IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2022-005898
UI-2022-005900
First-tier Tribunal Nos:
HU/51632/2021
HU/51784/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 1 September 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

(1) ABDULKADIR MOHAMUD MUSE
(2) ABDINASIR ALI SAID
(NO ANONYMITY ORDER MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms G Kiai, Counsel instructed by Wilson Solicitors
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

Heard at Field House on 19 May 2023

DECISION AND REASONS

Background

1. The appellants appeal against the decision of First-tier Tribunal Judge C Scott promulgated on 27 September 2022 ("the Decision"). By the Decision, the judge dismissed the appellants' appeal against the respondent's decision dated 19 January 2021 and 2 February 2021 respectively, refusing their applications for leave to remain in the United Kingdom on human rights grounds.

2. The appellants are nationals of Somalia. Their appeals were heard together by the First-tier Tribunal as the appellants are related as nephew and uncle respectively, and their appeals concerned common issues of fact and law.

3. The appellants entered the United Kingdom on 3 December 2015, when they were both 19 years old. They were granted entry clearance conferring leave to enter until 13 March 2017, issued subsequent to their appeals being allowed by the First-tier Tribunal on 15 July 2015, against a refusal of their application for entry clearance as a child of a refugee in the United Kingdom, namely, Abdi Fatah Ali Said (hereafter "the sponsor") - the uncle of the first appellant and the brother of the second appellant. It was accepted by the appellants before the First-tier Tribunal that they did not meet the requirements of the Immigration Rules for entry, but nonetheless, they contended that refusal breached their right to family life with the sponsor. The First-tier Tribunal agreed, accepting that the sponsor had cared for the appellants since 2004; that the appellants were part of his pre-refugee flight family, and that, a refusal of entry clearance was a disproportionate interference with the family life they enjoyed with the sponsor. Accordingly, the appeal was allowed contrary to Article 8 ECHR.

4. On 11 March 2017 the appellants applied for further leave to remain in the United Kingdom on human rights grounds. The applications were granted and leave to remain was issued on 10 May 2018 valid until 10 November 2020. On 13 October 2020 the appellants applied for further leave to remain in the United Kingdom also on human rights grounds. Essentially, the appellants claimed that they had lived with the sponsor since their arrival in the United Kingdom until they moved to London to find employment. Whilst they lived together with an uncle in London, they remained the responsibility of the sponsor. The appellants gained employment as NHS Patient Support Assistants (hospital porters); they were classed as key workers throughout the Covid-19 pandemic and were financially self-sufficient. The appellants claimed to have established lives in the UK and feared their lives would be destroyed if forced to return to Somalia where they had not lived since 2013.

5. The respondent refused the application on the basis that the appellants did not have a partner or any dependent children in the United Kingdom to meet any of the family life provisions in Appendix FM of the Immigration Rules, and their claim was considered on private life grounds. The respondent noted that the appellants had not lived in the United Kingdom for the requisite period of twenty years and concluded

that there were no very significant obstacles to their integration on return to Somalia. Nor did the respondent consider that there were any exceptional circumstances to warrant a grant of leave to remain outside of the Immigration Rules – it was not accepted that the appellants were dependent on the sponsor; the appellants had established independent lives and were in employment.

6. It was the respondent's refusal of this application that was the subject of the appeal before the judge.

Decision of the First-tier Tribunal

7. The parties were represented before the judge who heard evidence from the appellants and the sponsor. The judge dismissed the appellants' appeal on human rights grounds. She found that the appellants could not satisfy the requirements of the Immigration Rules for a grant of leave to remain and that their removal would not be a disproportionate interference with their right to respect for private life contrary to Article 8 ECHR. I return below to the detailed reasons given for the Decision.

The appeal to the Upper Tribunal

8. The appellants appeal on four grounds. First, that the judge erred in law in failing to take into account material evidence and/or failed to provide adequate reasons for finding that the sponsor could visit the appellants in Somalia**.** Second, that the judge failed to take into account the evidence relating to the "value" of the employment undertaken by the appellants to the community, and failed to consider various concessions applicable to NHS migrant workers in the United Kingdom. Third, that the judge failed to consider the appellants claim that they should not be penalised for securing employment and establishing their independence. Finally, the judge erred in failing to consider a material issue, namely, that the appellants had lawful leave since their arrival in the United Kingdom.

