



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/03740/2017

THE IMMIGRATION ACTS

Heard at Field House
On 19th April 2018

Decision & Reasons Promulgated
On 18th May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE LEVER

Between

S H
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Loughran of Counsel

For the Respondent: Mr Melvin, Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The Appellant born on 31st December 1982 is a citizen of Somalia. The Appellant was represented by Ms Loughran of Counsel and the Respondent was represented by Mr Melvin, a Presenting Officer.
2. The Appellant had first come to the United Kingdom to attend a conference as a member of the Somali government in August 2011 and returned to Somalia on 5th September 2011. She returned to the UK on 11th February 2012 on that same visa and

claimed asylum. Her application had been refused on 9th November 2012. Her appeal was dismissed on 21st December 2012. Although granted leave to appeal to the Upper Tribunal her appeal was dismissed on 2nd April 2013. She made further submissions on 11th September 2013 which were rejected by the Respondent on 22nd March 2017. It was that refusal that she had appealed.

3. Her appeal was heard by First-tier Tribunal Judge Shaw sitting at Taylor House on 9th October 2017. He granted her appeal.
4. The Respondent made application for permission to appeal on 25th January 2018. That application for permission to appeal was refused by Judge of the First-tier Tribunal Landes on 22nd February 2018.
5. The Appellant also made application for permission to appeal on 7th February 2018. That application was also heard by Judge of the First-tier Tribunal Landes who granted permission on 22nd February 2018 on the basis that it was arguable that the judge had misdirected himself as to the effect of **Devaseelan** and although commentary was made about other Grounds of Appeal in summary it was said that the comments raised did not restrict the grounds which may be argued. Directions were issued for the Upper Tribunal to firstly consider if an error of law had been made by the First-tier Tribunal and the matter came before me in accordance with those directions.

Submissions on Behalf of the Appellant

6. Ms Loughran submitted that the Respondent's application for permission to appeal under Article 8 had been refused and that application had not been renewed and in any event the Appellant had been granted status under Article 8 by the Home Office.
7. In terms of the Appellant's claim for protection it was accepted that **Devaseelan** applied but it was said that at the original hearing the Appellant had been unrepresented and that there was extra evidence available that was not before the First-tier Tribunal. It was submitted that the judge had not dealt with **Devaseelan** properly. It was said there was no argument in terms of this being an Article 3 health case.

Submissions on Behalf of the Respondent

8. Mr Melvin submitted that the judge had not erred in law in terms of those matters raised by the Appellant.
9. At the conclusion of the hearing I reserved my decision to consider the evidence and submissions raised and I now provide that decision with my reasons.

Decision and Reasons

10. This case has a protracted history which in itself is not unusual. The Appellant had initially come to the UK on a valid visit visa as a member of the Somalia government to attend a conference in August 2011. She returned to Somalia in September 2011. She then returned to the UK on the same visa, which presumably was issued and valid for six months from her first date of entry, on 11th February 2012 and claimed asylum. That application was refused on 9th November 2012 and thereafter she entered the

appeal system as she has been firmly embedded for nearly six years. Her first application for asylum was dismissed on appeal and she appears to have been appeal rights exhausted in April 2013. She then made further submissions from the UK in September 2013. The Home Office took no less than three and a half years to reject that application in March 2017 which produced her second appeal heard by First-tier Tribunal Judge Shore in October 2017.

