Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00005/2015

THE IMMIGRATION ACTS

Heard at Nottingham Magistrates Court	**Decision & Reasons Promulgated**
On 19th January 2016	**On 22nd January 2016**

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

MR ABDIFATAH OSMAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Not Represented
For the Respondent: Mr M Dwnycz (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is an appeal to the Upper Tribunal by the Appellant, with permission, against a Decision of First-tier Tribunal Judge Henderson promulgated on 22nd October 2015. The Appellant is a citizen of Somalia born on 11th January 1987.

2. The First-tier Tribunal dismissed his appeal against the Secretary of State's decision, taken on 22nd January 2015 to revoke his refugee status and deport him to Somalia.

3. A First-tier Tribunal Judge granted permission on the basis that she thought it arguable that the Judge had erred in failing to make material findings relevant to cessation of the Appellant's refugee status. It is said that the Judge correctly identified the test at paragraph 29 of the Decision and Reasons but did not appear to make any findings as to fundamental and durable changes which can be assumed to remove the basis of fear of persecution. It is said that the judge repeated the conclusion in the country guidance case of MOJ about durable changes in the sense that Al -Shabab had withdrawn completely from Mogadishu. However the Judge granting permission to appeal said that fear of Al-Shabab was not the basis on which the Appellant and his family had been granted asylum. Secondly the judge felt it arguable that the First-tier Tribunal may have erred in not adjourning or adjourning part heard so that evidence could be heard from the Appellant's family who the Judge had been told were on their way.

4. The background to this case is that the Appellant came to the United Kingdom in 2001, aged 14. On 29th September 2001 he was granted asylum, along with his sister in line with his mother.

5. The Appellant started to get into trouble from the age of 17 in 2004. In 2006 he was given a two-year sentence for possession of Class A drugs with intent to supply. That conviction resulted in a decision to deport him and the issue of a certificate pursuant to s.72 of the Nationality, Immigration and Asylum Act 2002. However, he succeeded in an appeal to the Tribunal on 6th September 2007, the Judge being persuaded that he no longer represented a danger and had successfully rebutted the presumption in s.72 such that as a Refugee he could not be deported. The Judge accepted that he was a changed man.

6. It transpired that the Judge's faith in the Appellant was misplaced as he continued to offend. Only two years after that appeal was allowed, on 8th October 2009 he was convicted of four counts of possession of Class A drugs with intent to supply and sentenced to 3 years imprisonment. Another decision to deport him was made and section 72 invoked.

7. On 23rd October 2012 he was convicted of three more offences of possession of Class A drugs with intent to supply and on this occasion was sentenced to 5 years and seven months. Another deportation decision was taken along with the revocation of his refugee status and section 72 invoked again. That was the decision appealed against before the First-tier Tribunal and the subject of the current appeal to the Upper Tribunal.

8. The issues to be decided in this case are firstly whether in accordance with section 72 and paragraph 339A (x) of the Immigration Rules the Appellant is excluded from refugee status. If so that would not prevent his deportation.

9. If he is not excluded from refugee status by reason of s.72 the question then is whether there have been durable changes in Somalia such that he

is no longer in need of protection (paragraph 339A (v) of the Immigration Rules and Article 1C(5).

10. If the Appellant is not entitled to refugee status the question then is whether he is at risk on return either on the basis of his original asylum claim or on the basis of his current claims.

11. If the Appellant would not be at risk on return to Somalia the question then is whether he should succeed in his appeal against the decision to deport him and in accordance with MF (Nigeria) [2013] EWCA Civ 1192 the Immigration Rules and paragraphs 398 & 399 are a complete code in that respect.

