IAC-FH-LW-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/07173/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3 February 2020 and 2 October 2020	**On 07 October 2020**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

M E H
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Julia Lowis instructed by Duncan Lewis & Co Solicitors (Harrow Office)
For the Respondent: Mr Stephen Walker, a Senior Home Office Presenting Officer

DECISION AND REASONS

Anonymity order

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) The Tribunal has ORDERED that no one shall publish or reveal the name or address of [initials] who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of him or of any member of his family in connection with these proceedings.

Any failure to comply with this direction could give rise to contempt of court proceedings.

1. This case concerns the application of Article 8 ECHR to the circumstances of a foreign criminal, with reference to section 117C of the Nationality, Immigration and Asylum Act 2002 (as amended) and paragraphs 398 and 399A of the Immigration Rules HC 395 (as amended). The applicant is a Somali citizen from the minority Ashraf clan.

2. The appellant appeals with permission against the decision of the First-tier Tribunal dismissing for the second time his appeal against the respondent's decision on 17 August 2017 to deport him to Somalia as a foreign criminal, which he challenged on protection and human rights grounds. The appellant has long standing drug and alcohol problems, as well as some mental health issues, and until recently was street homeless and destitute, although sometimes he stays with his sister and her children here. From June 2020, he has been accommodated at the [Wembley], in accordance with the government's pandemic provision for the housing of street homeless people.

Vulnerability adjustments

3. The appellant is vulnerable. He has post-traumatic stress disorder and depression, and he told me at the beginning of the hearing that he had been having a bad week. He was unable to access treatment for his depression, because no general medical practitioner would register him as he had no identity documents.

4. In accordance with the Practice Direction of the Senior President of Tribunals, Lord Justice Carnwath, entitled *First-tier and Upper Tribunal: Child, Vulnerable Adult and Sensitive Witnesses* [2008] and the Joint Presidential Guidance Note No 2 of 2010, issued by the then UTIAC President, Mr Justice Blake and the acting President of the First-tier Tribunal, Judge Arfon-Jones, and the judgment of the then Senior President of Tribunals, Lord Justice Ryder, in *AM (Afghanistan) v Secretary of State for the Home Department* [2017] EWCA Civ 1123, I sought to establish whether the appellant was fit to testify and what adjustments the Tribunal should make to ensure he could give evidence as comfortably as possible.

5. I asked Ms Lowis to explain what adjustments might be needed to enable the appellant to cope with the hearing and give evidence. Ms Lowis said it was not the applicant's case that was unfit to testify: rather, he might need breaks and some flexibility during the hearing.

6. I arranged for the appellant to have water available and we had two breaks during the hearing for him to go and have a walk and some fresh air. I also agreed that the appellant could get up and walk around the hearing room when he felt the need, but asked him to remain near a microphone when giving evidence, and to stay in the room if he could, in order to be able to give instructions to his Counsel.

7. The appellant coped adequately with the hearing in that way and the credibility of his evidence, and that of his witness Mr Musa, was accepted by Mr Walker at the end of the hearing. I am satisfied that the applicant had a fair hearing.

Criminal history

8. The appellant has four criminal convictions, in March 2008 for false accounting (suspended sentence and supervision order with unpaid work requirement), in October 2009 for battery (12 months' community service and unpaid work requirement), in August 2013, again for battery (20 weeks' imprisonment and a restraining order valid till 20 August 2015) and in August 2017 for possession of a class B controlled drug (14 weeks' imprisonment).

9. The battery offences were in relation to the applicant's former wife. A reference in the applicant's witness statement to a fifth conviction on 3 September 2013 for battery is an error made by the applicant's solicitors, as Mr Walker accepted at the hearing. That phantom conviction does not appear in the respondent's decision letters.

Background

10. The appellant came to the United Kingdom in 2002 when he was 17 years old and made an unsuccessful asylum claim. His younger sister came too: she was granted asylum. The appellant was granted exceptional leave to remain until 21 May 2003 and discretionary leave thereafter until 4 December 2007. The appellant then made a timely application for further leave to remain and on 12 June 2010 was granted indefinite leave to remain under the Legacy Exercise.

