Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/05367/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8th January 2016	**On 18th May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

[M A]
~~(ANONYMITY DIRECTION NOT MADE)~~

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms N Nnamani; Counsel instructed by Dillex Solicitors
For the Respondent: Ms A Everritt; Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision and reasons by First-tier Tribunal Judge Dean promulgated on 23rd September 2015 in which she dismissed an appeal against a decision made by the Secretary of State

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on 6th March 2015 to refuse the appellant's claim for asylum, and leave to remain in the UK on the basis of the appellant's family or private life.

2. The appellant is a Somali national. Borrowing from the decision of the First-tier Tribunal Judge, I summarise and augment the background. The appellant is a member of the mixed Bajuni/Barawa minority clan. She married her husband in Somalia in 1986 and they had three children. In 1995 they left Somalia because of the war and moved to a refugee camp in Kenya. In December 1995 the appellant's husband and two sons left Kenya with the help of an agent and arrived in the United Kingdom where they claimed asylum. The appellant and their daughter remained in Kenya. In 2007 the appellant came to the United Kingdom, with her daughter, on a spouse visa valid until 9th March 2009. In November 2013, the appellant claimed asylum. The appellant believes that if she returns to Somalia she will be persecuted because of her minority clan membership and the fact that she will be returning as a lone woman. The claim for asylum was made by the appellant after she was served with a Notice of Liability to Removal as an overstayer, following the refusal of an application for indefinite leave to remain in the UK.

The decision of First-tier Tribunal Judge Dean

3. The First-tier Tribunal Judge set out at paragraphs [11] and [12], the background. She records, at paragraph [10], that she heard evidence from the appellant and her husband. The Judge's findings and conclusions are set out at paragraphs [13] to [36] of the decision. Insofar as the appeal against the claim for asylum is concerned the Judge accepted, at paragraph [16] that if the appellant is returned to Somalia, that will be to Mogadishu. Having considered the Country Guidance case of **MOJ and Ors (Return to Mogadishu) Somalia CG [2014] UKUT 00443 (IAC)**, the Judge found that the appellant's return to Mogadishu would not be unreasonable. She found, at paragraph [18]

that the appellant is an "ordinary citizen", and at paragraphs [20] she found that the appellant is not at risk of persecution or harm requiring international protection as a result of her minority clan membership if she is returned to Mogadishu.

4. The Judge went on to consider the appellant's claim that is she returned to Somalia, it will be as a lone woman. The Judge rejected that claim. At paragraph [22] of her decision she states:

> *"22. Accordingly, looking at this evidence in the round, I find that the Appellant would not be a lone woman in Mogadishu and has failed to demonstrate to the required standard that she is in need of international protection. Therefore, looking at the totality of the evidence before me, I find that the Appellant neither faces a real risk of persecution in Mogadishu nor is she at risk of harm such as to require protection under Article 15(c) of the Qualification Directive or Article 3 of the ECHR. "*

5. The Judge then turned to the appellant's Article 8 claim. It had been conceded at the hearing that the appellant did not meet the requirements of the Immigration Rules. It is uncontroversial that the appellant could not satisfy the requirements for leave to remain as a partner or parent under Appendix FM. In addressing the appellant's claim to a private life, the Judge states:

> *"25. However, the Appellant may satisfy paragraph 276ADE(vi) which states that a person can be entitled to leave to remain on grounds of private life if she is over 18 years old and lived in the United Kingdom for less than 20 years and there would be very significant obstacles to her integration into the country to which she would have to go if required to leave the United Kingdom.*
>
> *26. The Appellant satisfies the age and residence requirement of this provision. However, the issue is whether or not there are "very significant obstacle to her integration" in Somalia. The*

Appellant stated in her second Asylum Interview (question 24) that when she was in Kenya she cooked and sold food and I therefore find she would be able utilise this experience to provide a source of income to support herself in Somalia. Furthermore, the Appellant's husband has previously provided financial support and there is no evidence before me to demonstrate that he is unable or unwilling to continue to support his wife. Looking at the totality of the evidence before me I find that the Appellant has failed to demonstrate to the required standard that there are "very significant obstacle to her integration" in Somalia. I therefore further find that the Appellant fails to meet the requirements of paragraph 276ADE(1) (vi).