11. The judge had in his Notice of Decision granted her appeal. In reaching that decision the judge had arrived at various conclusions. At paragraph 95 he had found that “on balance I do not find the Appellant’s claim for asylum should succeed”. In like manner he dismissed her claim under Article 2 and Article 3 of the ECHR (paragraphs 95 to 96). He also found that she did not have a real subjective fear of persecution on return because of the findings of fact that he had made (paragraph 97).
12. At paragraph 98 he said “outside the Rules I find that the Appellant has shown that there are exceptional circumstances that warrant the grant of leave to remain for the same factual reasons as I have granted the Article 8 case within the Rules”.
13. The explanation for that decision in paragraph 98 seems to be found at paragraphs 99 to 101. In those paragraphs the judge said:
 98. “In coming to my decision I have taken into consideration the guidance in the Supreme Court decision in **Agyarko [2017] UKSC 11** on the application of Article 8. I have also considered the Supreme Court decision in **MM [2017] UKSC 10**. I appreciate I have to consider Article 8 outside of the Rules and allow the appeal if there are exceptional circumstances. It is necessary for me to conduct a proportionality exercise before coming to a conclusion.”
 100. “I have taken into account the five stage process in **Razgar [2004] UKHL 27** and also **Huang [2007] UKHL 11** in considering whether the Respondent’s decision is proportionate. I have also had regard to Sections 117A to 117D of the 2002 Act. I note and accept the need for the maintenance of an effective system of immigration control is in the public interest.”
 101. “I find that to refuse the Appellant’s asylum and humanitarian protection would amount to an interference by the Respondent with the exercise of her right to respect for a private life of sufficient gravity to engage the operation of Article 8. Such interference is not in accordance with the law for the reasons given above. Such interference may be necessary in a democratic society in the interests of the reasons identified by Lord Bingham in **Razgar**. Such interference in this case is not proportionate to the public end that the Respondent was seeking to achieve. The balance that I undertook were the public interest in removal and the credibility of the Appellant which I have given substantial weight and the effect on the Appellant of the decision to refuse asylum and humanitarian protection.”
14. It would seem therefore that the “grant” of the appeal was based on the disproportionate removal of the Appellant under Article 8 of the ECHR outside of the Immigration Rules for the reasons (wrong in law) outlined above in paragraph 101.
15. As is usual in cases when an appeal is allowed under Article 8 outside of the Rules the Respondent appeals. Essentially the Respondent’s Grounds of Appeal were that the

judge had materially erred in law by allowing the appeal outside of the Rules under Article 8 where the Appellant did not meet the Rules of a private life under paragraph 276ADE(vi). It was also said the judge had not properly considered factors under Section 117B of the 2002 Act in assessing proportionality. There was no reference by the Respondent within the Grounds of Appeal to the judge's findings and commentary at paragraphs 98 to 101 as outlined above which should perhaps have been at the forefront of the mind of the Respondent when considering an application for permission to appeal.

16. That application was refused by First-tier Tribunal Judge Landes. Essentially that judge found that the judge's conclusion that the Appellant fell within paragraph 276ADE did not reveal an error of law. She noted the judge's findings on the Appellant's condition of PTSD and lack of treatment in Somalia. She said that it was right the judge did not address the Section 117 factors particularly fully because the Appellant met paragraph 276ADE of the Rules.
17. In this case there were a number of legal concerns that needed to be addressed once findings on fact were established. Firstly the judge needed to decide whether there was a risk on return for a Convention reason. If not he then needed to consider whether there was a requirement for humanitarian protection as an alternative. Next he needed to decide notwithstanding his decision under the Geneva Convention whether there was a risk, applying the appropriate standard, to a breach of the Appellant's protected rights under Article 2/Article 3 of the ECHR. Finally if he had concluded none of the above applied he needed to look at whether the Appellant met any of the requirements of the relevant Immigration Rules. If not then finally he needed to make an assessment, outside of the Rules, as to whether Article 8 applied and apply the relevant case law in that respect. If he was conducting an examination outside of the Rules under Article 8 he was then bound to consider Section 117 of the 2002 Act.
18. The refusal of the Respondent's application for permission to appeal was based on the assertion that the judge had found the Appellant came within paragraph 276ADE of the Immigration Rules and therefore he did not need to fully consider Section 117 of the 2002 Act because he was not looking at the Appellant's case under Article 8 outside of the Rules.
19. The question is whether in reality the First-tier Tribunal Judge had looked at and allowed the Appellant's case under paragraph 276ADE of the Rules.
20. At paragraph 40 and summarising the Respondent's reasons for refusal the judge had said "the Respondent had considered the Appellant's claim under Article 8 within the Rules". She could only meet the factual nexus of paragraph 276ADE(1)(vi) but the Respondent determined that there were not very significant obstacles to her integration into Somalia because she had lived in that country nearly all her life, has family there, speaks the language and is familiar with Somali culture and customs".
21. In his summary of submissions, the judge did not include any submissions on behalf of the Appellant that she did indeed fall within paragraph 276ADE(1)(vi). That is not to say submissions were not made on behalf of the Appellant to suggest that she came

within the Immigration Rules but nothing appears within the judge's decision to say that such submissions were made.