9. Permission to appeal was granted on renewed application by Upper Tribunal Judge O'Callaghan on 16 January 2023 on all grounds (albeit he questioned the merits of Grounds two and three). In his grant of permission Judge O'Callaghan observed *inter alia* that the grounds of application failed to engage with the substance of the concessions referred to therein, and directed the appellants to file and serve the applicable concessions. The appellants complied with that Direction.

10. On 17 February 2023 the respondent filed a Rule 24 response opposing the appeal on the basis that the Decision was adequately reasoned and legally sound.

11. At the hearing the representatives made their respective submissions, Ms Kiai amplified her grounds of appeal on behalf of the appellants and

Ms Isherwood made submissions opposing the appeal. The representatives submissions are reflected where necessary in my conclusions below.

Discussion

12. I first turn to the Decision itself. It is on the whole well-structured with a clear self- direction on the law at [9]-[17], a concise and accurate summary of the facts at [19]-[26] (agreed by Ms Kiai) and with clear findings being made from [27]-[48] as to the appellants' circumstances and immigration history in the United Kingdom, to which the law is applied at [27]-[28], [34]-[36] and [38], in accordance with the five-step approach in *Razgar v Secretary of State for the Home Department [2004] UKHL 27*, to the issues raised in the appeal, namely: (i) whether there would be very significant obstacles to the appellants' reintegration to Somalia, such that they would satisfy paragraph 276ADE(1)(vi) of the Immigration Rules; and (ii) whether there are exceptional circumstances such that refusing the appellants leave to remain would amount to a disproportionate interference of their rights under Article 8 ECHR.

13. In summarising the facts the judge noted *inter alia* as follows:

> "22. Upon arrival in the UK, the appellants lived with the sponsor at his home in Birmingham. They started to do casual work approximately 7 to 8 months after coming to the UK, but gained permanent employment in 2017.
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> 23. A1 and A2 [the appellants] currently work as Patient Support Assistants at University College Hospital, London. Their respective gross salaries are, with effect from 1 April 2021 £23,810 per annum. Both appellants were classed as key workers throughout the COVID-19 pandemic. They worked for the NHS throughout that period. They have never claimed any benefits from the state.
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> 24. The sponsor agreed that the appellants could move to London so as to gain employment. This was on the condition that the appellants lived with one another.
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> 25. The appellants' position is that the sponsor continues to have responsibility of their affairs, as they remain his responsibility in the UK, notwithstanding the fact that they no longer live with him and are in full-time employment.
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> 26. The appellants had been away from Somalia since 2013, as they were residing in Ethiopia from 2013 to 2015, before coming to the UK. They have established lives in the UK. They fear that their lives will be destroyed if they return to Somalia."

14. The judge then considered the issues in light of the above facts taking into account the submissions of the parties. The case for the appellants in respect of the first issue - whether there would be very significant obstacles to the appellants' reintegration to Somalia – was stated as follows:

> "30. Miss Jones submits that there would be very significant obstacles to the appellants returning to Somalia. They would have no relatives to return to. She relied on the respondent's policy on 'Family reunion for refugees and those with humanitarian protection' which stated, at p.33, which considered the position in respect of children over the age of 18 who were not living an independent life. The guidance requires the decision maker to consider granting leave to enter outside of the Immigration Rules, where an appellant would be left in a conflict zone or dangerous situation; where they have no relatives they could live with or turn to for support in their own country; and are not leading an independent life. Applying those factors to these appellants, she submits that if the appellants were returned, they would be in a conflict zone, without assistance from family members, and as such, there would be very significant obstacles to their reintegration."

15. The judge gave these submissions short shrift at [31]-[32]. Whilst the judge acknowledged that the appellants would face some hurdles on return, she observed that their lives were very different to their lives before coming to the United Kingdom. The judge noted that the appellants would be returned to Mogadishu and could support each other, and found that they could utilise their life experiences of living independently and gainful employment on return to Somalia, where they were familiar with the culture and language having lived in that country for a period of seventeen years. The judge observed that no evidence was relied upon by the appellants that would indicate their lives would be in danger in Somalia, and she rejected the sponsor's evidence that he would be unable to support them financially on return through a period of readjustment. Accordingly, the judge concluded that the appellants would not face very significant obstacles in reintegrating on return.

