Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01044/2013

THE IMMIGRATION ACTS

Heard at : Field House
On : 2 June 2015

Determination Promulgated
On 8 June 2015

Before

UPPER TRIBUNAL JUDGE KEBEDE
DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

ADAN MOHAMMED QASALI
(NO ANONYMITY ORDER)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms B Asanovic, instructed by Wilson Solicitors LLP
For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal comes before us following a grant of permission to appeal on 18 November 2014.

2. The appellant is a citizen of Somalia, born on 1 May 1959. He claims to have arrived in the United Kingdom in March 2002, but has provided no evidence of lawful entry or residence. On 6 February 2006 he was convicted of wounding with intent to do grievous bodily harm and was sentenced on 7 April 2006 to an indeterminate sentence with a minimum term of 20 months.

3. On 25 July 2006 the appellant was served with a notice of liability to deportation to which he subsequently responded, claiming in his questionnaire at that time and in subsequent questionnaires in July 2011 and October 2013 to hold both Dutch and Somali nationality. He was granted parole on 29 August 2012 and on 3 September 2012 was detained under immigration powers. On 2 November 2012 the Dutch Consulate confirmed that he was not a Dutch national and did not have any status in the Netherlands.

4. On 25 March 2013 a Deportation Order was signed against him and a decision was made that section 32(5) of the UK Borders Act 2007 applied. He appealed against that decision.

5. The appellant's appeal was initially listed for hearing on 24 July 2013, but was adjourned for further consideration of his claim that he was a Dutch national. He subsequently admitted that he was not a Dutch national, but on 1 October 2013 advised the respondent that he wished to claim asylum. Following a screening interview on 22 October 2013, he was interviewed about his claim on 13 February 2014, and a decision was made on 29 July 2014 refusing his claim. His appeal was, in the meantime, listed for directions hearings and adjourned on several occasions pending the outcome of his claim and finally came before the First-tier Tribunal on 13 October 2014.

The Appellant's Claim

6. Prior to making his asylum claim, in a statement dated 19 July 2013 produced for his deportation appeal, the appellant claimed to be a Dutch national born in Hargeisa who married his wife in Somalia and who left Somalia due to the civil war and went to Holland in 1992 with his wife and eldest child. They all obtained Dutch nationality and he followed his wife and children to the United Kingdom in March 2002. He could not return to Somalia as he feared Al-Shabab.

7. Following his asylum application the appellant claimed, in his screening interview, to be a member of the Reer Hamar minority clan from Merka, and as such to have had problems from the majority clans. He claimed that his parents and sister were killed in Somalia in 1988 and 1989 and that he had fled Somalia in 1989. He claimed to have married his wife in Nairobi in 1987, to have subsequently lived with his wife and children in Holland, where he was issued with a residency card as a refugee, to have followed his wife and children to the United Kingdom in March 2002 and to have separated from her in 2003. His wife and children obtained Dutch nationality prior to coming to the United Kingdom, but he did not obtain nationality himself.

8. In his substantive interview, the appellant claimed to have been born in Mogadishu and to have moved to Merka at the age of three years as a result of his father's work for the government as a tax collector. He himself worked as a nurse in Mogadishu and also, when his father left his work with the government and obtained a minibus, he drove the bus. He claimed to be a member of the Isaaq clan as his father was Isaaq, although his mother was Reer Hamar and he considered himself as Reer Hamar. He feared the majority clans and also Al-

Shabab and so did not want to return to Somalia. He subsequently said that he was not aware of the power of majority clans and was not brought up to be interested in clan values and had no problems himself before the war. He left Somalia in 1989 as a result of the war, after his house was destroyed and his parents and sister were killed in the fighting and he was attacked when driving his bus and stabbed with a knife.