11. On 17 August 2017 the respondent served the appellant with a decision to deport and a section 120 notice. The notice of decision to deport on 17 August 2017 ended his indefinite leave to remain by operation of law and therefore, since he arrived in the United Kingdom on 16 April 2002 aged 17 years and (almost) 4 months, he had spent only 15 years and (just over) 4 months here and that does not amount to 'most of his life' (see *Secretary of State for the Home Department v SC (Jamaica)* [2017] EWCA Civ 2112 at [53] in the judgment of the Senior President of Tribunals, Lord Justice Ryder). If the period between his application for asylum and the granting of exceptional leave to remain is discounted, the period of lawful residence is approximately one month shorter.

12. The appellant made a protection and human rights claim in January 2018, which was refused on 18 April 2018, and the appellant appealed to the First-tier Tribunal. A decision made in the First-tier Tribunal in October 2018 was set aside and remade in the First-tier Tribunal on 5 September 2019. The present appeal is against that second decision. The protection claim is not pursued.

First-tier Tribunal Judge Beach's decision

13. The First-tier Judge found the appellant to be a persistent offender. She considered Article 8 ECHR at [79]-[84], finding as a fact that the appellant had not been lawfully resident in the United Kingdom for most of his life and that he was unable to show 'very compelling circumstances' over and above the Exceptions in section 117C of the 2002 Act. she rejected the assertion of *Kugathas* dependency between the appellant

and his sister, finding that there was only private life and not family life between him, his sister, and her children. The Judge dismissed the appeal.

Permission to appeal

14. The appellant's grounds of appeal, in so far as they relate to Article 8 ECHR, dispute the finding of fact that the appellant had not spent 'most of his life' in the United Kingdom and assert that the Judge erred in applying section 117C(5) rather than 117C(4) to his circumstances. The appellant contended that there were no findings on whether in his circumstances there would be 'very significant obstacles' to his integration in Sudan now, after 18 years away, particularly as he is a vulnerable person, with past alcohol and drug dependency and present post-traumatic stress disorder and depression.

Upper Tribunal hearing

15. The appellant gave evidence at the hearing, adopting his witness statements to date. He acknowledged in cross-examination that he had previously had difficulty with both alcohol and drugs. In prison, he had been in what he described as 'full rehab' and had worked through the available programmes. He no longer used either drugs or alcohol and had committed no crimes since his release from immigration detention in June 2018. He said that when he committed the two offences of battery against his former wife, he was temporarily insane as he had been drinking: he now knew he could not handle alcohol.

16. The appellant said that he was a war child and had seen many terrible things in Somalia. His father had been killed in front of him; his mother had escaped to a displaced persons camp in Uganda, where she still lived. His other two siblings had been killed in Somalia after the appellant and his sister escaped to the United Kingdom. He had nobody in Somalia now and no clan protection as he came from a minority clan.

17. Since coming out of immigration detention in June 2018, the appellant had initially lived in Northampton, where he met Imam Musa, who would give evidence today. Organisations in Northampton had helped him stay away from alcohol and drugs, and from violence and gangs. He had previously enjoyed snooker very much, but he did not go to snooker clubs any more as they were risky for him: there were gangs, drugs and alcohol there to tempt him, so he avoided them. Being street homeless had really hurt him but it had taught him a lesson.

18. The applicant had slept in parks in the summer: he had a duvet which kept him warm. In the winter, he sometimes slept at the mosque, or stayed with kind, good friends. He would go to church for food, and the community had been a big help.

19. He had met Imam Musa in 2004 at the mosque in Northampton, when he was taking drugs and drinking. Mr Musa had sought to encourage him to reform. From 2006 onwards, Mr Musa had been the appellant's emotional support and a good friend. He had visited the appellant in prison and been supportive when the appellant did

not feel well. In return, the appellant provided translation services for other people who came to the mosque asking Mr Musa for help with their housing and other problems: whenever the Imam asked the appellant, he went willingly to help. Mr Musa deeply understood where the appellant was coming from and his experiences.

20. Their connection continued after the appellant moved to east London to stay with his sister. He stayed with his sister and her two children for about three months, but she could not cope with the appellant's mental health problems and now she had a third child, so there was no room for the appellant in her accommodation.