16. It is appreciably clear that these findings were entirely open to the judge on the evidence. The appellants do not challenge them.

17. The judge then turned to consider the second issue namely, the appellants claim on Article 8 ECHR grounds. Unlike her approach on the first issue, the judge did not summarise the oral submissions made by the representatives hereunder. The judge found that the appellants did not have a family life with the sponsor essentially because they were financially independent and were living independent lives. She did accept however that the appellants had established private lives in the United Kingdom at [33] and [37]. The judge answered the second, third and fourth questions posed in *Razgar* affirmatively, and the matter boiled down to the question of proportionality.

18. The judge concluded that the respondent's decision was proportionate – her operative reasoning is as follows:

> "40. The appellants does (sic) not meet the requirements of the Immigration Rules. I attach significant weight to this in the balancing exercise.
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> 41. As confirmed by s.117(B) of the 2002 Act, the maintenance of effective immigration control is considered to be in the public interest. I afford this significant weight.

> 42. Section 117B(5) of the 2002 Act requires me to afford little weight to a private life that is established when a person's immigration status is precarious. As such, I afford little weight to the private life of the appellants between 2015 and the date of hearing.
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> …
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> 43. For the purposes of sub-sections (2) and (3) of the 2002 Act, the appellants speak English. There is no evidence of financial dependence on the state. However, these matters do not positively weigh in favour of the appellants in any event, these factors being neutral when met.
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> 44. The removal of the appellants from the UK would result in them no longer visiting the sponsor on a regular basis. Undoubtedly this is likely to affect the closeness of that relationship. That being said, I find that the relationship could be maintained, by telephone/video calls, and the sponsor visiting the appellants in Somalia. As such, I attach some limited weight to this.
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> 45. The appellants both work for the NHS and were key workers during the Covid-19 pandemic. I have no doubt that they worked hard under difficult circumstances during this period. The removal from the UK would result in them losing that employment (sic). They will no longer contribute to the UK economy. I attach some limited weight to this. However, I find that they would be able to use the skills obtained in order to gain employment on return to Somalia.
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> 46. Further, I find that the appellants are no longer financially dependent on the sponsor. They live independently from him, in a different city. This is clearly a marked change from their position when they first arrived in the UK in 2015.
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> …
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> 47. I find, having weighed the factors for and again (sic), that the strong public interest in the removal of the appellants carries significant weight. Adopting the balance sheet approach, I find that the public interest outweighs the factors in favour of private life."

19. The substance of the appellants challenge criticises the judge's consideration above of their Article 8 ECHR claim. Whilst Ms Kiai said everything that she could say on behalf of the appellants, I am not persuaded the judge materially erred in law in dismissing the appellants appeal on human rights grounds.

20. There is a degree of overlap between the four grounds of challenge in respect of the asserted errors. The central complaint across all four grounds is the contention that the judge failed to take into account material considerations in her assessment of proportionality. I shall deal with the grounds in turn.

21. Ground one avers that the judge failed to consider material evidence or gave legally inadequate reasons for finding that the sponsor could visit the appellants in Somalia. There is no dispute that the sponsor is a refugee from Somalia and that the appellants were granted entry clearance to join him in the United Kingdom for the reasons I summarised at [3]. Whilst the judge was aware that the appellants entered as dependents of the sponsor (at [1] & [19]), she did not have

the benefit of the decision of the First-tier Tribunal, but nothing is said to turn on this. The judge stated that she had considered the evidence and submissions, and whilst the Decision reflects overall that she did so, I accept the judge appears to have overlooked the sponsor's written testimony that he is a recognised refugee and, in consequence, she fell into error in finding at [44] that the sponsor could visit the appellants in Somalia.