Respondent's Decisions

9. With respect to the deportation decision made in March 2013, the respondent considered whether the exceptions to automatic deportation applied to the appellant and concluded that they did not. The only exception relied upon at that stage was Article 8, and in that respect the respondent noted that the appellant had been sentenced to a period of at least four years' imprisonment and that there were no exceptional circumstances outweighing the public interest in his deportation for the purposes of paragraph 398 of the Immigration Rules. It was therefore not accepted that his deportation would breach Article 8 of the ECHR.

10. In refusing the appellant's asylum claim, in her letter of 29 July 2014, the respondent noted that the appellant's evidence had been inconsistent in various respects, including his place of birth, his clan, the death of his parents, his departure from Somalia and his marriage. The respondent rejected his claim to come from Mogadishu and concluded, in light of his earlier references to have been born in Hargeisa, that he was from Somaliland and was a member of the Isaaq majority clan. It was considered, with reference to the country guidance in AMM and others (conflict; humanitarian crisis; returnees; FGM) Somalia CG [2011] UKUT 445, that he would be at no risk in Mogadishu. The respondent considered, in light of the risk posed by the appellant to the public as a result of his criminal offending, that the presumption in section 72(2) of the Nationality, Immigration and asylum Act 2002 was applicable to him, so that Article 33(2) of the Geneva Convention did not prevent his removal from the United Kingdom. He was, for the same reasons, excluded from a grant of humanitarian protection and it was considered that his deportation would not breach his human rights.

Appeal before the First-tier Tribunal

11. The appellant's appeal against the deportation decision was heard before the First-tier Tribunal, by a panel consisting of Designated First-tier Tribunal Judge Coates and Dr T Okitikpi. The panel heard from the appellant, noting that no family members had attended to give oral evidence. They considered a further statement produced in a supplementary appeal bundle in which the appellant claimed to have been born in Barawe near Mogadishu and denied coming from Somaliland, and claimed to belong to the Reer Hamar minority clan. In addition they had before them an expert report from Professor Mario Aguilar addressing the issue of clan membership. The appellant gave evidence that he was born in Barawe but was brought up in Mogadishu.

12. The panel concluded that the appellant's account was not credible, given his inconsistent evidence on core issues and the timing of his asylum claim which they considered had been made solely for the purposes of frustrating removal. They upheld the section 72(2) certificate and accordingly dismissed the appellant's asylum appeal. With regard to Article 3, they concluded that the appellant would not be at risk on return to Mogadishu and that his deportation would not breach his human rights.

13. Permission to appeal to the Upper Tribunal was sought on one ground, namely that there had been a failure to apply all parts of the head-note and relevant paragraphs in the country guidance in MOJ & Ors (Return to Mogadishu) [2014] UKUT 442, with particular reference to paragraph (ix) of the head-note.

14. Permission to appeal was granted.

Upper Tribunal: Appeal hearing and submissions

15. At the hearing it transpired that an application had been made to the Upper Tribunal in February 2015, on behalf of the appellant, for a further ground to be added which had not elicited any response. That application followed a change of legal representative to those currently representing the appellant. The further ground asserted that the First-tier Tribunal had erred in its findings on the s72 certificate as there had been a failure to apply the two-stage test required by that provision and no consideration had been given to whether the appellant posed a present danger to the public.

16. Mr Tarlow did not object to the amendment to the grounds and, given the fact that the application had been made some time ago and that it arose from a change of legal representative, we admitted the additional ground. However we did not consider it appropriate to permit a further amendment to the grounds requested by Ms Asanovic and referred to in a skeleton argument dated 19 February 2015 which did not appear to have been received by the Tribunal and which was therefore brought to our attention, and to Mr Tarlow's attention, only at the hearing. No formal written application had been made to amend the grounds in respect to the further point, namely a challenge to the panel's approach to the expert report and their findings on the appellant's clan membership, and we considered there to be no good reason to allow the further amendment. Accordingly the appeal proceeded on the basis of the two agreed grounds of appeal and we heard submissions from both parties in that regard.

