



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

Case No: UI-2023-005607

First-tier Tribunal No: HU/56569/2021

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**

**On 27<sup>th</sup> of June 2024**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE GRIMES**

**Between**

**Secretary of State for the Home Department**

Appellant

**and**

**ABDULRIZAQ ALI ABDI**

Respondent

**Representation:**

For the Appellant: Mr F Habtemariam, IAS

For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

**Heard at Field House on 11 June 2024**

**DECISION AND REASONS**

Introduction

1. Although this is an appeal by the respondent, I refer to the parties as they were in the First-tier Tribunal.
2. On 20 August 2023 First-tier Tribunal Judge Elliott granted the respondent permission to appeal against the decision of First-tier Tribunal Judge Prudham promulgated on 6 April 2023.

Factual Background

3. The appellant, aged 33, is a national of Somalia. He arrived in the UK in 2003 and was granted indefinite leave to remain on 2 October 2009. The appellant was convicted of attempted robbery on 23 October 2010 and was sentenced to 12 months imprisonment suspended for 24 months. On 8 February 2012 he was convicted of resisting or obstructing a constable and committing a further offence

during a suspended sentence. On 2 May 2012 he was convicted of two counts of possession of class A drugs with intent to supply and was sentenced to 40 months detention in a Young Offenders Institute. On 3 June 2014 the respondent made a Deportation Order against the appellant. On 14 November 2014, a First-tier Tribunal Judge dismissed the appellant's appeal against the deportation decision (the 2014 First-tier Tribunal decision). The appellant made further submissions on 27 December 2019 which were refused by the respondent on 9 October 2021. The appellant appealed against that decision.

4. In summary, the further submissions were based on the appellant's marriage to a British citizen and the birth of their two children in 2017 and 2018, both of whom are British citizens.

#### The decision of the First-tier Tribunal

5. The First-tier Tribunal Judge allowed the appellant's appeal finding that it would be unduly harsh for the appellant to be returned to Somalia leaving his wife and children in the UK (the 'stay' scenario) and that it would be unduly harsh for the appellant's wife and children to return to Somalia with the appellant (the 'go' scenario). The judge also found that there are compelling circumstances over and above those described in Exceptions 1 and 2 which outweigh the public interest in deportation.
6. The judge made the following findings -
  - a. The appellant is now married to a British citizen, she was born in Somalia but left there when she was a baby and her family all now live in the UK. The appellant and his wife married on 10 April 2017, she was aware of his offending from the outset of their relationship. Together they have two children, born in 2017 and 2018. The domestic arrangement is that the appellant is responsible for the childcare and his spouse works. The appellant has a close and loving relationship with his family. He is a "hands on" father who assumes parental duties when his wife is at work.
  - b. The appellant and his spouse have an extended family close by who may be able to offer some limited financial support and limited support with looking after the children.
  - c. The appellant is now in a stable family setting and has stable living arrangements. He has not re-offended since his last conviction in 2012. The appellant has rehabilitated himself, he now carries out voluntary work in his local community.
  - d. The appellant last lived in Somalia in 2003 when he was 11 years old and his family now live in the UK and he has no family ties in Somalia. Over time his social and cultural ties with Somalia have diminished, whilst those with the UK have grown. He has not for many years associated with Somalian gangs.
  - e. If the appellant is removed his wife and children will be emotionally and psychologically affected.
  - f. The removal of the appellant would also have a knock on effect upon his wife's ability to work. At present she is able to work because he undertakes the childcare. If the appellant is removed his wife would be left to cope with looking after their children alone and would more than likely give up her employment and become reliant upon state benefits.

The wider family living nearby have their own families to care for and so the assistance they can offer is limited.

