Upper Tribunal
(Immigration and Asylum Chamber) Appeal number: RP/00154/2018

THE IMMIGRATION ACTS

Heard at: Field House Decision & Reason Promulgated
On14 August 2019 On 21st August 2019

Before

Upper Tribunal Judge Gill

Between

A M
[ANONYMITY ORDER MADE]

Appellant

And

The Secretary of State for the Home Department

Respondent

Anonymity

I make an order under r.14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant. No report of these proceedings shall directly or indirectly identify him. This direction applies to both the appellant and to the respondent and all other persons. Failure to comply with this direction could lead to contempt of court proceedings.
I make this order because this is a protection claim.
The parties at liberty to apply to discharge this order, with reasons.

Representation:
For the appellant: Mr K Smyth of Kesar & Co Solicitors.
For the respondent: Mr S Kotas, Senior Presenting Officer.

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DECISION AND DIRECTIONS

1. The appellant, a national of Somalia born on 5 January 1974, appeals against the decision of Judge of the First-tier Tribunal M A Khan who, in a determination promulgated on 23 April 2019, dismissed his appeal against a decision of the respondent of 25 September 2018.

2. The appellant is from the Reer Hamar minority clan. He claims to have entered the United Kingdom clandestinely on 15 February 2001. He came to the attention of the United Kingdom authorities on 19 February 2001 at which time he claimed asylum. On 4 April 2001, he was granted asylum and indefinite leave to remain.

3. In the decision letter dated 25 September 2018, the respondent decided to cease the appellant's refugee status. Having applied the cessation provisions, the respondent decided that the presumptions in s.72 of the Nationality, Immigration and Asylum Act 2002 applied, i.e. that the appellant had been convicted of a particularly serious crime and that he presented a danger to the community of the United Kingdom. The respondent also concluded that the appellant's removal would not be in breach of his rights under Articles 2, 3 or 8 of the ECHR.

4. The respondent decided to cease the appellant's refugee status following his conviction on 12 January 2016 at Wood Green Crown Court of an offence of robbery in respect of which he was sentenced on 13 January 2016 to a four years' imprisonment.

5. Before the cessation decision was taken by the respondent, the UNHCR was invited to make representations concerning the respondent's intention to cease the appellant's refugee status. By a letter dated 9 February 2018 (the "UNHCR letter"), the UNHCR stated that "*cessation under Article 1C(5) was not considered appropriate*". In its letter, the UNHCR relied upon evidence that post-dated the country guidance in MOJ & Others (return to Mogadishu) Somalia CG [2014] UKUT 00442 (IAC).

6. Para 339A of the Immigration Rules provides, insofar as relevant, as follows:

   ‘Refugee Convention ceases to apply (cessation)

   339A. This paragraph applies when the Secretary of State is satisfied that one or more of the following applies:

   (i) …;

   (ii) …;

   (iii) …;

   (iv) …;

   (v) they can no longer, because the circumstances in connection with which they have been recognised as a refugee have ceased to exist, continue to refuse to avail themselves of the protection of the country of nationality; or

   (vi) …

In considering (v) and (vi), the Secretary of State shall have regard to whether the change of circumstances is of such a significant and non-temporary nature that the refugee's fear of persecution can no longer be regarded as well-founded.'

7. There are three grounds:

   (i) Ground 1: that the judge failed to consider para 339A, the burden of proof being on the respondent to show that there had been a significant and non-temporary change in the circumstances.

   (ii) Ground 2: that the judge failed to consider whether the evidence relied upon by the UNHCR in its letter justified departing from the country guidance in MOJ, stating at para 56 of his decision, stating at para 56 that he had *"considered the UNHCR reports in light of the findings in the case of MOJ and come to the conclusion that the Upper Tribunal had all the necessary information before it to come to the result it did in its finds [sic]".*

   (iii) Ground 3: That the judge erred in reaching his finding that the appellant's mother was in Somalia. This finding was based on a single sentence in the appellant's OASys assessment which stated: "*He stated … that his mother still lives in Somalia who he speaks to on the phone from time to time*". The judge had erred by failing to consider the possibility of an error on the part of the author of the OASys assessment.

8. At the hearing, I indicated my preliminary view on grounds 1 and 2, saying that it seemed to me that:

   (i) The judge appeared not to have considered the cessation provisions, as it appeared that he considered that the cessation provisions were to be equated with the question whether there was a real risk of the appellant being persecuted in Somalia.

   (ii) The judge appeared not to have considered whether the evidence referred to in the UNHCR letter, which evidence post-dated the country guidance case of MOJ, justified departing from the country guidance in MOJ

9. Mr Kotas initially submitted that any error in relation to grounds 1 and 2 was not material because any judge who assessed the evidence relied upon by the UNHCR in the UNHCR letter would have concluded that the cessation provisions applied. However, as I indicated at the hearing, the fact was that there was no reasoning at all in the judge's decision of the evidence in the UNHCR letter from which it followed that I would have to conduct the assessment myself in order to conclude that the judge's errors were not material. I informed Mr Kotas that I was willing to hear his submissions and decide the appeal if he still considered that the judge's decision could stand. Mr Kotas then informed me that he did not wish to try and persuade me to depart from my preliminary view on grounds 1 and 2.

10. I have concluded that the judge did err in law as contended in grounds 1 and 2. I am satisfied that his errors were material to the outcome.

11. In addition, if the judge had come to the conclusion that the cessation provisions applied, he should have proceeded to consider whether the appellant had rebutted the two presumptions in s.72. There is no mention of s.72 at all in his decision

notwithstanding that it was plainly raised in the decision letter. If he had considered the matter and concluded that the presumptions in s.72 had been rebutted, then he would have had to consider whether the appellant had established his asylum claim and humanitarian protection claims and his claims under Articles 2 and 3 of the ECHR. If he had concluded that the presumptions in s.72 had not been rebutted, then he would have had to consider whether the appellant had established his claims under Articles 2 and 3 of the ECHR.

