Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01288/2014

THE IMMIGRATION ACTS

Heard at Columbus House, Newport	**Decision & Reasons Promulgated**
On 2 September 2015	**On 18 September 2015**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

A G A
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondent: Ms S Nowaparast of NLS Solicitors

DETERMINATION AND REASONS

1. I make an anonymity order under rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended) in order to protect the anonymity of the appellant's children. This order prohibits the disclosure directly or indirectly (including by the parties) of the identity of any of the appellant. Any disclosure and breach of this order may amount to a contempt of court. This order shall remain in force unless revoked or varied by a Tribunal or Court.

2. Although this is an appeal by the Secretary of State against a decision of the First-tier Tribunal allowing the appellant's appeal, for convenience I will refer to the parties as they appeared before the First-tier Tribunal.

Introduction

3. The appellant is a citizen of Somalia who was born on 5 April 1989. He came to the United Kingdom in 2003, together with his mother, when he was 14 years old. In February 2003, the appellant's mother claimed asylum with the appellant as her dependant. That application was refused in June 2003 and a subsequent appeal was dismissed.

4. It appears from the Secretary of State's decision letter dated 23 May 2014 that the appellant, together with his family, was granted indefinite leave to remain on 29 January 2008.

5. Subsequent to that, the appellant committed a number of criminal offences. On 18 August 2008, he was convicted at the South East Suffolk Magistrates' Court of burglary and ordered to pay compensation of £538. On 15 May 2010 at the Cardiff Magistrates' Court he was convicted of possession of class B drugs (cannabis) and fined £75.

6. On 15 December 2010, the appellant was sentenced at the Crown Court for two offences of burglary and unlawful wounding for which he received terms of imprisonment of twelve months and sixteen months respectively to run consecutively. The total sentence was, therefore, one of two years and four months imprisonment.

7. On 18 February 2010, the appellant was informed that he was liable to deportation under the automatic deportation provisions of the UK Borders Act 2007.

8. On 14 March 2011, the appellant made an application for asylum and further submissions were made on his behalf seeking to resist his deportation. Subsequently, the appellant attended a screening interview on 2 June 2011. On 29 September 2011, the appellant informed the Home Office that he did not wish to pursue his asylum claim. On 10 February 2012, his legal representatives indicated that he only wished to pursue his case under Arts 2, 3 and 8 of the ECHR. On 11 February 2013, the appellant confirmed that he did not wish to claim asylum but relied on Art 8.

9. On 23 May 2014, the Secretary of State refused the appellant's claim under Arts 2 and 3 of the ECHR and for humanitarian protection under para 338C of the Immigration Rules (Statement of Changes in Immigration Rules, HC 395 as amended). In addition, the Secretary of State concluded that the appellant could not succeed under paras 398, 399 and 399A of the Rules and there were no exceptional circumstances to justify the grant of leave outside the Rules. Consequently the Secretary of State made a decision that s.32(5) of the UK Borders Act 2007 applied and that the appellant was subject to the automatic deportation provision of the 2007 Act. On 7 May 2014, a deportation order was made against the appellant.

The Appeal

10. The appellant appealed to the First-tier Tribunal. In a determination promulgated on 23 December 2014, Judge Britton allowed the appellant's appeal on the basis that his deportation would breach Art 8 of the ECHR.

11. The Secretary of State sought permission to appeal to the Upper Tribunal. The Secretary of State relied on three grounds. First, the judge had failed to apply para A362 of the Immigration Rules and apply the amended Rules in effect from 28 July 2014 and in force at the date of the hearing. Secondly, the judge had wrongly applied s.117C of the Nationality, Immigration and Asylum Act 2002 ("NIA Act 2002"), in particular 'Exception 2' in s.117C(5) in concluding that the effect on the appellant's partner and children would be "unduly harsh" if he was deported. Thirdly, the judge had erred in law in assessing the best interests of the appellant's children and in concluding that it would be unduly harsh to expect the appellant's wife and children to integrate into Somali society and had failed to have sufficient regard to the public interest.

12. On 19 January 2015, the First-tier Tribunal (Judge Chambers) granted the Secretary of State permission to appeal.

13. The appeal first came before me on 2 June 2015. In a decision dated 18 June 2015, I found that the First-tier Tribunal's decision involved the making of an error of law and the judge's decision to allow the appellant's appeal under Art 8 could not stand. I set that decision aside and directed that the appeal be relisted for a resumed hearing before me in order to remake the decision under Art 8 of the ECHR.

