Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01718/2014

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination issued**
On 31 March 2015	**On 21 April 2015**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ABDURAHAN MOHAMMED

Respondent

Representation:
For the Appellant: Mrs M O'Brien, Home Office Presenting Officer
For the Respondent: Miss A E Miller, of Katani & Co., Solicitors

DETERMINATION AND REASONS

1. The parties are as described above, but are referred to in the rest of this determination as they were in the First-tier Tribunal.
2. The SSHD appeals against a determination by First-tier Tribunal Judge Kempton, promulgated on 2 December 2014, allowing "on human rights grounds" the appellant's appeal against refusal to revoke a deportation order.
3. Mrs O'Brien relied on the SSHD's grounds of appeal to the Upper Tribunal, which she described as detailed and thorough. They should be read along

with this determination. She referred to the cases cited therein –*Lee v SSHD* [2011] EWCA Civ 348, in particular at paragraph 27; *SS (Nigeria) v SSHD* [2013] EWCA Civ 550; *LC (China) v SSHD* [2014] EWCA Civ 1310; *AM v SSHD* [2012] EWCA Civ 634; *Masih v SSHD* [2012] UKUT 00046; and *DS (India) v SSHD* [2009] EWCA Civ 544. She submitted that the judge failed to grasp that the appeal was against refusal to revoke a deportation order, and failed to apply the legal approach well-established in a line of authority. Although the judge at paragraph 29 quoted the requirements of the Rules and the presumed public interest, she did not go on to apply them to the case before her. Rather, at paragraph 30 she embarked on a loose Article 8 consideration without regard to the Rules. At paragraph 31 she said there were parts of Rule 399 and 399A which the appellant met, but not all. She did not say which parts were met and which were not, although such findings were crucial. It had to be explained which parts of the rules the case did not satisfy, and if so, why the appellant might nevertheless succeed. At paragraph 34 she said that the case presented "a fragile balance to be struck", which ignores the presumption and the particular requirements of the Rules. She failed to recognise that the provisions of the Immigration Rules relating to deportation have been held to form a complete code incorporating Article 8 considerations. She did not explain why she approached the case outwith the provisions of that code. She showed no understanding of the weight which the courts have emphasised should be given to the public interest. Those were such misdirections on the law as to require the determination to be set aside.

4. Miss Miller submitted that paragraph 31 in particular showed that the judge had the Rules clearly in mind. Although the judge did not go through them step by step, she did in effect apply them, finding the circumstances required by the Rules in matters such as the country of return being Somalia with all its difficulties, where the appellant's partner and child could not be expected to go. The determination should stand.

5. I indicated that I was satisfied that the determination errs materially in law and could not stand.

6. Although the judge stated the correct approach at paragraph 29, she had in advance minimised the appellant's offending at paragraph 28. Having acknowledged the Rules, at paragraph 30 she embarked on an assessment outside them. The Rules in deportation cases have been found to constitute a code which incorporates all relevant Article 8 considerations. The case was for decision by reference to the Rules, not as a free-ranging exercise. At paragraph 31, after saying that some unspecified parts of the Rules were not met, the judge went on, "Accordingly, the matter has to be considered simply as a stand alone Article 8 case". She unfortunately at that point strayed into material legal error. The point is reflected in the outcome, allowing the appeal "on human rights grounds"; if the case succeeded, it did so within not outside the Rules.

7. Although Miss Miller pointed to the findings that it would be unduly harsh for the appellant's partner and child to leave the UK to live in Somalia, that is uncontentious, and does not answer the questions whether it would be

unduly harsh for the partner and child to remain in the UK without the appellant. Nor are the other questions posed by the Rules answered. The case was not one which presented "a fragile balance". It required the judge to answer the questions posed by the Rules bearing in mind the approach explained in the case law.

8. Neither party suggested that there is any Scottish case in point. A further recent case from the Court of Appeal is *AQ (Nigeria) & others v SSHD [2015] EWCA Civ 250*, which explains at paragraph 70:

> It follows that whenever the offender appeals against a deportation order on the ground that the public interest in his deportation is outweighed by his private or family life in the UK, the tribunal will need to examine the factors that would, under the Secretary of State's policy, outweigh the public interest in deportation. The policy seeks to identify factors relating to private and family life of such cogency that they would be sufficient to outweigh the public interest. Ultimately, the assessment of proportionality is for the tribunal or the court to make but national policy as to the strength of the public interest in the deportation of foreign criminals is a fixed criterion against which other factors and interests must be measured. When this court in MF (Nigeria), LC (China) and AJ (Angola) spoke of the requirement to view the assessment of proportionality through the lens of the new rules, I conclude that it had in mind the need for decision-makers to have close regard to the weight of factors that would be required under the rules to tip the balance of proportionality away from deportation. Accordingly, the starting point in a case where the offender has been sentenced to 4 years imprisonment or more is that very compelling circumstances (over and above those identified in paragraphs 399 and 399A) would be required to outweigh the public interest in deportation.

9. As to remaking the decision, Mrs O'Brien submitted that there could be only one answer and that the determination should be reversed. Ms Miller said that there was no change of circumstances and that a fresh decision need not involve a fresh hearing in the First-tier Tribunal.

10. The determination is **set aside**. No findings are to stand. In spite of the indications from both parties, I think that there has been an absence of effective judicial decision-making in the First-tier Tribunal, such that under section 12(2)(b)(i) of the 2007 Act and Practice Statement 7.2 it is appropriate for this decision to be remade there entirely afresh. The member(s) of the First-tier Tribunal chosen to reconsider the case are not to include Judge Kempton.

11. The Tribunal remaking the decision should be careful to approach this in the light of the fact that it is an application for revocation of a deportation order, paying attention to the framework of the decision appealed against, the relevant paragraphs of the Immigration Rules, and the case law.

Hugh Macleman

31 March 2015
Upper Tribunal Judge Macleman