12. It is clear from what I have said above that there has been a wholesale failure by the judge to engage with most of the material issues in this case in any way.

13. For the reasons given above, I set aside the decision of the judge.

14. The next issue concerns the ambit of the re-making of the decision on the appellant's appeal. Ground 3 is relevant to this issue.

15. On this subject, the judge said, at para 43, as follows:

> "At page 19 of the appellant's bundle, at 6.10, the OASys report states that the appellant reported that his mother still lives in Somalia, who he speaks to on the phone from time to time. However, in his written statement and his evidence at the hearing before, the appellant stated that his mother and sister live in a refugee camp in Nairobi, in Kenya and he did not provide the information to the Probation about his mother living in Somalia. If the appellant did not provide the writer of the report with the whereabouts of his mother, then how did this information come to attention of the Probation? I find that the appellant is the only person who could have provided this information and his mother is actually living in Somalia and not in Kenya as claimed."

16. Mr Kotas submitted that the judge was plainly aware of the appellant's evidence that he had not said to his probation officer that his mother still lived in Somalia and that he was in contact with her. He therefore must have had in mind the appellant's contention that the probation officer had made a mistake and rejected it. Mr Kotas therefore submitted that the judge's findings that the appellant's mother still lives in Somalia and that he is in contact with her should stand.

17. Mr Smyth submitted the judge had failed to consider the possibility of an error on the part of the probation officer. At para 43 of his decision, he asked a rhetorical question but failed to consider the obvious answer, that it was a mistake on the part of the probation officer. As a matter of logic, the appellant had effectively said that the probation officer had made a mistake, which the judge had failed to consider. Mr Smyth asked me not to view ground 3 in isolation but to take into account the fact that, given the judge's failure to carry out any analysis of the issues in the case, his errors were such that the appellant has been deprived of a fair hearing. He therefore asked me to remit the appeal to the First-tier Tribunal for a re-hearing on the merits.

18. Mr Kotas submitted that ground 3 was a disagreement with the judge's finding. The judge was faced with two possibilities, i.e. the appellant's evidence at the hearing which effectively meant that he was saying that the probation officer had made a mistake or that the appellant had been inconsistent as to whether his mother was living in Kenya or in Somalia. He asked me to preserve the judge's finding that the appellant's mother lives in Somalia and that he is in contact with her. Mr Kotas took a

neutral stance as to whether or not the appeal should be remitted to the First-tier Tribunal.

19. I reserved my decision on ground 3.

20. As I said, given that I had decided that grounds 1 and 2 were established, ground 3 concerned the ambit of the re-making. In reaching my decision on this issue, I took to account the following:

    (i) Ground 3 concerns credibility, whereas grounds 1 and 2 do not. In principle, therefore, there is no reason why the fact that the judge materially erred in law as contended in grounds 1 and 2 should have any impact on his assessment of credibility. I can therefore see some force in the submissions of Mr Kotas.

    (ii) On the other hand, I can also see force in Mr Smyth's submission that ground 3 should to be viewed in isolation and that it is relevant to take into account the scale of the errors made by the judge in relation to grounds 1 and 2. Indeed, not only did the judge err as contended in grounds 1 and 2, he also failed to consider whether the presumptions in s.72 were rebutted. It is difficult to escape the conclusion that the appellant has not had a fair hearing.

    (iii) At the commencement of the hearing before me, Mr Smyth submitted a witness statement from the appellant dated 14 August 2019 with attachments. Although this evidence is not relevant in deciding whether the judge had materially erred in law and whether his decision should be set aside as I said at the hearing, it is relevant in deciding the ambit of the re-making of the decision on the appellant's appeal. In this bundle, the appellant relies on fresh evidence to show that his mother is living in Kenya. In re-making the decision, it would be unfair to exclude this evidence. I therefore admit the evidence.

    (iv) Having admitted the recent witness statement for the purpose of re-making the decision on the appellant's appeal, I have concluded that the judge hearing the appeal on the next occasion should be at liberty to make his or her own findings afresh on the evidence as a whole.

21. In all of the circumstances and for the reasons given above, I have decided that the judge's finding that the appellant's mother is living in Somalia should not stand.

22. It is clear from the above that all the issues in the case will have to be considered afresh, that is, the cessation provisions and (in the event that the cessation provisions are applied), the presumptions in s.72, credibility and the appellant's claims under Articles 2 and 3 and, if the presumptions in s.72 are rebutted, his asylum and humanitarian protection claims. In these circumstances, I have decided that this appeal should be remitted to the First-tier Tribunal for a fresh hearing on the merits by a judge other than Judge of the First-tier Tribunal M A Khan.

23. At the hearing before the judge, the appellant's representative submitted that his Article 8 case was very weak and that she was not seeking to rely upon Article 8 (para 36 of the judge's decision). The grounds in support of the application for permission to appeal to the Upper Tribunal did not raise Article 8. At the hearing before me, Mr Smyth confirmed that Article 8 was not relied upon. Accordingly, the issues to be considered by the FtT following the remittal of this appeal do not include the appellant's Article 8 claim.

Notice of Decision

The decision of Judge of the First-tier Tribunal M A Khan involved the making of errors on points of law such that the decision to dismiss the appeal is set aside.

This case is remitted to the First-tier Tribunal for a fresh hearing on the merits by a judge other than Judge of the First-tier Tribunal M A Khan.

Signed Date: 16 August 2019
Upper Tribunal Judge Gill