27. Accordingly, I find that the Appellant's claim for leave to remain in the United Kingdom on the basis of private life under paragraph 276ADE fails.

6. At paragraphs [30] to [36] the Judge states:

30. I recognise that the facts of this case insofar as they relate to family life are somewhat unusual in that this is a situation where there is, in effect, a family reunion and this is not specifically addressed by Appendix FM of the Immigration Rules. I therefore find that the Appellant's case is one where it is appropriate to consider the Appellant's family life under Article 8 outside the Rules. In so doing I have paid particular attention to the House of Lords decision in ***Razgar [2004] UKHL 27*** *and the step-by-step approach of Lord Bingham.*

31. First it is necessary to establish whether there is a family life with which removal would interfere. I accept that the Appellant has a husband and three adult children in this country and that the Razgar questions (i)-(iv) can be answered in the affirmative. The issue therefore is one of proportionality, namely whether the interference with the Appellant's claimed family life is proportionate to the legitimate public end sought to be achieved.

32. The Appellant's two sons were born in 1988 and 1989. They left Kenya with their father in December 1995 when they were 7 and 6 years old. The Appellant did not come to this country until 2007 by which time her sons were adults of around 19 and 18 years old. The Appellant's daughter, who was born in 1994, remained in Kenya with the Appellant and they travelled together to the United Kingdom in 2007. There are no Witness Statements before me from the Appellant's children and all three are now adults. The Appellant's two sons have British citizenship (Appellant's bundle, pages 25-26) and her daughter has been granted leave (Appellant's bundle, pages 22-23). However, there is no evidence before me concerning the current social circumstances of the Appellant's three children. In particular, where they live, whether they have families of their own and what contact, if any, they have with their mother. The Appellant's representative stated that the Appellant's daughter was sitting at the back of the court and I note a letter, dated 15 April 2014, in the Appellant's bundle (page 22). However, without more, I find that this does not advance the Appellant's claim to a family life with her children because it is well established that relationships between parents and their adult children do not necessarily benefit from protection under Article 8 of the Convention unless the existence of additional elements of dependence other than normal emotional ties can be proven ***(Mokrani v France [2003] 40 EHRR 123****, paragraph 33). I find that there is no such evidence before me.*

33. The Appellant's husband was separated from his wife between 1995 and 2007. There is little corroborating evidence placing the Appellant and her husband at the same address. Telephone bills in the Appellant's name were submitted, dated 10 July 2007, 12 October 2014 and 12 July 2015 (Appellant's bundle, pages 31-33). Although all three bills are from BT the name on the first bill is the Appellant's full name whereas the name on the second bill only uses the Appellant's initials and the typescript is different to the first bill. While this evidence is not determinative,

without more, I give it little weight as corroborating the Appellant's claim to live at the same address as her husband. Moreover, given that the Appellant entered the United Kingdom in March 2007 as a visitor, I find it implausible that four months later she would have a BT telephone account in her name, whereas her husband had been living here since 1995. I therefore give this evidence little weight as evidence of family life between the Appellant and her husband. Furthermore, I find that save for a letter dated 20 April 2009 from Kidbrook School, and a Sixth Form progress report for 2011/2012 from Corelli College, there are no corroborating documents which have the name of both the Appellant and her husband at the same address.

34. Looking at the totality of the evidence before me concerning the Appellant's claimed family life with her husband and children I find that it weighs very lightly in the balance. I also find that the legitimate importance attached to the interests of the Respondent in maintaining a proper system of immigration control must be given considerable weight, particularly in this case where the Appellant overstayed her visa and failed over a period of 4 years to attempt to regularise her status. I have also had regard to paragraph 117B of the Nationality, Immigration and Asylum Act 2002 which sets out the public interest in Article 8 cases. Accordingly, when taken in the round, I find that the Appellant's removal from the United Kingdom would not be a disproportionate interference with her family life when weighed against the Respondent's legitimate interest in effective immigration control.