- g. The appellant's removal would result in long term separation from his wife and children.
- h. Although she was born in Somalia, the appellant's wife has resided in the UK from a very young age and has no real connection with the country. She has little or no knowledge of Somalia and is unable to speak the language and has no family remaining in the country. The appellant's children are both British citizens currently aged 5 and 4 and have commenced early years education in the UK. Their removal would not only result in a disruption to their early years education but would also separate them from their extended family. The judge noted the Country Policy and Information Note, Somalia Background Note December 2020 (paragraph 11.1.3) which states that early childhood education is a neglected sector across the education systems in Somalia.
- i. The best interests of the appellant's children are met by remaining with both parents in the UK. They are both British citizens who were born and raised in the UK. Both children have begun their education in the UK and have no wider family or support in Somalia.
- j. Over 10 years have elapsed since the appellant's convictions. When he was convicted he was still young and immature. Since his convictions he has rehabilitated. He is now a married man with two young children. He volunteers in his local community and appears to be generally engaged with the wider community where he lives.

### The grounds of appeal

7. It is contended for the Secretary of State in ground one that the judge erred in his approach to the unduly harsh test in that the case law recognises that the unduly harsh test involves an appropriately elevated standard and the judge did not adequately reason the impact on the appellant's partner or children in either the 'go' or 'stay' scenario. It is further contended that the judge failed to refer to any supporting evidence to illustrate the extent of the disruption on the family resulting from the appellant's criminal offence. It is contended that the challenges faced in relocating as a family unit (in the 'go' scenario) are not so significantly difficult that they cannot be overcome or that the children, who are both still young, cannot adapt to a new environment with their parents. In terms of the 'stay' scenario, it is contended that the judge failed to consider that the children would be cared for by their mother and would likely have the support around them of family members living in the UK. It is further contended that it is neither exceptional nor uncommon a circumstance for a single parent to care for the family and rely on independent childcare so that they can work.
8. In ground two it is contended that the judge erred in assessing whether there are compelling circumstances in this case. It is contended that the judge erred in failing to consider that the appellant has had no lawful basis to reside in the UK since November 2014. It is further contended that the judge erred in finding that the delay in the appellant lodging submissions and the delay in response by the Secretary of State diminish the weight to be attached to the public interest. It was noted that the appellant did not leave the UK after becoming appeal rights exhausted in 2014, instead remaining and establishing a family life in the knowledge that he had no lawful right to do so. Reference is made to the decision

in RLP (BAH revisited – expeditious justice) Jamaica [2017] UKUT 00330 (IAC) where the tribunal held that, in cases where the public interest in deportation is potent and pressing, even egregious and unjustified delay on the part of the Secretary of State in the underlying decision-making process is unlikely to tip the balance in the immigrant’s favour in the proportionality exercise under Article 8, and that the respondent was entitled to proceed on the basis that the appellant, who was unlawfully in the UK, would leave of his own accord.

9. Permission to appeal was granted on the basis sought.

#### Rule 24 response

10. The appellant filed a Rule 24 response in which it is contended that there is no material error of law in the First Tier Tribunal Judge's decision. It is submitted that the SSHD's application for permission amounts to no more than a disagreement with the judge’s conclusions. It is contended that the judge correctly applied the Devaseelan principles. It is contended that the judge correctly directed himself as to the meaning of “unduly harsh” and recognised that it sets a high threshold, above what is merely uncomfortable, inconvenient or difficult. It is contended that it is plain from the reasons set out at paragraph 33 of the judge’s decision that the impact on the appellant’s partner and children were adequately reasoned. It is contended that the respondent cannot reasonably complain that he does not know why the appeal was dismissed and that the objections amount to a disagreement with the conclusions.
11. It is contended that ground two is misconceived as the judge properly set out the relevant case law, directing himself as to the meaning of “compelling circumstances” and set out all the factors he took into account before reaching his decision.

#### The error of law hearing

12. I heard detailed submissions from both representatives. At the end of the hearing, I reserved my determination.

#### Decision on error of law

13. Although not raised in the grounds, Mr Clarke highlighted that at paragraph 27 the judge set out the wrong approach to the statutory provisions. However he accepted that, although the judge set out the wrong approach, he did go on to consider the appeal in substance in accordance with the statutory scheme. Mr Habtemariam too accepted that the judge set out the wrong approach at paragraph 27 but accepted that in substance he approached the application of the statutory test correctly.
14. At paragraph 27 the judge found that the appellant was unable to rely on Exception 2 because the children had not lived in the UK for seven years immediately before the immigration decision and the appellant’s relationship with his wife was formed when he was in the UK unlawfully and his immigration status was precarious. However, section 117D defines a ‘qualifying child’ as a person who is under the age of 18 and is *either* a British citizen *or* has lived in the UK for a continuous period of seven years or more. It is not in dispute that the appellant’s children are British citizens. It is not in dispute that the appellant has a genuine and subsisting relationship with his wife. A ‘qualifying partner’ is defined as a British citizen or a person who settled in the UK, it is not in dispute

that the appellant's wife is a British citizen. Accordingly, Exception 2 applies if the effect of the appellant's deportation on the partner or children would be 'unduly harsh' in accordance with section 117D (5).