22. I am not persuaded however, as Ms Kiai submits, that had the judge factored the sponsor's refugee status into her assessment of proportionality that "she may have given it more weight and found that this tipped the balance in favour of allowing the appellants' appeals…". That submission in my view goes too far. The Decision has to be read holistically. The judge found that the relationship could be maintained by telephone/videos calls and the sponsor visiting, and gave some limited weight to this, but by no means treated her mistaken belief that the sponsor could travel to Somalia to visit the appellants as a decisive factor. The judge considered these factors alongside many other factors on both sides of the balance sheet, and as Ms Isherwood rightly pointed out, this should be viewed within the context of the unchallenged findings of the judge that there was no family life between the appellants and the sponsor. Bearing that in mind, it is difficult to see had the judge not made the error, how it would have strengthened the appellants' private lives such that it would have tipped the scales in their favour. I am satisfied that the error is not material. I find that Ground one is not made out.

23. Ground two avers that the judge failed to take into account the "value" of the appellants' contribution as key workers to the community and the loss to the community of that "value", and further failed to engage with the submission that "there were various concessions for NHS immigrant workers… and it was unclear why the SSHD had taken a different approach to these Appellants". In support Ms Kiai prayed in aid the principles in *UE (Nigeria) and Others v SSHD* [2010] EWCA Civ 975. Ms Kiai reiterated these points in her oral submissions from which two matters emerged following enquiries from the Tribunal.

24. The first is that it cannot be discerned from the Decision whether arguments under the umbrella of *UE* were advanced before the judge. Ms Kiai was not in a position to assist as she did not represent the appellants before the First-tier Tribunal. Ms Kiai referred to extracts from the witness statements of the appellants and sponsor, and to the appellants skeleton argument before the First-tier Tribunal, which she submitted raised the issue. Whilst the written testimony and skeleton argument refer to the appellants working hard during the pandemic in difficult circumstances, and reference is made to "many concessions for NHS staff of foreign origins…", and the need for key workers (see: §§ 14 to 17 of the appellants' witness statements), there is no explicit reference and nor can it reasonably be inferred that the judge was being invited to specifically consider this issue. The second point is that

Ms Kiai accepts that the concessions, which have been adduced subsequent to the grant of permission, do not apply to the appellants. Ground two therefore should be considered with that context in mind.

25. First, the appellants' witness statements and skeleton argument were in the hearing bundles before the judge. The judge stated that she had taken the evidence contained therein into account in addition to the oral evidence and submissions at [8]. The hearing bundles in respect of both appellants do not exhibit the concessions. It is not clear what the judge was to make of the appellants contention that the respondent had treated them differently to other key workers when, as appears to be the case, the concessions were not adduced before her. Ms Kiai submits that the judge ought to have considered the "principle" that there are concessions for NHS key workers, but I fail to understand how the judge fell into error, let alone a material one, when the concession evidence was not before her, and when it is accepted that the concessions do not in any event apply to the appellants.

26. Second, the judge was clearly aware of the appellants position as key workers. She referred to their employment at [23], [31] and [37] and considered it at [45]. The judge took into account the appellants worked hard during the pandemic in difficult circumstances, that they stood to lose their employment and would no longer contribute to the UK economy. Here, in my view, the judge was being mindful of the appellants written testimony regarding their employment and the importance they attached to it.

27. Ms Kiai submits that the judge was required to consider the "value" of that employment to the community and its loss thereto. I am not satisfied that that argument was properly raised before the judge who bears no burden to identify, unless obvious, all potential issues that may arise in favour of a party. In the circumstances, I do not consider that the judge can be fairly criticised for not considering what is a discreet point that was not firmly placed before her.

28. Nonetheless, taking Ground two at its highest, *t*he Court of Appeal made clear in *UE* that whilst the loss of public benefit to the community is a factor to be placed into the balance, cases of this kind are of course very fact-sensitive and, in practice, it will be unusual for the loss of benefit to the community to tip the scales in an applicant's favour. So, even if the judge fell into error by her failure to apply *UE*, it would not in my view have made a material difference to the outcome. The judge had due regard to the appellants' employment, and gave adequate reasons why the public interest did not outweigh it. In my judgement Ground two is a quarrel with the judge's findings and fails to establish that she committed a material error of law. I find there is no merit in this ground.