35. I accept that the Appellant will have established a private life while in this country. However, section 117B(4) of the Nationality, Immigration and Asylum Act 2002 states that little weight should be given to a private life established by a person at a time when she is in the United Kingdom unlawfully. Similarly section 117B(5) states that little weight should be given to a private life established when a person's immigration status is precarious. It is clear that the Appellant was in this country

unlawfully after 2009 and that although in 2013 she made an application for Indefinite Leave to Remain and, subsequently, Asylum, her immigration status was not determined and was therefore precarious. Moreover, looking at the totality of the evidence before me, I find that this amounts to nothing more than ordinary day-to-day life which I find could just as easily be carried out in all essential respects in Somalia. Accordingly, looking at the evidence in the round I find that the Appellant's removal from the United Kingdom would not have consequences of such gravity as to engage Article 8 on grounds of private life.

36. However, even if Article 8 is engaged on grounds of private life, when taken in the round, I find that the Appellant's private life can be given little weight because it was established at a time when she was in the country unlawfully and her immigration status was precarious. Thus I find that the Appellant's private life is outweighed against the Respondent's legitimate interest in effective immigration control."

The grounds of appeal and the hearing before me

7. Permission to appeal was granted by Upper Tribunal Judge Deans on 26th October 2015. The matter comes before me to consider whether or not the decision of First-tier Tribunal Judge Deans involved the making of a material error of law, and if so, to remake the decision.

8. The appellant appears to challenge the findings made by the Judge in respect of both the asylum and human rights claims. I shall deal with each in turn.

9. First, insofar as the asylum claim is concerned the appellant submits that the Judge failed to give appropriate weight to the risk associated with the fact that the appellant is a member of a minority claim and she would be returned to Mogadishu as a lone woman and so would face real harm on return *(paragraph 4 of the Grounds of Appeal)*.

Furthermore, the appellant is not an "ordinary citizen" but a member of a minority clan and indeed a lone woman *(paragraph 27 of the Grounds of Appeal).* Ms Nnamani submitted before me that the Judge records at paragraph [21] that the appellant stated that she had cousins in Somalia who had previously provided her with assistance, but the Judge failed to take account of the appellant's evidence at paragraph [13] of her witness statement dated 27th August 2015 in which she states that they have no communication with any relatives in Somalia, and that most of them died in the war going on in Somalia. Ms Nnamani submits that although the grounds of appeal do not directly challenge the findings made by the Judge, it is implicit that the Judge has not adequately dealt with the evidence before her.

10. Second, insofar as the Article 8 claim is concerned, the Judge failed to acknowledge the fact that a 20 year absence from Somalia in effect constitutes a loss of ties with the country of nationality and that in turn would mean that removal of the appellant to Somalia would not be an appropriate measure. The appellant claims that paragraph 276ADE of the Immigration Rules is engaged *(paragraph 6 of the Grounds of Appeal)*.

11. The appellant claims that the Judge should have had regard to a previous version of paragraph 276ADE(1)(vi) under which an applicant was required to establish that they are 18 years or above, have lived continuously in the UK for less than 20 years but have no ties (including its social, cultural or family) with the country to which they would have to go, if required to leave the UK. The appellant submits that the Judge should have considered the "ties" that the appellant has to Somalia, by reference to the decision of the Upper Tribunal in **Ogundimu (Nigerial) [2013] UKUT 00060** *(paragraphs 7 to 15 of the Grounds of Appeal).*

12. The appellant claims that in any event, even having regard to the current version of paragraph 276ADE(1)(vi) introduced in July 2014, the Judge should have found that there are a very significant obstacles to the appellants integration into Somalia, a country where she would have no protection from the authorities or clan members. The appellant submits that the fact that she has no ties to Somalia remains relevant in considering whether there are significant obstacles to the appellant's integration back into Somalia *(paragraphs 16 to 21 of the Grounds of Appeal).* The appellant claims that the Judge's approach to paragraph 276ADE(1)(vi) also affected the Judge's assessment of the Article 8 claim outside the rules.