17. Ms Asanovic submitted that the panel had erred by failing to consider the relevant factors in paragraph (ix) of the head-note to MOJ which were particularly relevant given the lengthy period of the appellant's absence from Somalia and the lack of challenge to his evidence that he had no family ties in Somalia and no access to financial resources from his family in the United Kingdom. With regard to the section 72 certificate, there had been no consideration given to the fact that the Parole Board had agreed to release the appellant and to his evidence in his statement as to his remorse for his

previous actions. His conviction dated back to 2006 and there was no evidence that he posed a present danger to the community.

18. Mr Tarlow asked us to find that the panel had made no material errors in their decision and to uphold the decision.

19. After careful deliberation, we advised the parties that we did not accept that the panel had made any errors of law such that their decision ought to be set aside. Our reasons for so concluding are as follows.

Consideration and findings.

20. We turn first of all to the initial ground of appeal referring to the country guidance in MOJ. It is plain that the panel had regard to the guidance. We agree that it would have assisted if they had provided a more detailed assessment addressing in particular the factors in (ix) of the head-note and applying the appellant's own circumstances to those considerations. However the panel were in some difficulty in that regard, in that they were unable to make a definitive assessment of the appellant's circumstances, given the significant variations in his evidence. The appellant's evidence was completely inconsistent in almost every aspect and in respect to all core issues, as the panel pointed out at paragraph 41 of their decision. He gave contradictory evidence about his clan, his place of birth and residence in Somalia, the events leading to his departure from Somalia and the timing of his departure, his family and marriage and even, for some time, his nationality. It was therefore impossible for the panel to make clear findings of fact in regard to the appellant's profile and circumstances.

21. It is the appellant's case that there was nevertheless sufficient evidence before the panel, which was not compromised by inconsistencies, to establish a risk on return on the basis of the factors in paragraph (ix). Such evidence is said to include his length of absence from Somalia, his lack of family in Somalia, the lack of resources available to him from the United Kingdom, his lack of financial support whilst living in the United Kingdom and his dependency upon public benefits and the minimal cost of his journey to the United Kingdom as compared to other migrants. However, for the most part those factors were not the subject of any positive findings of fact made by the panel and we do not agree that a lack of challenge to those aspects of the appellant's life ought to be viewed as positive findings of fact, given the overall concerns as to the reliability of his evidence.

22. Although the appellant claimed to have no family ties to Somalia, the panel had found him to be an entirely unreliable witness in every respect and made no findings on that claim. Whilst they found the absence of family members at the hearing indicated a lack of any "significant degree of support" in the United Kingdom, that was for the purposes of a claim based upon family life under Article 8. We agree with the view expressed in the respondent's rule 24 response, that it is disingenuous of the appellant to rely upon a finding of no support at the hearing, when he was otherwise seeking to rely upon statements of various family members, including that of his nephew Mustafa

Aden who was claiming to provide him with financial support and to have sent money to him in prison and who stood surety for him in his bail applications.

23. In any event we consider that, based on the findings made by the panel and the parts of the guidance they relied upon at paragraph 45 of their decision, there was nothing material in the factors listed in paragraph (ix), or in the guidance at paragraph (xi), that could have assisted the appellant. It is clear from their findings at paragraphs 22 and 40 that the panel proceeded on the basis that the appellant was a member of the Isaaq clan from Hargeisa, which was the conclusion reached by the respondent. They referred, amongst other paragraphs of the head-note to MOJ, to paragraph (vii), albeit quoting from paragraph (viii), as being applicable to the appellant and thus relied upon the significance of clan membership and the support provided by majority clans. Accordingly it is clear that they concluded that the appellant would not be returning to Mogadishu without any means of support. With regard to paragraph (x), which they relied upon at paragraph 45, there was no evidence before them from the appellant to explain why he would not be able to access the economic opportunities available in Mogadishu and we note that the evidence before them was that he was a qualified nurse and had previously worked as a nurse, as well as a driver, in Somalia. There was, furthermore, no evidence before the panel to suggest that a significant period of absence from Somalia would, on that basis alone, put the appellant at risk.

