



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/33164/2011

THE IMMIGRATION ACTS

Heard at North Shields  
On 2<sup>nd</sup> September, 2013

Determination Promulgated  
On 27<sup>th</sup> September, 2013

Before

Upper Tribunal Judge Chalkley

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JAMAL ABDULLAH BASHIR  
(No anonymity order made)

Respondent

Representation:

*For the Appellant:*

*Mr P Mangion, Home Office Presenting Officer*

*For the Respondent:*

*The appellant in person*

## DETERMINATION AND REASONS

1. The respondent is a citizen of Somalia who was born on 5<sup>th</sup> January, 1978. He arrived in the United Kingdom on 6<sup>th</sup> September, 1996, and claimed asylum which was refused by the respondent on 4<sup>th</sup> May, 2000. However on 29<sup>th</sup> September, 2000, the appellant granted the respondent exceptional leave to enter until 29<sup>th</sup> September, 2004. The respondent made an in time application for further leave and on 5<sup>th</sup> June, 2005, was granted indefinite leave to remain.
2. On 2<sup>nd</sup> September, 2006, the respondent was convicted of wounding with intent to cause grievous bodily harm and sentenced to a term of two years' imprisonment. He was served with notice of intention to make a deportation order against him on 13<sup>th</sup> September, 2006, and on 10<sup>th</sup> February, 2007, was served with a deportation order. The signing of the order revoked his grant of indefinite leave to remain. On both 29<sup>th</sup> May, 2007, and 11<sup>th</sup> June, 2007, the respondent signed a disclaimer indicating that he wished to leave the United Kingdom and waive his right of appeal.
3. On 11<sup>th</sup> September, 2007, the respondent was removed to Kenya with the intention of him taking an onward flight to Somalia. However he was returned to the United Kingdom by the Kenyan authorities, since no onward flight was available. On 11<sup>th</sup> February 2008 he signed a further disclaimer, indicating that he wished to be removed from the United Kingdom without awaiting for an outcome on his appeal. It appears that nothing further happened.
4. On 28<sup>th</sup> January, 2010, the respondent submitted representations which were accepted by the appellant as an application to revoke a deportation order. He also submitted various representations concerning the claims that he was suffering from ill-health. He was given an opportunity to provide full details at a screening interview and a substantive asylum interview on 11<sup>th</sup> November 2010. In addition to claiming a fear of return to Somalia, he claims that he suffers from breathing difficulties, mental health problems, depression, alcohol addiction and pain as a result of a broken arm.
5. On 18<sup>th</sup> January, 2011, the application for revocation of his deportation order was refused with an in-country right of appeal. The respondent lodged an appeal on 3<sup>rd</sup> February, 2013, but this refusal decision and the appeal were withdrawn by the appellant on 14<sup>th</sup> March, 2011, for further consideration.
6. Following further consideration, the application for the revocation of the deportation order was again refused by the appellant on 25<sup>th</sup> May, 2011 and the respondent lodged an appeal against this decision on 15<sup>th</sup> June, 2011. Again the appeal and decision were withdrawn by the respondent on 27<sup>th</sup> June, 2011, for further consideration. Having given the matter further consideration, the appellant refused to revoke the deportation order on 25<sup>th</sup> October, 2011, again generating an in-country right of appeal. The respondent lodged Notice of Appeal on 14<sup>th</sup> November, 2011.