13. Ms Nnamani submitted before me that the issue in the appeal is whether the Judge applied the correct test and adequately dealt with the Article 8 claim. She submits that the Judge's consideration of the claim under paragraph 276ADE of the immigration rules is deficient, and at paragraph [26] of her decision, the Judge does not refer to material matters such as the fact that the the Appellant would be returning to Mogadishu, an area in which she has never previously lived, as a lone woman, and with no family connections. Ms Nnamani submits that these are all matters that establish that there would be very significant obstacles to the appellant's integration into Somalia.

14. Ms Nnamani submits that in assessing the Article 8 claim outside the immigration rules, the Judge was wrong to say at paragraph [32] of her decision that there was no evidence before her concerning the current social circumstances of the appellant's three children. The evidence of the appellant at paragraph [12] of her witness statement dated 27th August 2015 is that the family all live together under one roof as a family unit. She submits that although the appellant's children are adults, the family remains living together as a family unit and the Judge erred in finding that the relationship between the appellant and her adult children cannot benefit from protection under Article 8.

15. The respondent has filed a Rule 24 response dated 2nd November 2015 that was adopted by Ms Everritt. The respondent opposes the appeal and submits that the Judge is clearly mindful at paragraph [18] of her decision, of the appellant's case that she has been absent from Somalia for 20 years. The Judge considered the appellant's continued connection with Somali culture and it was open to the Judge to find that the Bajuni clan has a presence within Mogadishu on the basis of the CIG Report and that as a consequence, the appellant would not be at risk on the basis of her clan membership. The Judge noted that the appellant's minority clan membership was not in issue and properly assessed the claim in accordance with the country guidance case of **MOJ**. Ms Everritt submits that it was open to the Judge to find that the appellant would not be a lone woman in Mogadishu for the reasons set out.

16. Ms Everritt submits that the Judge was entitled, having carefully considered the evidence, to find that the appellant has not established that there are "very significant obstacles" to the appellant's integration into Somalia. Ms Everritt submits that the grounds of appeal do not challenge the findings of fact made by the Judge or proceed upon the basis that the Judge failed to make findings in relation to material matters. She submits that the judge gave cogent reasons at paragraph [26] of her decision having noted at paragraph [17] that the appellant's knowledge of Somalia has not dimmed during the years of her absence.

Discussion

17. As to the asylum claim, the issue for me to decide is whether or not the Judge was entitled to conclude that the appellant has failed to demonstrate to the required standard, that she is in need of international protection. In that respect I follow the guidance of the Court of Appeal in **R & ors (Iran) v SSHD [2005] EWCA Civ 982**. The Court of Appeal held that a finding might only be set aside for error of

law on the grounds of perversity if it was irrational or unreasonable in the *Wednesbury* sense, or one that was wholly unsupported by the evidence. A finding that is "perverse" embraces findings that are irrational or unreasonable in the Wednesbury sense, and findings of fact that are wholly unsupported by the evidence. On appeal, the Upper Tribunal should not overturn a judgment at first instance, unless it really could not understand the original judge's thought process when she was making material findings. I apply that guidance to my consideration of the decision in this appeal.

18. First-tier Tribunal Judge Dean found that the appellant would not be a lone woman in Mogadishu and has failed to demonstrate to the required standard that she is in need of international protection. Having considered the totality of the evidence, she found that the appellant neither faces a real risk of persecution in Mogadishu nor is she at risk of harm such as to require protection under Article 15(c) of the Qualification Directive or Article 3 of the ECHR. The Judge reached her decision for the reasons that are set out at paragraphs [16] to [21] of her decision having considered the country guidance case of **MOJ and Ors (Return to Mogadishu) Somalia CG [2014] UKUT 00443 (IAC)**.

