



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos.: UI-2024-000166

First-tier Tribunal Nos:
RP/00131/2018

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 23rd of April 2024

Before

UPPER TRIBUNAL JUDGE SMITH
DEPUTY UPPER TRIBUNAL JUDGE LEWIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

ISMAIL MOHAMOUD ALI

Respondent

Representation:

For the Appellant: Mr N Wain, Senior Home Office Presenting Officer

For the Respondent: Mr D Sellwood, Counsel instructed by Wilson solicitors LLP

Heard at Field House on Friday 5 April 2024

DECISION AND REASONS

BACKGROUND

1. This is an appeal by the Secretary of State. For ease of reference, we refer to the parties as they were before the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge Brannan promulgated on 5 December 2023 (“the Decision”) allowing, on human rights grounds, but dismissing on asylum grounds the Appellant’s appeal against the Respondent’s decision dated 28 August 2018 refusing his human rights claims and revoking his protection status as a recognised refugee.

2. There is little dispute as to the facts and immigration history which can be shortly stated. The Appellant was born in Somalia in 1983. He came to the UK aged fifteen in 1998 and claimed asylum. He was recognised as a refugee in 2001 and granted indefinite leave to remain. The Appellant says that he has no family, friends or clan contacts in Somalia. His immediate family are in the UK. He is a member of the Reer Hamar clan.
3. The Appellant was convicted on two counts of possession/control of an identity document with intent and five counts of dishonestly making a false representation. The offences were ones of benefit fraud. The Appellant was sentenced in 2017 to terms of three months and twenty-seven months to run consecutively therefore totalling a term of two and a half years.
4. The Respondent thereafter took revocation/deportation action culminating in the decision here under appeal.
5. Although Judge Brannan allowed the Appellant's appeal on Article 3 (and Article 8) grounds based on a risk of destitution and suicide on return, he expressly rejected the Appellant's Article 3 medical claim. In his Rule 24 reply, the Appellant points out that he is unable to appeal that finding as things stand because he has won on Article 3 grounds but makes clear that he intends to pursue that claim in the event that an error of law is found in the Decision and the Decision is set aside.
6. As we come to below, we have concluded that there is no error of law in the Decision and accordingly we need say no more about this matter. Obviously, the Respondent does not take issue with the Judge's conclusion on the Article 3 medical claim having won on that aspect. There is no challenge to the dismissal of the appeal on asylum grounds.
7. Aside the dismissal of the medical claim on Article 3 grounds, Judge Brannan reached the following conclusions:
 - (1)The Judge found that the Appellant is not a danger to the community within the meaning of section 72 Nationality, Immigration and Asylum Act 2002 ("Section 72"). He was not therefore to be excluded from refugee status for that reason.
 - (2)Nevertheless, there has been a significant and non-temporary change in the situation in Somalia so that the Appellant is no longer at a real risk of persecution. His refugee status could therefore lawfully be revoked.
 - (3)However, in reaching that conclusion, Judge Brannan considered it appropriate to depart from country guidance in relation to whether there is discrimination in Somalia based on clan membership. The country guidance relevant to this case is OA (Somalia) CG [2022] UKUT 00033 (IAC) ("OA") and MOJ & Ors (Return to Mogadishu) Somalia CG [2014] UKUT 00442 (IAC) ("MOJ").
 - (4)Although Judge Brannan considered that the Appellant could not be excluded from refugee status under Section 72 (see above), he

concluded that the Appellant could be excluded from humanitarian protection based on the seriousness of his crime.

(5) However, having considered the general situation in Somalia based on the country guidance and the Appellant's own circumstances, in particular the suicide risk arising from the Appellant's fear of return to Mogadishu, Judge Brannan concluded that the Appellant would face a real risk of destitution and therefore that return would breach Article 3 ECHR for that reason.

(6) The Judge went on to consider the Appellant's case also under Article 8 ECHR. Looking at the exceptions under section 117C Nationality, Immigration and Asylum Act 2002, the Judge found that the Appellant had lived in the UK lawfully for more than half his life and was socially and culturally integrated (which was conceded by the Respondent). In relation to very significant obstacles to integration, due to the real risk of destitution and discrimination from other clans, Judge Brannan accepted that such obstacles would exist on return and therefore allowed the appeal under the exception relating to the Appellant's private life. Deportation would therefore be disproportionate.