22. The judge's findings appear at paragraphs 83 to 102. When looking at those findings the judge properly considered the asylum claim, Article 15(c) humanitarian protection, and Articles 2 and 3 of the ECHR. There is no reference to the judge in his process of proceeding through the legal hoops stopping and considering whether the Appellant came within the terms of the Immigration Rules in particular paragraph 276ADE(1)(vi). It is possible to make some inference from paragraph 94. The judge had accepted medical evidence that the Appellant suffered from depression and PTSD. He found that the Appellant's depression was treatable in Somalia. However he found little evidence that PTSD could be treated in Somalia and therefore "the seriousness of the condition presents very significant obstacles to the Appellant being able to integrate into Somalia if she was returned". It could be inferred therefore that in that sentence the judge had considered paragraph 276ADE(1)(vi) although he made no reference to an examination within those Rules. Furthermore he did not discuss those matters raised by the Respondent to indicate why there would be little difficulty in her reintegrating into Somalia. Furthermore if that sentence did disclose he was looking at paragraph 276ADE(1)(vi) and had found in the Appellant's favour it is questionable why he would need to look at Article 8 outside of the Rules which he clearly did.
23. At paragraph 98 having dismissed her claim under the Geneva Convention, Article 2/ Article 3 it was under Article 8 outside of the Rules that he found the Appellant had shown "exceptional circumstances that warrant the grant of leave to remain, for the same factual reasons as I have granted the Article 8 case within the Rules". On that basis the exceptional circumstances outside of the Rules being the same as those within the Rules must be a reference to the lack of treatment for PTSD in Somalia. However his explanation for granting leave to remain under Article 8 outside of the Rules is found at paragraph 101 which is referred to above. On the face of it that paragraph has nothing to do with a lack of treatment for PTSD but rather as the judge said "I find that to refuse the Appellant asylum and humanitarian protection would amount to an interference by the Respondent with the exercise of her right to respect for a private life of sufficient gravity to engage the operation of Article 8". That does not on the face of it disclose the exceptional circumstances in mind as being a lack of treatment for PTSD in Somalia, and secondly is clearly unsustainable in law.
24. However the Respondent for reasons unknown did not in their initial application for permission to appeal referred to those final paragraphs of the judge's decision and having had their application refused for reasons given above did not seek to renew their application. Moreover, presumably on the strength of First-tier Tribunal Judge Landes' decision to refuse their application they granted the Appellant discretionary leave to remain outside of the Rules under Article 8 for a period of time. It is correct therefore that there is no appeal outstanding from the Respondent and the Appellant now has discretionary leave to remain.
25. The remaining issue is the granting, by the same judge, of the Appellant's application for leave to appeal on the basis that the judge arguably erred in his self-direction of

Devaseelan and in any event there may have been good reasons for the Appellant's failure to produce evidence at the earlier appeal hearing.

