Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/04147/2016

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision & Reasons Promulgated**
On Thursday 21 November 2019	**On Wednesday 27 November 2019**

Before

UPPER TRIBUNAL JUDGE SMITH
UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

M A
[Anonymity direction made]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Eaton, Counsel instructed by Duncan Lewis & Co solicitors
For the Respondent: Ms A Fijiwala, Senior Home Office Presenting Officer

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity order was made by the First-tier Tribunal. As this is an appeal on protection grounds, it is appropriate to continue that order. 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 his family. This direction applies, amongst others, to both parties.

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DECISION AND REASONS

Background

1. The Appellant appeals against the decision of First-tier Tribunal Judge Freer promulgated on 15 August 2019 ("the Decision"). By the Decision, the Judge dismissed the Appellant's appeal against the Respondent's decision dated 8 April 2016 refusing his protection and human rights claims. That decision was made in the context of a decision to deport the Appellant to Somaliland.

2. The Appellant is a national of Somalia. He was born in Somaliland. He came to the UK on 30 September 1990 with his parents and siblings. The family was granted indefinite leave to remain in February 2000. The Appellant has committed a number of criminal offences in the UK. He appealed against an earlier deportation decision made in 2007. His appeal was allowed on 14 October 2008. Since then, the Appellant has married a British citizen of Somali heritage, and they have two young children.

3. The Judge did not accept that the Appellant would be at risk on return to Somaliland. The Respondent intended to remove him to Hargeisa via Addis Ababa and not via Mogadishu. The Judge did not accept that there would be very significant obstacles to the Appellant's integration in Somaliland and nor did he accept that the Appellant was socially and culturally integrated in the UK. Accordingly, he could not meet the Immigration Rules ("the Rules") or Section 117C Nationality, Immigration and Asylum Act 2002 ("Section 117C") based on his private life. Nor could the Appellant meet the Rules or Section 117C based on his family life as the Judge did not accept that the impact of the Appellant's deportation on his partner and children would be unduly harsh. Outside the Rules, the Judge found that the Appellant had failed to show that there were very compelling circumstances.

4. The Appellant appeals on five grounds as follows:

   Ground one: failure to consider the viability of return to Somaliland;

   Ground two: failure to apply the Devaseelan principles;

   Ground three: failure properly to consider certain of the evidence;

   Ground four: perverse conclusion in relation to the children's best interests; and

   Ground five: failure to weigh in the balance the Appellant's length of residence.

5. Permission to appeal was granted by First-tier Tribunal Judge Povey on 12 September 2019 in the following terms so far as relevant:

> "... 3. The grounds disclosed arguable errors of law. The Judge arguably failed to determine an issue before him which was material to the outcome of the appeal (the viability of the Appellant's onward return to Somaliland from Mogadishu). He arguably misdirected himself on the principles deriving from Devaseelan and arguably reached findings as to the Appellant's cultural abilities which were speculative and unsupported by evidence. It was similarly arguable that the Judge erred in deciding to place no weight at all on any of the opinions expressed in the expert social worker's report because of the view he took (arguably unsupported by evidence and again speculative) in respect of one aspect of it. Finally, the Judge's findings on the best interests of the Appellant's children and the weight to be afforded to the Appellant's private life in the UK (having arrived aged 2) were arguably insufficiently reasoned. All of these issues were material to the Judge's determination.
>
> 4. For those reasons, the grounds disclosed arguable errors of law and permission to appeal is granted. All grounds may be argued."

6. The matter comes before us to assess whether the Decision does disclose an error of law and to re-make the Decision or remit to the First-tier Tribunal for re-hearing.

DISCUSSION

7 Although permission was granted on all grounds, it appeared to us that ground two was the strongest and had the potential to impact on other issues. As such, we asked Mr Eaton to address us only on that issue and allowed Ms Fijiwala to respond, again only on that ground. Having heard the oral submissions, we concluded that ground two did indeed disclose an error of law. We formed the view that it was not necessary to hear from the parties on the other issues, but we agree with Judge Povey's view that there is merit in particular also on grounds three to five. Ground one is possibly less meritorious particularly since Judge Povey appears to have misunderstood the route of return which is to be via Addis Ababa and not via Mogadishu. The ground in that regard though is that the Judge failed to consider what that route entailed, viewing it as a purely operational matter and we therefore conclude that this ground also had some merit.

8. We therefore turn to give our reasons for finding an error of law based on ground two.

9. The Judge recorded the Devaseelan principle at [122] of the Decision in the following manner:

> "**Devaseelan*** may apply and Mr Eaton sought to rely on it. In paragraph 3 of his skeleton argument he has particularised which of the various findings of IJ Harries he wishes to stay in force today, but he has not sought to explain why specifically that would be the right course even now. He mentions the findings that the Appellant did not speak Somali, he did not have family or meaningful links to call upon, and he would have significant difficulties accessing housing and any form of employment."

10. As we identified at the hearing, and we understood Ms Fijiwala to accept, that is not a correct statement of the principle laid down in Devaseelan for two reasons. First, the application of the principle is mandatory and not, as appears suggested by the first sentence of paragraph [122], discretionary. Second, there is no burden on an appellant to justify the preservation of findings. The findings in the first appeal stand as a starting point and the issue is whether there are circumstances or later evidence which displace those findings. There is therefore an error disclosed by the statement of the test which applies.