8. The Respondent appeals the Decision on five grounds as follows:

Ground 1: the Judge failed to take into account a pending prosecution and/or failed to give adequate reasons for finding that Section 72 should not apply.

Ground 2: the Judge has failed to explain why and how he has accepted the evidence of the Appellant's witnesses about the situation on return having regard to what is said in OA.

Ground 3: the Judge has failed to give adequate reasons for his conclusion that the Appellant would not be able to find work on return.

Ground 4: the Judge has failed to take into account what is said in OA and the Appellant's clan membership when reaching the conclusion that the Appellant would risk destitution and suicide on return. The Judge should not therefore have allowed the appeal on Article 3 grounds.

Ground 5: for the same reasons the Judge has erred in concluding that there are very significant obstacles to integration on return and that the appeal should be allowed on that basis.

9. Permission to appeal was granted by First-tier Tribunal Judge Saffer on 24 December 2023 in the following terms:

"Regarding ground 1, it is arguable that the Judge has materially erred in the assessment of the ongoing risk to the public having accepted the Appellant spends £50 per week on alcohol, and in not factoring in to the assessment his current criminal proceedings.

Regarding ground 2,3 and 4 it is arguable that the Judge has materially erred in the assessment of the difficulties the Appellant will have on return given the family network apparently available to support him.

Ground 5 follows from grounds 1-4 and appears to add little, but I do not limit the grant to exclude that."

10. The Appellant filed a detailed Rule 24 Reply addressing the grounds dated 12 February 2024.
11. The matter comes before us to determine whether the Decision contains an error of law. If we conclude that it does, we must then consider whether to set aside the Decision. If we set aside the Decision, we must then either re-make the decision or remit the appeal to the First-tier Tribunal to do so.
12. We had before us a bundle running to 1230 pages. Although Mr Sellwood and those instructing him had apparently not seen that bundle or had access to it, Mr Sellwood was able to refer to documents in that bundle which we were then able to find and was not therefore prejudiced by the lack of the paginated bundle.
13. Although we reserved our decision at the end of the hearing, as we note above, we have concluded that the Decision does not contain an error of law and should therefore be upheld. We set out our reasons below, taking the grounds in order.

DISCUSSION

Ground 1: Section 72

14. Judge Brannan dealt with this issue at [18] to [20] of the Decision as follows:

“18. I begin by looking at whether the Appellant has rebutted the presumption that he is a danger to the community under section 72 of the NIAA. Mr Ojo maintained the Respondent’s position that the Appellant has not rebutted that presumption but did not seek to pursue the argument with much vigour. Mr Sellwood submitted that the fact that the Appellant had only one conviction, albeit for offences which took place over a number of years, has had no subsequent convictions, and has been assessed by Dr Boucher as a low risk of reoffending, meant that the Appellant had rebutted the presumption that he is a danger to the community.

19. I agree with Mr Sellwood. My greatest concern about the danger the Appellant poses to the community stems not from a risk of criminality but from his consumption of alcohol, in which he spends £50 a week. I that [sic] it is remarkable that he has avoided antisocial behaviour resulting in action by the authorities despite his heavy drinking. Dr Boucher explained that the impact of the Appellant’s drinking is mixed because on the one hand it has the obvious impact on his cognitive abilities but on the other it leads him to leave his home and socialise, albeit with other people who drink in the park. While some people may dislike others engaging in these activities, the drinking itself is not a danger to the community but rather the problem is the antisocial behaviour which frequently results from being drunk. There is no evidence that the Appellant has been guilty of such behaviour.

20. Overall I find that the Appellant is not of a criminal disposition. He committed a serious fraud which triggers the presumption under section 72. But he has committed no other fraud or other serious offence. His current behaviour is not connected with his previous offending. He has shown he is not a danger

to the community within the meaning of Article 33(2) of the Refugee Convention or section 72”.