15. However, as accepted by both representatives, this is not a material error on the judge's part as he in fact went on to consider whether the effect of the appellant's deportation on his wife and children would be unduly harsh and then to consider whether there are very compelling circumstances over and above Exceptions 1 and 2.

#### *Ground one*

16. Although the judge erred in his approach to Exception 2 in paragraph 27, as set out above, this was not a material error as he did in fact consider the substance of section 117C in his analysis of Article 8. At the hearing Mr Clarke submitted that ground one amounts to a perversity challenge.

17. I bear in mind what was held in Sicwebu v SSHD [2023] EWWCA Civ 530 at [27] - [29];

27. In *HA (Iraq)* the Supreme Court gave authoritative guidance on the approach to the question posed by section 117C(5) 2002 Act. In summary, first, when considering whether the effect of deportation would be unduly harsh, the decision-maker should adopt the following self-direction, namely, that the concept:

"'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher."

When applying this self-direction, decision makers should recognise that it involves an appropriately elevated standard and make an evaluative judgement of the effect of deportation on the qualifying child and/or partner in order to judge whether the elevated standard has been met on the facts and circumstances of the individual case being addressed: see paragraphs 41 and 44.

28. Secondly, the seriousness of the parent's offending is not a factor to be weighed in the balance when assessing the interests of the child in applying the unduly harsh test. The child is not to be held responsible for the conduct of the parent.
29. Thirdly, there is no "notional comparator" which provides the baseline against which undue harshness is to be evaluated. In this regard, the Supreme Court affirmed the approach explained by Underhill VP in this court ([2020] EWCA Civ 1176) as follows:

"56...if tribunals treat the essential question as being "is this level of harshness out of the ordinary?" they may be tempted to find that Exception 2 does not apply simply on the basis that the situation fits into some commonly-encountered pattern. That would be dangerous. How a child will be affected by a parent's deportation will depend on an almost infinitely variable range of circumstances and it is not possible to identify a baseline of "ordinariness". Simply by way of example, the degree of harshness of the impact may be affected by the child's age; by whether the parent lives with them (NB that a divorced or separated father may still have a genuine and subsisting relationship with a child who lives with the mother); by the degree of the child's emotional dependence on

the parent; by the financial consequences of his deportation; by the availability of emotional and financial support from a remaining parent and other family members; by the practicability of maintaining a relationship with the deported parent; and of course by all the individual characteristics of the child."

18. As accepted by Mr Clarke, the judge properly identified at paragraph 32 that 'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult and that it poses a considerably more elevated threshold. The judge was therefore made the appropriate self-direction and was clearly aware of the test and that the threshold is a high one.
19. The judge noted that respondent accepts that the appellant has a genuine and subsisting relationship with his wife and children. As set out above, the judge accepted that the appellant has a close and loving relationship with his family and is a hands-on father assuming parental duties when his wife is at work. The judge accepted that if the appellant is removed his wife and children will be emotionally and psychologically affected; that his wife will no longer have childcare and would be likely to give up employment and become reliant on state benefits . Although his wife has wider family close by, the judge accepted that the assistance they can offer is limited. The judge accepted that the appellant's removal would have a significant impact on his wife and children and would result in long term separation and concluded that it would be unduly harsh if the appellant returned to Somalia leaving his family in the UK.
20. The judge went on to consider the 'go' scenario noting that the appellant's wife was born in Somalia but has lived in the UK from a very young age, has no connections with the country and is unable to speak the language. The children are both British citizens and had commenced early years education in the UK. The judge noted that early childhood education is a neglected sector in Somalia and that, if the children went to Somalia, they will be separated from the wider family in the UK. The judge found that it would be unduly harsh for the appellant's wife and children to travel to Somalia with him.
21. In my view the judge made findings open to him on the evidence. The judge then made an assessment, based on the facts found, as to the effect of deportation on the appellant's partner and children. It was open to the judge, having made the appropriate self-direction, and considering all of the evidence before him, to conclude that the impact of his deportation on the appellant's wife and children would be unduly harsh.
22. I reject the respondent's submission that he does not know the reasons for the decision. The reasons are adequately clear. In my view the respondent has not established that the judge's findings were irrational or perverse. They were open to him on the evidence.
23. Looking at the facts found and the decision as a whole, I consider that the reasons given by the judge in this case were adequate in explaining how he concluded that, viewed cumulatively, the effect on the children and wife of going to Somalia with the appellant or staying in the UK without the appellant would be unduly harsh.

