maintained.

Signed: S Kebede
Upper Tribunal Judge Kebede

Judge of the Upper Tribunal
Immigration and Asylum Chamber
21 March 2023