21. In re-examination, the appellant explained that he was now working with a project in Acton which sought to support youths who might otherwise be in difficulty. The appellant would explain his own life, and told them about knife crime, and what it felt like to be in prison. He would play football with the young people: one of his friends had formal coaching qualifications.

22. The appellant said that he had been in the United Kingdom for 18 years, and that his whole life was basically street life.

23. The next witness was Imam Abdi Musa of the Northampton Islamic Centre, 72 Clare Street, Northampton NN1 3JA. Mr Musa is a postman in daily life and produced his Royal Mail identity document. He is also an Imam at the Islamic Centre, and travelled from Northampton to give evidence today.

24. Mr Musa adopted his letter of support of 24 September 2020:

> "I have known [the appellant] for several years. As Imam religious leader I work with the members of the community. During my visitation, I met him twice in Woodhill Prison in Milton Keynes, and twice in Brookside Detention Centre in London. In my interactions he informed me that he was a substance abuser and alcoholic and most of his problems emanated from the result of this and caused over time a mental health issue. …I arranged a meeting in London to see how he was doing after the completion of his sentence in prison.
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> Having seen him and the work he is doing through the community engagements by helping young people in London, in issues related to knife crime, drugs and gangs involvement, with his experience of being in prison life. Arriving this country at a younger age and [living] nearly 20 years not knowing any other country. Judging by his actions, I see a reformed offender who is willing to integrate with the society and deserved to be given a second chance. …"

25. In cross-examination, Mr Musa said that he had known the appellant since 2004 or 2005, through the mosque and the Somali community in Northampton. He also knew the appellant's sister, who had children and now lived in London.

26. Northampton was a small town and had a fair number of Somalis living there. He was aware of the appellant's drug and alcohol abuse and difficulties. The appellant did have a home, when in Northampton, but when he was arrested and detained for 5-6 months, the Council took it back.

27. He knew that the appellant had troubles and had visited him twice in HMP Woodhill. He saw the appellant in detention and took him clothes. The appellant told Mr Musa that there was a case and he might be deported, and asked for advice.

28. Mr Musa had lost touch with the appellant for a time when he moved to London but then contact was re-established. The appellant told him about his work with the Acton Youth Association, and a few months ago, while visiting London, Mr Musa called the appellant and saw him working there with a few other youths. The appellant said that he wanted to help others who were in the same difficulty he had been in, a few years ago.

29. An email from the appellant's sister says simply that she cannot attend for childcare reasons. She has a new, third child. She says she lives in Essex and that her brother previously lived there with her, which corroborates his evidence to that effect. Her earlier witness statement dated 3 July 2018 says that the appellant lived at her home on immigration bail from 12 May 2017 to 16 August 2017. She herself had been in foster care, being younger, but had also found adjusting to the United Kingdom difficult. Her brother had not abused either alcohol or drugs while living with her and had complied with all reporting restrictions.

30. The sister's elder child was 4 years old in 2018 and is autistic. The uncle and nephew bonded well and the attachment had survived the separation. Her sons did not get exposed to many people and she valued the family contact her brother provided for them. She would be worried for his welfare if he went back to Somalia as he would not be able to get the correct medication and could be vulnerable to harm.

31. A document purporting to be a statement from the appellant's mother in her Ugandan refugee camp can bear little weight, because it is not signed, dated, or sourced, but the copy of her Ugandan refugee card shows that she is indeed in Uganda and Mr Walker did not dispute that document's reliability.

32. An email from Mr Abdullahi Ali, manager of Acton Youth Association says that the appellant 'has been working with Acton Youth Association from 22 January 2019 till the present day. He has been focusing on mentoring our attending kids, with the use of workshops.'

Evidence of Dr Markus Hoehne

33. Dr Hoehne describes himself as a Somalia Expert at the University of Leipzig, Germany and set out his expertise, which has not been challenged, in the first three pages of his report. The passages concerning mental health difficulties are at pages 26-29 of his report. After setting out the difficulties, Dr Hoehne concludes that mental health issues are not well understood and there is a 'massive lack of infrastructure and qualified personnel, and of drugs and equipment to adequately even treat the few mental health problems that are somewhat recognised in Somalia, such as schizophrenia (in Somali, it would simply be called 'craziness').' Persons with mental health problems are stigmatised, and children and youngsters often

throw stones at them in the street, while adults avoid them, regarding their ill health as a punishment for past actions.