19. I have carefully considered the evidence that was before the Judge and the reasons that are set out at paragraphs [16] to [21] of the Judge’s decision. In my judgement it was open to the Judge to find that the appellant will be returned to Mogadishu and that her return to Mogadishu would not *prima facie* be unreasonable. Having considered the matters set out in the country guidance case of **MOJ**, it was in my judgement open to the Judge to find that the appellant is an “ordinary citizen” and thus is not at risk of persecution or harm as a result of her minority clan membership. It was equally open to the Judge, on the evidence, to find that the appellant would not be a lone woman in Mogadishu. The Judge made findings that were adverse to the appellant. The appellant disagrees with the findings, but the findings are not

irrational or unreasonable in the *Wednesbury* sense, or findings that are wholly unsupported by the evidence.

20. I reject the appellant's claim that that the Judge should have had regard to a previous version of paragraph 276ADE(1)(vi) under which an applicant was required to establish that they are 18 years or above, have lived continuously in the UK for less than 20 years but have no ties (including its social, cultural or family) with the country to which they would have to go, if required to leave the UK. In **Odelola v SSHD [2009] UKHL 25**, the House of Lords concluded that the Immigration Rules and policies set out by the SSHD will apply to decisions at the time they are made unless and until such time as she promulgates different rules, after which she will decide according to the new Immigration Rules or policy (subject to any transitional provisions which the SSHD may decide to put in place in the circumstances of the rule or policy change). Both at the time of the respondent's decision of 6th March 2015 and as at the date of the decision of the First-tier Tribunal, in order to satisfy the requirements of paragraph 276ADE(1)(vi), the appellant was required to establish that there would be very significant obstacles to the appellant's integration into the country to which she would have to go, if required to leave the UK. The Judge found at paragraph [26] that the requirement was not met by the appellant. The requirement of 'very significant obstacles' sets a demanding standard. In my judgment when the grounds of appeal are carefully examined, they do no more than disagree with the Judge's findings and assessment. The appellant disagrees with the finding, but the finding is not irrational or unreasonable in the *Wednesbury* sense, or findings that are wholly unsupported by the evidence.

21. In any event, the Judge went on to consider the appeal on Article 8 grounds, outside the immigration rules. The Judge records at paragraph [28] of her decision that the appellant's representative conceded that the appellant did not meet the requirements of the Immigration Rules.

At paragraph [30] the Judge recognised that the facts of this case insofar as they relate to family life are somewhat unusual in that this is a situation where there is, in effect, a family reunion and this is not addressed by Appendix FM of the Immigration Rules. The Judge states at paragraph [31]

> *"31. First it is necessary to establish whether there is a family life with which removal would interfere. I accept that the Appellant has a husband and three adult children in this country and that the Razgar questions (i)-(iv) can be answered in the affirmative. The issue therefore is one of proportionality, namely whether the interference with the Appellant's claimed family life is proportionate to the legitimate public end sought to be achieved."*

22. On the face of it, the Judge in that paragraph appears to accept that the first four of the **Razgar** questions can be answered in the affirmative. That is, the proposed removal of the appellant will amount to an interference with the exercise of the appellant's right to respect for her family and private life; The interference will have consequences of such gravity as potentially to engage the operation of Article 8; The interference is in accordance with the law and the interference is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

23. The Judge notes at paragraph [31] that the issue therefore is one of proportionality, namely whether the interference with the appellant's claimed family life is disproportionate to the legitimate public end sought to be achieved.

24. It is not entirely clear from the decision whether the Judge, at paragraphs [32] and [33] of her decision, in fact makes a finding that the proposed removal of the appellant will not amount to an

interference with the exercise of the appellant's right to respect for her family and private life with her husband and children. If she does, that is at odds with what the Judge states at paragraph [31].