24. There was an attempt by the appellant's representatives to challenge the panel's findings on his clan membership in light of the views expressed in the expert report, but as we have recorded we did not allow the grounds to be amended further to admit such a challenge since that was not part of the application for permission. We would, however, make it clear that we consider the panel gave careful consideration to the expert report and were entitled to make the findings that they did in that regard. It was entirely open to them, in view of the inconsistent evidence given by the appellant in regard to his clan membership and his place of birth, to conclude that he was a member of a majority clan and that he would be able to access some support on that basis on return to Somalia.

25. Accordingly we find that the first ground of appeal is not made out and that the panel were entitled to conclude, for the reasons properly given, that the appellant had failed to show that he would be at risk on return to Mogadishu.

26. In light of such a finding we consider that any claimed error made by the panel in regard to the section 72 certificate would clearly be immaterial, given that the appellant could not in any event have succeeded in his claim on asylum grounds. However we do not consider that there was any error by the panel in that regard and we consider that they gave adequate consideration to all relevant matters when considering the certification.

27. The grounds assert that the panel failed to give consideration to the second part of the test in section 72(2), namely whether the appellant constituted a present danger to the community of the United Kingdom.

However we do not agree. At paragraph 42 they gave consideration to the Sentencing Judge's remarks including his consideration of future risk and his conclusion that the appellant posed a significant risk of serious harm to members of the public. They went on, at paragraph 43, to note that there was a presumption that the appellant's continued presence in the United Kingdom would constitute a risk to the community and that the only evidence he had submitted by way of rebutting that presumption was his own expression of remorse in his questionnaire and statement, as considered and rejected by the respondent at paragraphs 53 and 54 of the reasons for refusal letter of 29 July 2014.

28. It is submitted on behalf of the appellant that the panel ought to have given consideration to the fact that the Parole Board deemed him suitable for release into the community. However that does not appear to be a matter raised before the panel. In any event it was not for the panel to speculate upon the reasons why the appellant had been released or to conclude that that was evidence in itself that he no longer posed a risk, when they had not been provided with a report or any other information from the Parole Board and were unaware of any other considerations relied upon by the Parole Board in deciding to release him. The reference in the grounds, at paragraph 37, to the relevance of him not having been recalled into custody whilst on licence is undermined by the fact that he was taken into immigration detention shortly after his release and has remained in detention. Neither was there any requirement upon the panel to attach weight to the appellant's own expressions of remorse in his witness statement, given their findings as to his unreliability as a witness and considering also that that same statement contained other claims, such as those relating to his nationality and place of birth, from which he had resiled.

29. Accordingly there was a significant lack of evidence before the panel upon which they were able to conclude that the appellant had rebutted the presumption against him. We note that the appellant's skeleton argument makes mention at paragraph 40 of an OASys report referring to the appellant having received treatment for his mental health problems and having received no adjudications in prison and being an enhanced prisoner. However we do not have sight of that report and there is no indication in the panel's decision that it was before them. Ms Asanovic did not suggest otherwise. We have, amongst our papers, a Pre-Sentence Report dating back to 2006, but again there is no indication that that was before the First-tier Tribunal when the panel heard the appeal and in any event it does nothing to assist the appellant. With regard to the reference to mental health problems we note that that was not a matter raised before the First-tier Tribunal and neither was there any evidence before them in that regard.

30. In all the circumstances it seems to us that the panel's consideration of the section 72 certificate was adequate and that they were entitled to uphold the certificate. Accordingly we find that the second ground of appeal is not made out.

31. For all of these reasons we conclude that the grounds of appeal do not disclose any errors of law in the First-tier Tribunal's decision requiring the decision to be set aside.

DECISION

32. The appellant's appeal is accordingly dismissed. The making of the decision of the First-tier Tribunal did not involve an error on a point of law, such that the decision has to be set aside. We do not set aside the decision. The decision to dismiss the appellant's deportation appeal therefore stands.

Signed Date

Upper Tribunal Judge Kebede