34. At question 8 on page 31, the report deals with the position of IDPs in Somalia. It makes for grim reading and is supported by a report from the Danish Refugee Council from 2015. At [74], Dr Hoehne observes that Ashraf are a minority throughout Somalia, such that no internal relocation option would assist: 'I can at the moment not imagine any place where he would be secure, get acceptable medical treatment for his mental health issues and find a chance to make a living'.

35. In summary, at [75], Dr Hoehne says this:

> "75. [The appellant] suffers from several weaknesses, which all have a negative effect on his life if he would be deported to Somalia. First, he likely is a minority group member; as such, he would suffer structural discrimination in Somalia (regarding, e.g., access to the job market). Second, he is mentally disturbed, he is depressed and suffers from post-traumatic stress disorder; he also has a history of alcohol and drug abuse. All this points to a very unstable personality and unstable emotional situation… Back in Somalia, there would be nobody and no institution that could help to stabilise him; to the contrary, the conditions, particularly the continued insecurity in much of southern Somalia, are such that they would most likely contribute to a worsening of [his] condition. Any help that could be available would cost considerable money which neither [he] nor his sister have. Third, the long absence from Somalia since 2002 and the lack of family support on the ground further would isolate [him] back in Somalia and would add to his disorientation and inability to establish a living. …"

UNHCR Report

36. The appellant also relies on a report from the UNHCR published in 2016 entitled *Culture, context and mental health of Somali refugees,* which paints a cautiously improving situation for mental health provision, but still overall, inadequate and expensive. At page 28 of that report, the authors note that 'flight to refugee camps may put those with pre-existing severe mental illness at particular risk of neglect, abandonment or abuse.

Submissions

37. Mr Walker relied on his skeleton argument and on the decision letter. He accepted that Mr Musa had given very credible evidence, based on his long association with the appellant. Mr Musa had been a good friend to the appellant.

38. Mr Musa's evidence, and the documents in the hearing bundle, corroborated the appellant's account. The appellant was homeless until recently, but was striving to improve both himself and others. He had been frank about his previous issues with drink and drugs.

39. For the appellant, Ms Lowis also relied on her skeleton argument. The decision whether this appellant remained a persistent offender was fact specific. There had been four offences only, with sentences at the lower end of the scale for these kinds

of cases. There was no pattern of similar offending, and the appellant's case was that these offences came about as a result of circumstances, in particular his drug abuse and drinking. Ms Lowis' primary contention was that after two years without any further offence, despite very difficult living conditions (street homelessness and couch surfing) the appellant was no longer to be regarded as a persistent offender.

40. The appellant would rely on the evidence from Mr Musa to establish his social and cultural integration. He had been part of the Somali community in Northampton from about 2004, helping the Imam with translations at the mosque and relying on that community for support. He had now been working with the Acton Youth Association for nearly 2 years, as evidenced by the letter from its manager, Abdullahi Ali and Mr Musa's account of seeing him working with the youths there.

41. The appellant's serious mental health problems would cause him to have very significant difficulty in reintegrating in Somalia. Ms Lowis relied on the evidence of Dr Ruth Sagovsky, whose psychiatric report emphasised the appellant's as to the need for clan support. The appellant had produced a copy of his mother's refugee card confirming that she was in a refugee camp in Uganda.

42. The evidence of Dr Hoehne, and of the respondent's CPIN, was that post-traumatic stress disorder and mental health problems generally are liable to be regarded as demonic possession, leading to stigma in Somalia, and that there are very few specialised mental health services, and those which do exist would be too expensive for the appellant to access. People with mental health problems such as post-traumatic stress disorder would not be able to get employment in Somalia. The appellant was not an educated man, and absent good health and clan support, he would be likely to end up in an internally displaced persons camp, where he would suffer maltreatment and human rights abuses. There was a very high risk of severe mental or physical harm.