*Ground two*

24. It is contended that the judge erred in his consideration as to whether there are very compelling circumstances over and above Exceptions 1 and 2. As I have found the decision in relation to Exception 2 is sustainable, any error in the assessment of 'very compelling circumstances' would not be material given that there was no requirement to undertake such an assessment. However, for the purposes of completeness, I have considered this ground.
25. The judge found that the best interests of the children are to remain in the UK with both parents. He took into account that the appellant has not committed any further offences in over 10 years and has effectively rehabilitated. He noted that the appellant volunteers in his local community and is generally engaged with the wider community where he lives. The judge further took into account the delays in the case noting that the deportation order was made on 3 June 2014, the appellant became appeal rights exhausted on 26 November 2014 and his further submissions were made over five years later (on 27 December 2019) and these were refused almost two years later on 9 October 2021. The judge concluded that the delays diminish the weight he attached to the public interest in deportation. The judge concluded that there are compelling circumstances which outweigh the public interest in deportation.
26. Mr Clarke submitted that the judge failed to consider that the appellant has had no basis of stay in the UK since 2014. However this was specifically taken into account at paragraph 27.
27. Mr Clarke submitted that the judge was silent on the statutory requirements of section 117B. However, as Mr Habtemariam pointed out, this issue was not raised in the grounds, In any event, although not considered explicitly, it is clear, reading the decision as a whole, in particular paragraph 27, that the judge had in mind the factors in section 117B adverse to the appellant.
28. Mr Clarke further submitted that the judge erred in his approach to delay, submitting that the Deportation Order (at page 283 of the stitched bundle) stated that the appellant was required to leave the UK and it was not therefore incumbent on the Secretary of State to deport him. He further submitted that the judge failed to have regard to the decision in EB (Kosovo) v SSHD [2008] UKHL 41 in considering the issue of delay. He highlighted that the delay between 2014 and 2019 was the appellant's fault, not that of the respondent. He accepted that there was a delay of 1 year and 10 months before the Secretary of State made the decision in 2021, but submitted that this was not enough to justify the weight attached to the delay. On the other hand, Mr Habtemariam submitted that delay was just one factor the judge took into account and that he was simply looking at the timeframe.
29. In EB (Kosovo) Lord Bingham said "*delay may be relevant in reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control, if the delay is shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes.*" [16]. He went on to cite paragraph 25 of the decision in Akaeke v Secretary of State for the Home Department [2005] EWCA Civ 947 which states that, once it is accepted that unreasonable delay on the part of the Secretary of State is capable of being a relevant factor, then the weight to be given to it in the particular case was a matter for the tribunal.
30. In this case the judge took into account the timeframe in the appellant's case going on to say that these delays diminish the weight he can attach to the public

interest in deportation [38]. In my view it is clear that the judge took into account the delays on all sides as being relevant to his proportionality assessment including the delay on the part of the Secretary of State. The weight to be attached to the delays was a matter for the judge and disclose no error of law.

31. The judge reached findings open to him on the evidence and made no error in his approach to the assessment of whether there were very compelling circumstances.

**Notice of Decision**

32. The decision of First-tier Tribunal Judge did not involve the making of an error of law and I uphold it.

A Grimes  
Deputy Judge of the Upper Tribunal  
Immigration and Asylum Chamber

**20 June 2024**