7. The appeal was heard by First-tier Tribunal Judge Colyer on 3<sup>rd</sup> January, 2012. She dismissed the respondent's appeal, but permission to appeal to the Upper Tribunal was granted and the Upper Tribunal remitted the appeal to be reheard by the First-tier Tribunal, because of errors of law in the earlier determination. The matter was heard by First-tier Tribunal Judge Osborne on 31<sup>st</sup> May, 2013 and in her determination dated 18<sup>th</sup> June, 2013, the First-tier Tribunal Judge allowed the respondent's appeal on asylum and humanitarian protection grounds and allowed the respondent's human rights appeal under Article 3 of the European Convention for the Protection of Human Rights.
8. The appellant challenged the decision on three grounds although ground 1 and ground 2 were effectively the same. The grounds of appeal argue that the First-tier Tribunal Judge had failed to give adequate reasons for departing from the country guidance case of *AM and Others (Somalia) v Secretary of State for the Home Department* [2011] UKUT 445 and in particular at paragraphs 366, 370 and 371. the judge also made findings in respect of the respondent's mental state despite the fact that there was no medical evidence before her.
9. At the hearing today before me the respondent did not appear initially. He arrived late.
10. I carefully explained the purpose of the hearing to the respondent and that I would not interfere with the decision of the First Tier Tribunal Judge unless I was satisfied that it contain an error on a point of law.
11. The appellant was represented by a Home Office Presenting Officer who suggested that at paragraph 81 of the determination, First-tier Tribunal Judge Osborne had suggested that it was clear from the background information that Al-Shabaab operate in limited areas on the outskirts of Mogadishu and still retain control of certain areas. However there was no objective evidence before her which could have led to that conclusion and the judge does not indicate where she obtained that evidence. The evidence contained within the decision in *AM* suggests that this organisation is not in control although they do together with other militias move into some areas at night. I explained this to the respondent who appeared to understand it but disagreed.
12. The second challenge was effectively the same point, but made not in relation to the asylum claim but in relation to the Article 3 human rights appeal. The last challenge criticised paragraph 55 of the judge's determination, where she foud that there is a risk that the respondent's state of health could deteriorate further. She refered to Dr Hung's report, describing the extremely limited mental heath facilities throughout Somalia, but there was no medical evidence before her suggesting that the appellant was suffering any psychological or other difficulties. I explained these submissions to the respondent.

13. He told me that the judge had not made any error. He was in the United Kingdom in “a state of limbo”. His village is gone. “I will have to go back”, he said. He told me that since 2006 he had been moved so often that he cannot collect all the evidence he needs to put before the court.
14. The appellant said that he wanted to go “home” voluntarily. I again explained the purpose of today’s hearing, summarised the appellant’s submissions and asked him if there was anything further that he wished to say. He told me that the Home Office had “punished” him badly. He again said that he wanted to leave the United Kingdom and “go home”.
15. I have concluded that the judge did err in law. The judge did fail to properly consider and apply *AM*. There was no credible up to date evidence placed before her which would have allowed the judge to make the findings she did in respect of the respondent’s mental health.
16. I drew Mr Mangion's attention to paragraph 7 of Senior President’s Practice Statement which provides as follows:
  - “7.1 Where under Section 12(1) of the 2007 Act proceeding on appeal to the Upper Tribunal the Upper Tribunal finds that the making of the decision concerned involved the making of an error on a point of law the Upper Tribunal may set aside the decision and if it does so must either remit the case to the First-tier Tribunal under Section 12(2)(b)(i) or proceed in accordance with the relevant practice directions to remake the decision under Section 12(2)(d)(ii).
  - 7.2 The Upper Tribunal was likely on each such occasion to proceed to remake the decision instead of remitting the case to the First-tier Tribunal unless the Upper Tribunal is satisfied that
    - (a) the effect of the error has been to deprive the party before the Tribunal of a fair hearing or other opportunity for that party’s case to be put to and considered by the First-tier Tribunal or
    - (b) the nature and extent of any judicial fact finding is necessary in order for the decision in the appeal to be remade is such that having regard to the overriding objective in Rule 2 it is appropriate to remit the case to the First-tier Tribunal.
  - 7.3 Remaking rather than remitting will nevertheless constitute the normal approach to determining appeals where an error of law is found even if some further fact finding is necessary.”
17. I am satisfied that this is a case which falls squarely under paragraph 7 of the Senior President's Practice Statement, given the length of time the parties would have to wait for the matter to be relisted before me in North Shields. Conversely it could be heard relatively speedily by the First-tier Tribunal and in view of the overriding objective informing the onward conduct of this appeal, I have decided that the appeal be remitted to the First-tier Tribunal for hearing afresh before a First-tier

Tribunal Judge other than First-tier Tribunal Judge Osborne or First-tier Tribunal Judge Colyer.

18. I specifically draw the attention of the Secretary of State for the Home Department to the expressed desire of the respondent to leave the United Kingdom and to return, "home". I hope that steps will be taken to assist the respondent to achieve this, should that be his genuine wish, and that those steps are taken without delay; it is in the interest of all concerned that they should be.

Upper Tribunal Judge Chalkley