15. In relation to the pending prosecution which it is said that the Judge ignored, Mr Sellwood drew attention to the Appellant’s witness statement dated 31 October 2023 at [B/544-5] which deals with the events said to have led to the pending prosecution. As is there pointed out, although the Appellant was initially arrested, he was released without charge. Although the Judge did not deal with that issue, any failure in that regard is immaterial.
16. As is pointed out by the Appellant, even if the Judge did err in relation to this issue, it could have no impact on the Decision as the Judge went on to reject the appeal on asylum grounds. The Appellant’s refugee status is therefore revoked in any event. Mr Wain made the point that the Judge is required to deal with the Section 72 issue even if it is not raised (see Secretary of State for the Home Department v TB (Jamaica) [2008] EWCA Civ 977 at [29]). He submitted that it followed by analogy that a Judge must consider that issue properly and it is an error if he does not.
17. Even if Mr Wain is right about that, we do not accept that there is an error or at least not an error which should lead to the setting aside of the Decision. The Judge has given reasons based on the evidence why he did not accept that the Appellant posed a danger to the community. Those reasons explain to the Respondent why he lost on that issue.
18. Even if there were any error, that would not mean that the Decision should be set aside in consequence. Any error could have no impact on the outcome of the appeal as the Appellant failed on asylum grounds in any event.
19. For those reasons, the first ground does not establish an error. Even if it did, we would not set aside the Decision in consequence as any error could have no bearing on the result.

Ground 2: Assessment of witness evidence

20. The Respondent’s criticism in this regard focusses on [66] of the Decision where the Judge said this:

“Rather cutting across the general situation in this country guidance of strong clan and family links being retained by the Somali diaspora, the Appellant’s evidence and that of all his witnesses was that they have no family, friends or clan contacts in Somalia. It is difficult for a person to prove a negative. However, based on this evidence they are either lying or unusual. Given the absence of any other reasons to doubt their credibility, I accept their evidence that they do not have ties to family, friends or clan in Somalia.”
21. The main criticism of the Judge’s findings at [66] is that they are said to be inconsistent with the country guidance in QA and fail to take into

account clan associations. Mr Wain drew our attention to [4] and [5] of the headnote in OA as follows:

“4. The Reer Hamar are a senior minority clan whose ancient heritage in Mogadishu has placed it in a comparatively advantageous position compared to other minority clans. Strategic marriage alliances into dominant clans has strengthened the overall standing and influence of the Reer Hamar. There are no reports of the Reer Hamar living in IDP camps and it would be unusual for a member of the clan to do so.

5. Somali culture is such that family and social links are, in general, retained between the diaspora and those living in Somalia. Somali family networks are very extensive and the social ties between different branches of the family are very tight. A returnee with family and diaspora links in this country will be unlikely to be more than a small number of degrees of separation away from establishing contact with a member of their clan or extended family, in Mogadishu through friends of friends, if not through direct contact.”

22. Whilst we accept that this has a bearing on the Judge’s findings in this and other regards (see below), as Mr Sellwood pointed out, what is said at [4] of OA sets out the general position and makes clear that resort to an IDP camp for a Reer Hamar clan member would be unusual. However, that and [5] of the headnote have to be read in the context of the witness evidence in this case which the Judge accepted as credible that the family has no contacts in Somalia and no diaspora links. As the Judge said (consistently with the headnote in OA), that evidence was either a lie or unusual (using the same word as used at [4] of the headnote). The Judge found no reason to question the credibility of the Appellant’s witnesses and was therefore entitled to find that the circumstances here were unusual and therefore reason to depart from the norm.
23. Mr Sellwood also pointed out that, as a reasons challenge, the Respondent has to meet a high threshold in order to demonstrate an error. We do not need to cite the cases set out in the Appellant’s Rule 24 reply as the principle is established. As Mr Sellwood submitted and we accept, it is difficult to see what more reasons the Judge could have given at [66] of the Decision. He had regard to the country guidance. The headnote is set out in its entirety at [65] of the Decision. The Judge clearly had that in mind when saying what he did about the evidence in this case being “unusual”.
24. We agree with Mr Sellwood. The Judge has given adequate reasons which do not ignore or seek to depart from what is said in OA. It was open to the Judge to accept the credibility of the evidence he heard.
25. The Respondent’s second ground fails to establish any error.

Ground 3: Employment Prospects in Somalia

26. This ground focusses on [70] of the Decision. That paragraph has to be read in the context of the paragraphs on either side as follows:

“69. The Appellant has not supported himself in the UK. He is reliant on public funds. His crime involved fraudulently getting extra public funds. But it did not require any sophistication on his part suggesting an entrepreneurial spirit that might benefit the Appellant in Somalia.