The Resumed Hearing

14. The resumed hearing was listed before me on 2 September 2015.

15. At that hearing, the appellant was again represented by Ms Nowaparast and the respondent by Mr Richards.

16. At the outset of the hearing, Mr Richards accepted that it would be "unduly harsh" for the appellant's wife and children to go to Somalia and live there. He accepted, therefore, that the appellant met the requirement in para 399(a)(ii)(a) and 399(b)(ii). Both Mr Richards and Ms Nowaparast accepted that the sole issue in the appeal was whether it was "unduly harsh" for the appellant's children to remain in the UK if the appellant were deported (para 399(a)(ii)(b)) or it would be "unduly harsh" for his partner to remain in the UK if he were deported (para 399(b)(iii)).

17. On behalf of the appellant, Ms Nowaparast relied upon the appellant's witness statement dated 2 December 2014 and the oral evidence given before Judge Britton both by the appellant and his wife. In addition, the appellant and his wife gave brief oral evidence before me.

18. Further, Ms Nowaparast handed up to me a letter from the Department of Works and Pensions dated 27 February 2015 which showed that the appellant received a carer's allowance as the primary carer of his mother who lives with the appellant, his

wife and two children. Finally, Ms Nowaparast handed up to me a bundle of medical documents which showed that the appellant's wife is currently pregnant and their baby is due in the beginning of October.

The Relevant Rules

19. Paragraph 398 of the Immigration Rules, so far as relevant, provides as follows:

> "Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
>
> ....
>
> (b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months;
>
> ....
>
> the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A."

20. In this appeal, the appellant relies upon para 399(a) and (b) in respect of his "genuine and subsisting" relationship with his children in the UK and with his partner. Paragraph 399 provides as follows:

> "399. This paragraph applies where paragraph 398 (b) or (c) applies if –
>
> (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
>
> (i) the child is a British Citizen; or
>
> (ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case
>
> (a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and
>
> (b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or
>
> (b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and
>
> (i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and
>
> (ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling

circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported. " (Emphasis added.)

21. As I have already indicated, it is para 399(a)(ii)(b) and 399(b)(iii), which I have emphasised above, which are relied upon by the appellant.

The Submissions

22. On behalf of the respondent, Mr Richards submitted that the issue was whether, if the appellant were deported, the fact that his partner and children would remain in the UK would be "unduly harsh" to them. He referred me, in particular, to the Upper Tribunal's decision in MAB (Paragraph 399: "unduly harsh") USA [2015] UKUT 00435 (IAC). He submitted that the Upper Tribunal have decided that whether the effect on a partner or children would be "unduly harsh" did not require a balancing of the consequences to them against the public interest. Rather, it required an assessment of whether the impact upon them would be "inordinately" harsh or "unusually large" or "excessive". That test was, Mr Richards submitted, not to be equated with whether the impact would be 'uncomfortable', 'inconvenient' or 'challenging'. Mr Richards submitted that no doubt life for the appellant's partner and children would be difficult and challenging in his absence. He acknowledged that the appellant's partner, as she had told me in her evidence, found life difficult and challenging when the appellant was in prison but she had clearly coped and he submitted that there was no reason to believe she and the children could not do so in the appellant's absence if deported to Somalia.

23. Mr Richards submitted that on the evidence the appellant was not working at the present time and so there was no financial support to the appellant's partner and children which would be missed. He further submitted that there was no reason why the family could not remain in contact using modern methods of communication, for example the telephone and Skype. He submitted that there was no objective evidence before the Tribunal that Skype was not accessible in Somalia despite the appellant's evidence that he did not think that it was.

24. Mr Richards invited me to find that while the appellant's deportation would be unwelcome and challenging for his family, the consequences to them did not cross the heightened threshold of being "unduly harsh".