26. The judge had noted at paragraph 10 that a significant part of the appeal related to a previous determination and he had been asked to follow the **Devaseelan** guidelines in relation to findings of fact/credibility contained within paragraphs 37 to 42 of the earlier appeal decision. He also noted the Appellant's case that she had not been able to adduce some evidence before the earlier hearing because
 - (a) "she was unrepresented;
 - (b) she was not in receipt of funding;
 - (c) the previous judge hearing her appeal had refused an adjournment to obtain witness evidence."
27. First-tier Tribunal Judge Shore noted in his decision that he was in possession of the Appellant's full bundle which ran to "several hundred pages".
28. At paragraph 67 he noted that the judge at the previous hearing had determined the Appellant was not at risk and made negative credibility findings. He referred to that as being the starting point, correctly. He heard submissions as to why evidence now before him was not before the earlier judge, essentially for the reasons given above. He was clearly aware of that evidence providing a summary of it at paragraph 69 to 70. It is clear extensive submissions were made on this issue before the First-tier Judge and carefully considered by him.
29. At paragraph 85 the judge had noted that the original First-tier Tribunal hearing had also been considered by the Upper Tribunal and noted the decisions of both hearings stood as an assessment of the claim that the Appellant was then making. He noted properly that the decisions were not binding upon him but nor was he hearing an appeal against them, which did appear to be wholly or partly the approach being taken by the Appellant's representative. He noted that the issue before him were not the same as the issues before the previous hearings. It is clear he did not feel bound by or constrained by those previous decisions but rather had to consider the evidence before him (if nothing else, that is clear from his findings in relation to PTSD and allowing the Appellant's appeal under Article 8).
30. However he properly separated facts that have occurred since the previous hearing (such as medical evidence) and facts that were available but not drawn to the attention of the previous judge. He properly noted he needed to deal cautiously or with the "greatest circumspection" of such matters. He fairly noted that that note of caution could be overturned by good reason for the failure (paragraph 87). He then analysed what was submitted to be the good reasons why the evidence had not been produced at the earlier hearing although it was clearly available. He provided clear reasons at paragraphs 90 to 91 why he did not accept the submissions made on the Appellant's behalf. He was entitled to reach that conclusion and entitled to reach the decisions that he did in respect of those matters. It is also clear that he had considered both the expert report and country material available to him before reaching his findings. He

had also taken into account the Appellant's "vulnerable witness status" and made proper observations in that respect at paragraph 93.

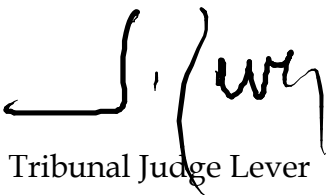
31. There was no error of law in the manner in which he considered evidence or the principles in **Devaseelan**. To some extent he may have been fortified by the fact that the original judge's decision was appealed by the Appellant at that time and that appeal may well have contained reference to the judge's failure to adjourn etc. but nevertheless the Upper Tribunal had dismissed her appeal and upheld that earlier decision.
32. First-tier Tribunal Judge Shore had obviously considered with care all of the evidence before him, not just that available at the original hearing and had properly segregated what was genuinely fresh evidence that had not been available before the original appeal. Indeed it is clear that it is part of that evidence namely the medical evidence that formed the basis of him granting appeal in respect of the Appellant's condition of PTSD although not her condition of depression.
33. There is no basis therefore for suggesting that he had made an error of law in his interpretation of **Devaseelan** or indeed his examination of the evidence generally. There is nothing to suggest that he made any error of law that was contrary to the interests of the Appellant as asserted or at all. Accordingly in respect of the only extant permission to appeal that was granted there was no material error of law made by the judge.

Notice of Decision

34. There was no material error of law made by the judge and I therefore uphold the decision of the First-tier Tribunal.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

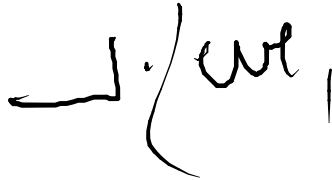
Signed 
Deputy Upper Tribunal Judge Lever

Date 15/3/18

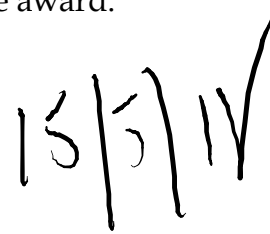
TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed

A handwritten signature in black ink, appearing to read "J. Lever". The signature is written in a cursive style with a long horizontal stroke at the beginning.

Date

A handwritten date in black ink, "15/5/17". The numbers are written in a simple, blocky style.

Deputy Upper Tribunal Judge Lever