11. Moreover, the earlier findings are the starting point and not the end point of the second Judge's consideration. Here, the Judge made a series of findings at [121] which include findings in relation to issues which were considered and determined in the previous appeal before turning to look at what was found in that appeal. That is the wrong way around. We would not find that to be an error in and of itself, but it is an error, particularly when coupled with the misstatement of the principle which applies.

12. We accept as Ms Fijiwala submitted that, following the statement of principle at [122], the Judge does go on to set out the passage of the earlier decision which contains the relevant findings at [123] and then sets out some reasons why circumstances may have changed. Some of those reasons may carry weight, for example, in relation to the change in country conditions. We also accept that the Appellant was not previously married and that too might mark a change in circumstances justifying a departure from earlier findings, particularly in relation to Article 8 ECHR (although tending to strengthen rather than weaken the claim).

13. There are however findings in those paragraphs and in what is said at [121] of the Decision which do not justify the departure which the Judge makes from the previous findings. First, the Judge finds at [122(i)] of the Decision that the Appellant's partner, [DA], has returned twice to Somaliland and "has returned safely and has not made any complaint of any level of harm while she visited there". That then feeds into the Judge's reasoning for departing from the findings in the earlier appeal as to risk at [124] of the Decision. However, as Mr Eaton pointed out, [DA]'s evidence was that she was obliged to cover herself whilst in Somalia and had stones thrown at her on one occasion. The Judge found [DA] to be a witness of truth but failed to take this into account.

14. In the earlier appeal, the Judge found that the Appellant would be viewed as an outsider on return to Somalia because he "knows only British culture", does not speak Somali and would be at risk of being perceived to have money. Those findings go to the issue whether the Appellant is "westernised". The Judge deals with this issue at [121(ii)], [121(x]), and [121(xi)]. He says that if the Appellant is westernised then so is [DA] (which stands to reason as she is in fact British), that "the Appellant did not marry outside his cultural and clan background", a fact on which the Judge placed great weight when assessing westernisation and that there

was no expert evidence in relation to westernisation produced by the Appellant.

15. Those findings are then used to displace the earlier appeal findings that the Appellant is in effect westernised, the Judge saying at [129] of the Decision that "[i]t is obvious that nobody in Somaliland decided that DA was westernised and had money or if they did, they did not act on the impulse to cause her serious harm at the time. It follows that no such risk has been demonstrated in regards to her husband the Appellant". Not only does that fail to have regard to [DA]'s evidence that she was obliged to cover herself whilst in Somalia but also once again fails to consider her evidence that she was stoned.

16. Moreover, as we observed during the hearing, the finding that the Appellant has not married outside "his cultural and clan background" makes certain assumptions about [DA] who is a British citizen. She may come from a Somali background but that does not automatically mean that she is anything other than British. We were also at a loss to understand the comment about expert evidence. Whether a person is "westernised" is a matter for the Judge to determine based on an assessment of the individual characteristics of an appellant. Whether an individual is at risk on return to a particular country for this reason may well be a matter for expert evidence but not whether they are as a matter of fact westernised. This finding also therefore fails to take into account what is said in the earlier appeal and the reasons why the previous Judge found the Appellant to be westernised. The factors there mentioned focus on the Appellant's integration in the UK which is likely to have strengthened and not weakened in the time since 2008. That also illustrates why it was important for the Judge to take those findings as a starting point and the consequences of him failing to do so.

17. Certain of the other findings are, as Mr Eaton submitted, speculative. Of particular note is the finding that the Appellant will be able to speak Somali. At [121(v)] the Judge finds it "improbable that [the Appellant] did not learn any Somali language from his father, who is close to him and with whom he has lived (when not married or incarcerated)". That runs contrary to the finding in the earlier appeal that "the appellant does not speak Somali" (at a time when he would still have been living with his family). The Judge asserts at [125] of the Decision that the Appellant "has had plenty of time since 2008 in which to learn Somali from those of its speakers who are in his life". We accept that the Appellant is now married to a woman who does speak Somali. However, she also speaks English. The Judge offers no evidence for the findings there made and does not treat the finding in the earlier appeal as the starting point and explain what it is that has changed.

CONCLUSION

18. Although, as we have already noted, the Judge was obviously entitled to have regard to the change in country conditions in Somaliland since 2008

and was also entitled to have regard to the Appellant's changed circumstances by his marriage, for the reasons we have given, the findings made by the Judge fail sufficiently to have regard to the findings in the earlier appeal and to explain why, based on the eidence he heard, those findings were displaced.

19. For those reasons, we are satisfied that the grounds disclose errors of law as set out above. We therefore set aside the Decision.

NEXT STEPS

20. We have considered carefully the appropriate course for re-making. Although the ground with which we have dealt in detail concerns only the protection claim, other of the grounds also identify errors in relation to the human rights assessment, particularly under Article 8 ECHR. We have not preserved any findings. The appeal will therefore have to be reconsidered entirely afresh. Given the extent of the issues and findings which will be required to be made, this is an appeal which it is appropriate to remit. Having regard to the Practice Statement in relation to the remittals of appeals, we have reached the conclusion that the appeal should be remitted to ensure that the Appellant has a fair determination of his appeal.

DECISION

We are satisfied that the Decision involves the making of a material error on a point of law. The Decision of First-tier Tribunal Judge Freer promulgated on 15 August 2019 is set aside. The appeal is remitted to the First-tier Tribunal for re-hearing before a Judge other than Judge Freer.

Signed Dated: 25 November 2019
Upper Tribunal Judge Smith