12. There are thus two aspects to the continuation of his refugee status. One is whether the Secretary of State was justified in revoking his asylum status on the basis of changes in Somalia and the other is whether in any event section 72 prevents him from benefiting. So far as the first is concerned, the Judge set out at paragraph 28 that the Appellant had argued that there were compelling reasons why his refugee status should not cease. It is said that he was born in Mogadishu and lived just outside the city and that he and his family suffered violence and persecution during the civil war. The Judge accepted that to be the case; that they had suffered persecution as a minority clan being members of the Tunni clan. However the judge went on to say that she was considering that matter in accordance with the current country guidance case of MOJ & Ors (return to Mogadishu) Somalia CG [2014] UKUT 00442 (IAC). The Judge also indicated that she had taken careful note of the letter from UNHCR dated 24th September 2014.

13. The Judge set out the requirements for the cessation clause in Article 1C (5) to be applicable, namely that there had been fundamental and durable changes in the country of origin which could be assumed to remove the basis of the fear of persecution.

14. At paragraph 34 the Judge set out the relevant paragraphs from MOJ which indicated that the original reason that the Appellant had been granted asylum were no longer applicable.

15. It is true, as indicated in the grant of permission, that the Judge has then dealt with the question of risk and Al-Shabab, finding that risk did not apply. It is true that that was not the basis of the original grant of asylum. However it was the basis upon which the Appellant claimed he should not now be removed. His case was, before the First-tier Tribunal, that if returned to Somalia he would join Al-Shabab and start killing people. The Judge rejected those claims and found the Appellant was no longer entitled to asylum.

16. The Judge, having so found, there was no necessity for her to go on and consider s.72. She ought to have started with s.72 but nothing turns on that. Had she done so, on the facts of this case, there is no doubt that the

certificate would have been upheld. The original Tribunal in his first deportation appeal also had to consider a section 72 certificate. That Tribunal correctly set out at paragraph 21 that a person is not entitled to refugee status where there are reasonable grounds for regarding him to be a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime constitutes a danger to the community of that country.

17. Section 72 of the Nationality, Immigration and Asylum Act 2002 defines a particularly serious crime and states that a person shall be presumed to have been convicted by a final judgement of a particularly serious crime and constitute a danger to the community of the United Kingdom if he is convicted in the United Kingdom of an offence, and sentenced to a period of imprisonment of at least two years. The presumption that such a criminal constitutes a danger to the community is rebuttable. In 2007 the Tribunal expressed itself at paragraph 28 to be entirely satisfied that this Appellant could not in any way be said to be a danger to the community. He had credibly expressed his wish to return to education and to his family environment and that his period of imprisonment had changed him. It was pointed out on his behalf that he was not the subject of any Court recommendation for deportation and that he was released on licence as someone who was considered to be of low risk. That Tribunal was satisfied that the Appellant had demonstrated that he was not a danger to the community and the certificate therefore could not be upheld. On that basis it found that the refugee status could not be withdrawn, he remained a refugee and thus could not be deported.

18. Unfortunately, events since 2007 have proved that Tribunal to have been wrong. Far from being a reformed character the Appellant's offending has escalated and the sentences appropriately longer. On that basis the Appellant cannot rebut the presumption and he is clearly a danger to the community. The Appellant claimed before me to have changed and been a model prisoner and asked for another chance. He said that his children need him. He has had a chance to show that he has changed and not taken it – twice. He had children before committing offences and that did not deter him and in any event as the First-tier Tribunal pointed out there is no evidence whatsoever that he has any relationship with them at all. Also, as the First-tier Tribunal found, it is not in children’s best interests to live with a Class A drug dealer.

19. The Appellant is not entitled to refugee protection and that combined with the findings of the First-tier Tribunal Judge that the situation in Somalia, in line with the Country Guidance case has changed such that he will not be at risk on return means that the Appellant must lose his appeal against the decision to revoke his refugee status. Whilst the Judge could have been clearer in setting out her findings, reading the judgment as a whole it is perfectly clear what the findings were and I can find no material error of law to justify it being set aside.

20. In considering the deportation itself, while the Judge has not specifically referred to MF (Nigeria) [2013] EWCA Civ 1192 or the Immigration Rules as they relate to deportation, any error is of form not substance as she has followed the principles contained in the Immigration Rules.