70. He is not physically in the best of health. He has long term insomnia connected with nocturia, and persistent back pain and a blocked nose. He would not be well suited to casual or day labourer positions. Mr Ojo accepted he is seriously ill.

71. When asked at the hearing, he was unaware of the Facilitated Returns Scheme. The advocates agreed this would give him £1500 when arriving in Mogadishu. Based on OA that could offer accommodation in a hotel for around 100 days. Mr Sellwood submitted that the Appellant’s mental health would decline during that time so the cushion would not prevent material deprivation after that time ended. The result would be suicide or destitution. I therefore turn to the circumstances related to this.”

27. That last sentence of [71] leads into the Judge’s reasoning which is relevant to the Respondent’s ground four and we therefore deal with it below.
28. Mr Wain submitted that the reference to “casual or day labourer positions” at [70] of the Decision ignores what is said in MOJ about job opportunities at [349] as follows:

“...The evidence is of substantial inward investment in construction projects and of entrepreneurs returning to Mogadishu to invest in business activity. In particular we heard evidence about hotels and restaurants and a resurgence of the hospitality industry as well as taxi businesses, bus services, drycleaners, electronics stores and so on. The evidence speaks of construction projects and improvements in the city’s infrastructure such as the installation of some solar powered street lighting. It does not, perhaps, need much in the way of direct evidence to conclude that jobs such as working as building labourers, waiters or drivers or assistants in retail outlets are unlikely to be filled by the tiny minority that represents ‘the elite’. Indeed, Dr Hoehne suggested that SSM, on whose behalf he was being asked questions:

‘could probably get a job as a waiter...’”

Mr Wain suggested that the Judge had confined himself at [70] to considering whether the Appellant could work in the construction industry without considering the other alternatives for employment which might be available to the Appellant despite his health concerns.

29. We agree with Mr Sellwood’s submission that, whilst Mr Wain’s interpretation might be one way of reading what is said at [70] of the Decision, there is no reason to think that the Judge was linking “casual” to “day labourer” (particularly since they are expressed in the alternative). We agree with Mr Sellwood that the Judge had very much in mind the sort of employment which may be available. The words “casual” and “day labour” are lifted directly from [8] of the headnote of OA. The Judge was also considering whether the Appellant might have the sort of entrepreneurial spirit which would enable him to set up in self-employment

(at [69]) and at [71] considered how the Facilitated Returns Scheme might avail the Appellant whilst he looked for employment.

30. As Mr Sellwood also submitted and we accept the Appellant's mental health is a relevant factor. Although the Appellant's medical claim was rejected, the Respondent conceded that the Appellant is seriously ill ([61] of the Decision). Mr Sellwood also pointed out that the Respondent has not challenged the findings made in relation to structural marginalisation and discrimination (see in that regard [48] to [50] of the Decision). Those too are relevant factors in relation to the prospect of the Appellant securing employment.
31. The Respondent's third ground appears to be based on an asserted failure to take into account the country guidance (particularly [349] of MOJ) and/or that the Judge misunderstood the evidence there set out. For the reasons set out above, the Judge did not fall into that error. He has given adequate reasons for his finding that the Appellant would not be able to secure employment on return.

Ground 4: Destitution and Risk of Suicide

32. The finding that the Appellant would not find employment is then relevant to the Judge's conclusions about destitution and suicide risk. That is then dealt with at [72] to [83] of the Decision.
33. Mr Wain agreed that there is some overlap between this ground and the second. It is argued for the Respondent that the Judge has failed to have regard to [4] of the headnote in OA and that his failure to take into account clan associations has rendered his conclusions about destitution and objectively well-founded suicide risk flawed.
34. We have already dealt with the point about [4] of the headnote in OA. We have concluded that the Judge was entitled to accept the evidence of the Appellant's witnesses and to find that this was an unusual case.
35. It is not suggested by the Respondent that the Judge has misdirected himself in law when dealing with suicide risk. He sets out the relevant cases at [72] to [76] before turning to apply the staged approach in J v Secretary of State for the Home Department [2005] EWCA Civ 629 ("J") to the Appellant's case as follows:

"78 First, the severe treatment that the Appellant fears is destitution after the funds from the Facilitated Returns Scheme run out. He fears having little prospect of supporting himself. Given that living conditions in an IDP camp can, depending on the circumstances, reach the level of severity to breach Article 3, I find the treatment the Appellant fears achieves a level of severity to satisfy the first principle.