29. I reach a similar conclusion in respect of Ground three. The substance of this ground is essentially that the judge failed to consider the

appellants' submission that they could not be expected to maintain the status quo and remain dependent on the sponsor and should not, in turn, be penalised for gaining valuable employment, contributing to the community and economy through payment of taxes. At §13 of the grounds of appeal Ms Kiai contends that penalising the appellants in this way "was disproportionate (and irrational)". I understand that criticism is being levelled at the respondent's consideration of the appellants' claim rather than a complaint against the judge's approach. Ms Kiai's brief oral submission under this head of challenge was to the effect that the judge failed to take into account a material submission.

30. Firstly, the judge is the ultimate arbiter of questions of fact, and also the ultimate arbiter on the question of proportionality in Article 8 cases. Whilst I acknowledge that the judge did not expressly refer to this submission in the Decision, at [8] she stated that she had considered the evidence and submissions. I have no reason to believe that the judge was not mindful of the appellants' case in this regard in her deliberations. As the ultimate arbiter the judge is not required to deal with each and every aspect of a parties case in a piecemeal manner. The judge was plainly aware of the appellants circumstances and was required to consider them at the date of hearing. The judge's conclusion that the appellants' lives were very different to that when they arrived in the UK, was open to her on the evidence and was a legitimate factor that was relevant to the proportionality assessment.

31. Secondly, even if the judge had given express consideration to this submission in her Decision, again, it is difficult to see how this could have strengthened the weight attached to the appellants' private lives in the United Kingdom, or materially affected the outcome of the appeal. Any such assessment could not on the evidence have legitimately led to a conclusion, even taking into account all of the other factors, that there would be unjustifiably harsh consequences on either the appellants or any of the other persons in the United Kingdom with whom they have ties. I find there is no material error of law in respect of Ground three.

32. Ground 4 contends that the judge did not have regard to the appellants' immigration history and to the fact they had lawful leave since their arrival in the United Kingdom in her application of s.117B of the NIAA 2002. I do not agree. The judge was plainly aware of the appellants' immigration history. She referred to their lawful entry at [19] and their subsequent grant of further leave to remain in the United Kingdom at [21]. The judge applied s. 117B at [41], [42] and [43]. The judge applied the 'little weight' provision relating to private life established when a person's immigration status is precarious at [42].

33. The Upper Tribunal held in *AM (S 117B) Malawi* [2015] UKUT 0260 (IAC):

> "23. We are satisfied that those who at any given date held a precarious immigration status must have held at that date an otherwise lawful grant of leave to enter or to remain"; and

> ...
>
> 27. In our judgement all those who have been granted by the Respondent a defined period of leave to enter the UK, or, to remain in the UK (which includes both those with a period of limited leave to remain, and those with a period of discretionary leave to remain), hold during the currency of that leave, an immigration status that is lawful, albeit "precarious".

34. Thus, in rightly recognising the precariousness of the appellants' statuses 'between 2015 and the date of hearing', the judge in my view was factoring into her consideration that their presence in the United Kingdom had been lawful throughout. I recognise that the little weight provision of s.117B(5) involves a spectrum that will result in the measurement of the quantum of weight considered appropriate in the context of every case (see: *Kaur (children's best interests/public interest interface)* [2017] UKUT 14 (IAC), which the judge did not expressly give lip service to in the Decision, but is it difficult to see how any flexibility in the 'little weight' provision relating to private life would have made any material difference to the outcome of the appeal. The judge in her assessment and having noted the statutory requirement as to little weight, proceeded to consider whether there were particularly strong features to the appellants' private lives in this country at [43]-[46] and concluded that there were not. Whilst the judge could have expanded upon her reasoning, it is adequate, and it was open to her to consider the circumstances as a whole and to assess where she considered a fair balance was struck on the facts of this case.

Conclusion

35. For the above reasons, I am not satisfied that the appellants have established that the judge materially erred in law. It is understandable why the appellants feel aggrieved by the Decision given the basis upon which they were granted entry to the United Kingdom, and another judge may well have come to a different decision, but it is not arguable that this judge's conclusion was outside a range of reasonable responses to the evidence. Consequently the appellants have not established that the Decision involved the making of an error on a point of law, therefore the Decision shall stand.

Notice of Decision

36. The decision of the First-tier Tribunal does not involve the making of an error on a point of law. The decision of the First-tier Tribunal shall stand.

R.Bagral

Deputy Judge of the Upper Tribunal