21. The sentence was in excess of five years so the Appellant case cannot benefit from any of the exceptions contained in paragraph 399 of the Rules. Paragraph 398 provides that a person such as this Appellant will be able to successfully avoid deportation only if there are very compelling circumstances over and above the exceptions listed in paragraph 399 and 399A. The Judge found at paragraphs 48 and 49 that there were not. That finding is unassailable as the only relationship capable of engaging Article 8 is the Appellant's relationship with his partner and children and there was a complete absence of evidence before the Judge (and me) from his partner in terms of a statement, a letter or a presence at the hearing. There was a complete absence of evidence as to the nature and strength of his relationship with his children and the frequency of any contact and on the dearth of evidence it was inevitable that the Judge would find no genuine and subsisting relationship with either his partner or his children.

22. The only other relationships were his relationships with his mother and his sister. They had provided witness statements which were unsigned and they did not attend the hearing before the First-tier Tribunal.

23. It is clear from the Decision and Reasons that the Appellant had indicated their intention to attend and that they had a car trouble en route. At paragraph 21 the Judge set out that his mother and sister were travelling to the hearing at Bradford from Leicester and when they had not arrived after the Appellant had completed his evidence she set the case down so that he could telephone them. The Judge was then told that they were 26 miles away from the hearing centre in a car. That was prior to midday. At two o'clock the judge was told that the car had broken down but they were not far away. The hearing concluded at 3 pm and they had still not arrived.

24. It is difficult to criticise the Judge given the leniency and time that was allowed for the witnesses to arrive. However, in an abundance of fairness and given that those witnesses attended the hearing before me, albeit at 11.30 rather than 10am, I indicated that I would hear their evidence. Additionally they both signed the statements contained in the file.

25. Neither witness gave any evidence to indicate anything other than a normal relationship between a parent and her adult child and between adult siblings. The Appellant’s sister used to live with her mother in Leicester but has recently moved with her husband and young baby to Birmingham. The Appellant, having been released on bail in mid-December 2015 currently resides with his mother in Leicester. Both witnesses confirm that they as a family support him and have seen a lot of changes in him. They did not believe Somalia to be a safe place for him and that he should be allowed to remain in United Kingdom. They said

that the continuing relationship with his children was important to him and to them.

26. His mother said that she had no family in Somalia but was in contact with the community there and it was the community who told her that her husband had been killed. On the basis of the evidence that I heard from the two witnesses, their evidence could have not possibly made any difference to the outcome of the appeal before the First-tier Tribunal. The Judge's conclusion that there were no very compelling circumstances over and above the exceptions was patently the correct conclusion in this case.

27. The Appellant's submission to me was that he knew he had made mistakes but he wanted to remain in the United Kingdom for his children. He told me that he had done a lot in prison and there are reports from prison saying that he had done well. He also told me that he suffers from psychiatric problems. However this has never been mentioned before by anyone and there is no medical evidence to support the assertion and I reject it.

28. Looking at the First-tier Tribunal's Decision and Reasons as a whole it is quite clear that the Judge found the Appellant is a) no longer in need of refugee protection on the basis of the change of circumstances in Somalia as evidenced by the Country Guidance case and b) as a foreign national criminal who has been convicted three times now of extremely serious drugs offences his deportation is in the public interest and there are no compelling or indeed any circumstances that could outweigh the very considerable public interest in this case. Additionally he is not entitled to refugee status due to the gravity of the offences and continuing risk that he presents.

29. For all of the above reasons I find the First-tier Tribunal did not make any material errors of law and I uphold the decision. On the facts of this case there is no possibility that any Judge would have come to a different conclusion.

30. There has been no application of anonymity in this case and I see no justification for making an anonymity direction.

Notice of Decision

The appeal to the Upper Tribunal is dismissed

No anonymity direction is made.

Signed Date 21st January 2016

Upper Tribunal Judge Martin