25. The Judge's assessment of proportionality is to be found at paragraphs [34] to [36] of her decision:

> *"34. Looking at the totality of the evidence before me concerning the Appellant's claimed family life with her husband and children I find that it weighs very lightly in the balance. I also find that the legitimate importance attached to the interests of the Respondent in maintaining a proper system of immigration control must be given considerable weight, particularly in this case where the Appellant overstayed her visa and failed over a period of 4 years to attempt to regularise her status. I have also had regard to paragraph 117B of the Nationality, Immigration and Asylum Act 2002 which sets out the public interest in Article 8 cases. Accordingly, when taken in the round, I find that the Appellant's removal from the United Kingdom would not be a disproportionate interference with her family life when weighed against the Respondent's legitimate interest in effective immigration control.*
>
> *35. I accept that the Appellant will have established a private life while in this country. However, section 117B(4) of the Nationality, Immigration and Asylum Act 2002 states that little weight should be given to a private life established by a person at a time when she is in the United Kingdom unlawfully. Similarly section 117B(5) states that little weight should be given to a private life established when a person's immigration status is precarious. It is clear that the Appellant was in this country unlawfully after 2009 and that although in 2013 she made an application for Indefinite Leave to Remain and, subsequently, Asylum, her immigration status was not determined and was therefore precarious. Moreover, looking at the totality of the evidence before me, I find that this amounts to nothing more than ordinary day-to-day life which I find could just as easily be carried out in all essential respects in*

> *Somalia. Accordingly, looking at the evidence in the round I find that the Appellant's removal from the United Kingdom would not have consequences of such gravity as to engage Article 8 on grounds of private life.*
>
> *36. However, even if Article 8 is engaged on grounds of private life, when taken in the round, I find that the Appellant's private life can be given little weight because it was established at a time when she was in the country unlawfully and her immigration status was precarious. Thus I find that the Appellant's private life is outweighed against the Respondent's legitimate interest in effective immigration control."*

26. In my judgment, the decision of the First-tier Tribunal discloses a material error of law and is set aside. Paragraphs [32] and [33] of the decision appear to be at odds with paragraph [31] of the decision. In the assessment of proportionality at paragraph [34], the Judge begins her assessment by stating that on the totality of the evidence before her concerning the appellant's claimed family life with her husband and children, she finds that it weighs very lightly in the balance. That appears to be based upon what is said by the Judge at paragraphs [32] and [33] of her decision, but her conclusions as to whether or not the appellant enjoys a family life with her adult children and her husband appear to be at odds with the finding at paragraph [31]. Had the judge proceeded upon the premise, as she appears to accept in paragraph [31], that the proposed removal of the appellant will amount to an interference with the exercise of the appellant's right to respect for her family and private life, and had regard to the evidence that the appellant and her family live together as a family unit, she might have attached greater weight to the family life in her assessment.

27. In my judgment, the Judge has given inadequate reasons for her conclusion that the respondent's decision does not give rise to a

disproportionate breach of the Article 8 rights of the appellant. This amounts to an error of law.

28. In my judgement there is a material error of law in the decision of the First-tier Tribunal insofar as the Tribunal's consideration of the Article 8 claim, outwith the Immigration Rules is concerned, and the decision is set aside.

29. The decision needs to be re-made and I have decided that it is appropriate to remit this appeal back to the First-tier Tribunal, having taken into account paragraph 7.2 of the Senior President's Practice Statement of 25th September 2012 which states;

> '7.2 The Upper Tribunal is likely on each such occasion to proceed to re-make 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 a party before the First-tier 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 or extent of any judicial fact-finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.'

30. In my view the requirements of paragraph 7.2(b) apply, in that the nature and extent of any judicial fact-finding necessary with regard to the Article 8 claim outwith the Immigration Rules, will be extensive. The parties will be advised of the date of the First-tier Tribunal hearing in due course.

Notice of Decision

31. The decision of the First-tier Tribunal involved the making of an error of law such that it is set aside. The appeal is allowed to the extent that the appeal on Article 8 grounds outwith the Immigration Rules is remitted to the First-tier Tribunal.

32. No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Mandalia

TO THE RESPONDENT

FEE AWARD

33. As the appeal was dismissed by the First-tier Tribunal, there was no fee award. I have remitted the appeal back to the First-tier Tribunal. No fee award is made by the Upper Tribunal. This is to be considered by the First-tier Tribunal.

Signed

Deputy Upper Tribunal Judge Mandalia