25. On behalf of the appellant, Ms Nowaparast submitted that the consequences to the appellant's partner and children did cross the threshold of being "unduly harsh". She submitted that it was in the children's best interests to be cared for by both their parents and that, at best, if the appellant were deported, continued contact for the foreseeable future could only be over the telephone or internet. She accepted there was no evidence that internet access was not readily available in Somalia. She submitted that, in effect, deportation would remove all physical contact between the children and their father. Visits to Somalia were practically impossible and she reminded me that the Foreign and Commonwealth Office advised against all travel

to Somalia by British citizens. She submitted that it was not in the children's best interest to be denied physical contact with their father. Ms Nowaparast submitted that even if the appellant's partner had coped whilst he was in prison, the situation was now different. There were now two children – one nearly 5 and one 2 – and the appellant's partner was about to give birth to their third child. The level of support needed was stronger now than when the appellant was in prison. She submitted that the appellant's partner had, in her evidence, emphasised how dependent she and the children were upon the appellant. She also pointed out that the appellant's sister and mother lived with the family and that dependance also had to be taken into account. She submitted that the lack of physical contact was not temporary and could be for an indefinite period and so the consequences of separation were "unduly harsh".

Discussion and Findings

26. The burden of proof is upon the appellant to establish that his deportation to Somalia would breach Art 8 and, therefore, that he falls within Exception 1 set out in s.33(2) of the UK Borders Act 2007. The appellant must establish that breach on a balance of probabilities.

27. In applying Art 8, I must adopt the two-stage approach: first, considering whether the appellant can succeed under the relevant Immigration Rules, namely para 399; and secondly, if he cannot, whether he has established "very compelling circumstances" over and above, those described in para 399 (see MF (Nigeria) v SSHD [2013] EWCA Civ 1192 and Singh and Khalid v SSHD [2015] EWCA Civ 74). In considering that second stage the Tribunal is carrying out the "proportionality assessment" under Art 8.2 and is required to "have regard" to the factors set out in ss.117B and 117C of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014).

28. The proper interpretation of the phrase "unduly harsh" was addressed by the Upper Tribunal in MAB. The essential conclusions of the UT are set out in the headnote as follows:

> "1. The phrase 'unduly harsh' in para 399 of the Rules (and s.117C(5) of the 2002 Act) does not import a balancing exercise requiring the public interest to be weighed against the circumstances of the individual (whether child or partner of the deportee). The focus is solely upon an evaluation of the consequences and impact upon the individual concerned.
>
> 2. Whether the consequences of deportation will be 'unduly harsh' for an individual involves more than 'uncomfortable, inconvenient, undesirable, unwelcome or merely difficult and challenging' consequences and imposes a considerably more elevated or higher threshold.
>
> 3. The consequences for an individual will be 'harsh' if they are 'severe' or 'bleak' and they will be 'unduly' so if they are 'inordinately' or 'excessively' harsh taking into account of all the circumstances of the individual."

29. I turn now to the evidence and my factual findings.

30. The appellant is a citizen of Somalia who arrived in the UK with his mother in 2003 when he was 14 years old. On 14 November 2009, the appellant married his wife, H.

They have two children, a son who was born on 5 December 2010 (aged 4) and a daughter who was born on 13 March 2013 (aged 2).

31. I have set out earlier the appellant's criminal record. The index offence for which he is subject to deportation resulted in his conviction on 15 December 2010 at the Crown Court for two offences of burglary and unlawful wounding for which he received consecutive sentences of twelve months and sixteen months respectively. The appellant was released from prison in February 2012.

32. The appellant's wife and children are British citizens. They have never been to Somalia. The appellant's wife is currently pregnant with their third child which is due to be born in October of this year.

33. The appellant's parents and siblings all live in the UK. His parents are separated. His father lives in London together with his siblings, apart from his 15 year old sister. The appellant's mother lives with the appellant, his wife and children. She is disabled and he receives carer's allowance as her primary carer. Recently, the appellant's 15 year old sister came to live with the appellant and his family. His sister attends school locally.

34. The appellant's evidence is that he is deeply sorry for his actions. His wife stood by him when he was in prison. The evidence before the judge, and given orally by the appellant before me, was that he is employed as a driver for a Chinese takeaway and also works, albeit intermittently, as a translator. He told me that for the driving he received £150 plus a carer's allowance of between £60 and £65 per week. When he was working as a translator, he was able to earn £25 an hour. He told me that, apart from child benefits, neither he nor his wife were in receipt of public funds.

35. The appellant's wife, however, gave slightly different evidence. She told me that the appellant had worked but recently he had ceased work because he had hurt his hand. She told me that she was in receipt of employment support allowance and he also received benefits.

36. Both the appellant and his wife gave evidence about the impact of the appellant being deported. The appellant said it would feel like "someone had passed away" and would "destroy us in every meaning of the word". He said that his family could not see themselves without him and he could not see himself without them. In cross-examination, the appellant said that he did not think it would be possible to keep in contact by Skype from Mogadishu.