79. Second, the Appellant's risk of suicide is a foreseeable consequence of his removal. I realise that the Respondent offers to ameliorate that risk by providing money through the Facilitated Returns Scheme. However, the Appellant would

obviously not be in that position if he were not removed. In the circumstances explained above, I am not asked to make a speculative assessment: I am simply assessing the circumstances when the money runs out. It is not at an unspecified point in the future, it is after approximately 100 days.

80. The third and fourth principles do not require individual consideration because of the point made in the first, that the fear of the IDP camp and linked suicide risk is capable of crossing the high Article 3 threshold.

81. Fifth, the Appellant's fear is objectively well-founded. The living situation in an IDP camp can breach Article 3.

82. Sixth, I accept that the Respondent would take steps in order to avoid suicide during the process of return. The Facilitated Returns Scheme is also a step she takes to prevent risk factors arising immediately on return. There is no evidence before me that the state in Somalia has systems in place to prevent suicide. I recognise that some mental health treatment and medication is available in Mogadishu. However, interventions to stop suicide are not explained. And in any case, it is the objectively justified potential for destitution that would lead to the risk of the Appellant's suicide. That destitution does happen in Somalia, as set out in the country guidance. It would also be the loss of the protective factors of his sister in the UK and hope of remaining in the UK. Dr Boucher assesses the risk of suicide to be high in the absence of those factors.

83. Looking at these factors together, I find that there is a real risk destitution in Somalia and consequently the Appellant has an objectively well-founded fear of destitution for that reason. There is a real risk, given his existing mental health and stable situation in the UK and well-founded fear of return – that he would kill himself to avoid the dangers he faces in Somalia. While the Respondent takes steps to ameliorate that risk during the process of deportation, the Appellant would ultimately be able to carry out his acts within reasonable proximity to the act of removal. There are not effective protections in Somalia to prevent him succeeding. The Appellant consequently faces a real risk of intense suffering and a significant reduction in life expectancy. That would be a breach of Article 3.”

36. As we have already noted, the error is said to be an overlap between the second ground (that the Appellant would find himself in an IDP camp despite his Reer Hamar clan membership and what is said at [4] of the headnote in OA) and the fifth stage of the Judge's application of J. Since we have not accepted that there is any error made by an acceptance that the Appellant runs a risk of ending up in an IDP camp, it follows that we do not accept that the application of the fifth stage in J is flawed.
37. As Mr Sellwood also pointed out, even if the Respondent were right that the Appellant's fear of having to live in an IDP camp was not objectively well-founded, it was still open to the Judge when applying the sixth stage of J to find that the Appellant had a genuine subjective fear which could not be overcome in Somalia. The findings in that regard at [82] of the Decision are not challenged.
38. The Respondent's fourth ground does not identify an error. Having made the findings he did at [66] to [71] of the Decision (which we have found contain no error) and having made the points he did about discrimination between clans (at [48] to [50] of the Decision which are not challenged),

the Judge was entitled to reach the conclusions he did regarding the risk of destitution and suicide and to allow the appeal on Article 3 grounds.

Ground 5: Very Significant Obstacles

39. Mr Wain accepted that this fifth ground stands or falls with the second to fourth grounds. Having concluded that those grounds do not identify errors, it follows that the fifth ground also fails.

CONCLUSION

40. For the foregoing reasons, we conclude that there is no error of law in the Decision. Accordingly, we uphold the Decision with the consequence that the Appellant's appeal remains allowed on human rights (Article 3 and 8) grounds but dismissed on asylum grounds.

NOTICE OF DECISION

The Decision of Judge Brannan promulgated on 5 December 2023 did not involve the making of an error of law. We therefore uphold the Decision with the consequence that the Appellant's appeal remains allowed on human rights (Article 3 and 8) grounds but dismissed on asylum grounds.

L K Smith
Judge of the Upper Tribunal
Immigration and Asylum Chamber
10 April 2024