



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/43123/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 10 August 2015**

**Decision & Reasons Promulgated  
On 20 August 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MOHAMED OMAR MAHMOOD  
(ANONYMITY ORDER NOT MADE)**

Respondent

**Representation**

For the Appellant: Mr T. Melvin, Senior Home Office Presenting Officer

For the Respondent: Ms Agata Patyna, Counsel instructed by Oracle Solicitors

**DECISION AND REASONS**

1. I see no need for, and do not make, an order restricting reporting of this case.

**The Respondent**

2. The respondent (hereinafter referred to as “the claimant”) is a citizen of Somalia born on 6 June 1983 who arrived in the UK in February 1990, aged six, with his mother and two brothers. On 26 September 2000 the claimant was granted indefinite leave to remain in the UK.

3. On 2 October 2014 the Secretary of State revoked the respondent's indefinite leave to remain pursuant to Section 76(1) of the Nationality and Immigration Act 2002 ("the 2002 Act"). Section 76(1) of the 2002 Act provides that:

'The Secretary of State may revoke a person's indefinite leave to enter or remain in the United Kingdom if the person—

- (a) is liable to deportation, but
- (b) cannot be deported for legal reasons'

4. The claimant has twice successfully appealed attempts to deport him on the basis that to do so would place the UK in breach of Article 8 of the European Convention of Human Rights (ECHR). In November 2005 the claimant was convicted on eight counts of possessing a Class A controlled drug with intent to supply and sentenced to three years imprisonment. He was served with a notice of intention to make a deportation order but successfully appealed under Article 8 of the ECHR. On 3 November 2011 he was convicted of burglary and theft and sentenced to 12 months imprisonment. He was notified of liability to deportation but successfully appealed on the basis of family life and length of residence in the UK.

5. The Secretary of State's decision of 2 October 2014 to revoke the claimant's indefinite leave to remain refers to the decision of First-tier Tribunal Judge B A Morris promulgated on 29 November 2013 allowing the second appeal against deportation, where Judge B A Morris states at paragraph 33:

"Despite our findings concerning the Appellant's credibility we find that we must allow the appeal although we do so with great reluctance. We have no doubt that the Appellant is not of benefit to the United Kingdom, that he has let down his family and that he did not take advantage of the second chance which was given to him in 2007 when his previous appeal against deportation was allowed. He is not a reformed character."

6. The Secretary of State's decision states that because the claimant had previously succeeded in an appeal against deportation he would not be removed from the UK. Rather, his indefinite leave to remain would be replaced with limited leave and in considering further applications for leave to remain his conduct would be taken into consideration.

### The First-tier Tribunal Decision

7. The claimant appealed and his appeal was heard by Judge Majid ("the judge") on 22 April 2015 who, in a decision promulgated on 28 April 2015, allowed the appeal.
8. The judge's decision does not make any reference to Section 76(1) of the 2002 Act or identify that the issue before him was that the claimant's indefinite leave was to be revoked. Instead, the decision reads as if the judge has assumed the Secretary of State had decided to remove the claimant, which was clearly not the case.
9. At paragraph 10(a) of his decision the judge stated that:

“... the Immigration Judge ... is not willing to allow the claimant to be deported. Logically, that should have been respected but the Home Office is not willing to take the same attitude to the Appellant; accordingly, this Appeal before me [sic] bringing more suffering to the Appellant who is keen to move on and work for the welfare of his family.”

10. Having noted that the appellant’s youngest child is only three and his best interests should be kept in mind, the judge then set out in detail case law concerning Section 55 of the Borders, Citizenship and Immigration Act 2009 before concluding that “the Appellant can benefit from the relevant Immigration Rules as amended and the protections of the ECHR, particularly concerning the “best interest” of the child”.

### Submissions

11. Mr Melvin, for the Secretary of State, submitted that the judge had failed to identify the relevant law, or to apply it. Ms Patyna, for the claimant, conceded that the judge had not addressed the relevant statute but argued that an Article 8 proportionality assessment was in any event required, which is what the judge had in effect carried out and as such the judge was entitled to reach the conclusion he had. She also argued that the Secretary of State’s revocation decision was defective.

### Consideration

12. The judge’s decision contains a clear error of law. He has failed to address the subject matter of the appeal and instead discussed areas of law that are either irrelevant or whose relevance has not been explained. The judge has approached the appeal as if it concerned removal of the claimant when in fact it was an appeal against a decision under Section 76(1) of the 2002 Act to revoke the claimant’s indefinite leave to remain and replace it with limited leave to remain.
13. I have considered whether it would be appropriate for me to remake the decision, and note that were I to do so I would have in mind the Supreme Court’s judgment in **R (George)** [2014] UKSC 28 where guidance is given on applying Section 76(1). However, it is my view that the effect of the error has been to deprive the claimant of a fair hearing and as such, in accordance with the section 7.2(a) of the Practice Statement of the Immigration and Asylum Chambers, I find that the appeal should be remitted to the First-tier Tribunal for re-making.

### **NOTICE OF DECISION**

14. The decision of the First-tier Tribunal contained errors of law such that it is set aside in its entirety and the appeal is to be heard afresh.
15. No anonymity direction is made.
16. The appeal is remitted to the First-tier Tribunal for hearing afresh before a judge other than Judge Majid.

Signed  
Deputy Upper Tribunal Judge Sheridan

Dated