37. The appellant's wife gave clear, and at times emotional, evidence that she and her children needed the support of the appellant. In particular, their son would be affected. They had been together for six years and she could not think of being without the appellant. She said she did not get much support from her family and would not be able to cope without him. In addition to their current children, she said that she was pregnant with their third child and needed his help in order to cope. She said that the appellant was remorseful; everyone made mistakes. She said that the appellant was her "backbone". She did not want her son to grow up without a father who needed to be there. When asked in cross-examination about how she had

coped whilst the appellant was in prison, his wife said that it had been "really hard". Her family had not really been there for her and she did everything she could to go and see the appellant.

38. The genuineness of the relationship between the appellant and his wife and between the appellant and his children was not doubted by Mr Richards. It is clear to me, having heard both the appellant and his wife give evidence, that their family relationships are deep and rich. They form a family unit of mutual support and dependence. The appellant is an integral part of the family providing strong parental support for his children and spousal support for his wife.

39. I found the appellant's wife to be a truthful and compelling witness. I accept her evidence in its totality. Although there were differences between her evidence and the appellant's as to his employment, accepting what she said, I find that the appellant is no longer employed but that is a recent event caused by his circumstances. He has clearly until the recent past obtained gainful employment and I have no reason to doubt that he would do so in the future to support his family. Were he deported, the appellant's wife and children would be deprived of the breadwinner of the family.

40. I also accept the evidence of the appellant's wife (and indeed the appellant), that the effect of the appellant's deportation would be particularly devastating to his children. It is clearly, in my judgment, in the children's best interests to be brought up by both their caring parents. The appellant has shown commitment to his wife and children since being released from prison in February 2013, over two and a half years ago. On all the evidence before me, I am satisfied that during that time the appellant's son has formed a close relationship and bond within the family with his father. Likewise, his second child was born during this time and has, for the last two years, lived with the appellant as part of the family unit. The effect of the appellant's deportation will, in my view, be to deprive both children of physical contact with their father for the foreseeable future. It is accepted by Mr Richards that it would be unduly harsh for the appellant's wife and children to live in Somalia. In my judgment, it would also be unreasonable (and beyond proper expectation) to expect the appellant's wife and children to visit the appellant in Somalia given the situation in that country and the FCO's advice, which Mr Richards did not challenge, advising British citizens not to travel to Somalia.

41. The effect would, therefore, be if the appellant were deported, that the children would be deprived of any <u>real</u> paternal contact and influence. The appellant has committed no further offences since 2010, in particular, since his release in February 2012. It was not suggested by Mr Richards that he presented any real risk of reoffending. His influence and support of both his children and wife is, in my judgment, positive and beneficial. I accept that there is no evidence that the appellant would not be able to keep in contact through modern electronic means, in particular Skype, with his wife and children. Over a short period of time, that may be a reasonable equivalent to direct physical contact with family members. It is not, however, a reasonable substitute for physical contact between a father and child (or

indeed husband and wife) over an extended period of time such as would be the case if the appellant were deported.

42. In my judgment, any meaningful relationship between the appellant and his wife or the appellant and his children would be destroyed by his deportation. His wife would lose his support both emotionally and financially in raising, what will shortly be, a family of three children. The burden upon his wife will, no doubt, be added to by the presence of her mother-in-law living in the house. There is every likelihood that the appellant's wife would become her carer in the appellant's absence. The presence of the appellant's 15 year old sister is, in my view, less significant since I see no reason why she could not return to live with her father in London as she had done so until recently.

43. Applying the approach in MAB, I am satisfied that the impact upon the appellant's wife and his children if he were deported would be "unduly harsh" in that the impact upon them would be inordinately or excessively harsh given the nature and longevity of the interference with their ability to live as a family unit.

44. For these reasons, I am satisfied that the appellant meets the requirements in paras 399(a) and 399(b).

45. On that basis, the appellant has established that his deportation would breach Art 8.

Decision

46. For the reasons given in my decision of 18 June 2015, the decision of the First-tier Tribunal to allow the appellant's appeal under Art 8 involved the making of an error of law. That decision has been set aside.

47. I remake the decision, allowing the appellant's appeal under Art 8 of the ECHR.

Signed

A Grubb
Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

No fee is payable and so I make no fee award.

Signed

A Grubb
Judge of the Upper Tribunal