43. The appellant maintained that he was entitled to the benefit of Exception 1 in section 117C(4) of the 2002 Act and that in his case, there were 'very compelling circumstances' as contemplated by section 117C(6) of the Act which would make his removal to Somalia disproportionate.

44. Ms Lowis asked me to substitute a decision allowing the appeal.

45. I reserved my decision, which I now give.

Analysis

46. I am grateful to both Counsel and their instructing solicitors for the documents and for their skeleton arguments. The first question is whether this appellant remains a 'persistent offender' and thus a foreign criminal as defined by the 2002 Act. I am guided in this by the decision of the Court of Appeal in *SC (Zimbabwe) v Secretary of State for the Home Department* [2018] EWCA Civ at [57]-[60]:

> "57. In order to answer the question whether someone is a persistent offender, the decision-maker (be it the Tribunal or the Secretary of State) must consider the

> whole history of the individual from the commission of the first offence up to the date of the decision and ask themselves whether he can properly be described as someone who keeps on committing criminal offences. Factors to be taken into account will include the overall pattern of offending, the frequency of the offences, their nature, their number, the period or periods over which they are committed, and (where relevant) any reasons underlying the offending, such as an alcohol or drug dependency or association with other criminals. This is in line with the guidance given in the Immigration Directorate Instructions, Chapter 13, version 5.0 (dated 28 July 2014) to which Mr Malik referred, which states that a persistent offender is "a repeat offender who shows a pattern of offending over a period of time". The guidance goes on to say "this can mean a series of offences committed in a fairly short timeframe, or which escalate in seriousness over time, or a long history of minor offences."
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> 58. If the person concerned has been out of trouble for a significant period or periods within the overall period under consideration, then the length of such periods and the reasons for his keeping out of trouble may be important considerations, though of course the decision maker is entitled to bear in mind that the mere fact that someone has not been convicted for some time does not necessarily signify that he has seen the error of his ways. It may simply mean that he has paused in his offending. It is the overall picture of his behaviour that matters.
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> 59. If during those periods of apparent good behaviour the person concerned was serving the custodial part of a short sentence, or was too unwell to go out and commit the kinds of offences he is generally prone to commit, there may be an explanation for the hiatus in offending which is not inconsistent with his being properly regarded as a persistent offender. Likewise, it he had a very strong incentive not to commit further offences, such as being subject to a community order, or a suspended sentence, or he is on bail, or he has been served with a notice of deportation, the fact that he has committed no further offences during that period may be of little significance in deciding whether, looking at his history as a whole, he fits the description.
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> 60. On the other hand, we agree with First-tier Tribunal Judge Whalan that an established period of rehabilitation *may* lead properly to the conclusion that an individual is no longer a persistent offender. Depending on the particular facts and circumstances, a former drug addict who has ceased shoplifting to feed his habit after a period in rehabilitation, and who has been out of trouble for a significant period of time thereafter, might not be capable of being termed a "persistent offender" because when his history is looked at in the round, it can no longer be said that he is someone who keeps on offending."

47. That is a clear statement of what the Upper Tribunal must consider. The appellant here has been out of trouble for over two years. He no longer drinks or takes drugs, despite the difficult circumstances of street homelessness in which he has lived for much of that time. He helps young people to remain out of trouble and acts as a living example to them of the effect on their lives if they join gangs, take drugs, carry knives, or drink to excess. His account and the supporting evidence provided is credible and consistent. My primary finding, therefore, is that there is in this appeal an established period of rehabilitation leading to the conclusion that the appellant is

no longer to be characterised as a persistent offender. That is dispositive of the application of section 117C to his offending.

48. I consider, also, whether he can safely be returned to Somalia, given his accepted vulnerability and ill health. The respondent's most recent CPIN entitled *Somalia: Majority Clans and Minority Groups in south and central Somalia, version 3.0* [January 2019] states at 2.4.6 that members of minority groups which become internally displaced persons and end up living in an IDP camp anywhere in Somalia may be particularly vulnerable and could face discrimination and various human rights abuses from state or non-state actors: "Clan networks extend to IDP camps and there have been reports of minority groups being unable to access basic services and gatekeepers restricting their access to aid. …". I bear in mind that this appellant is already vulnerable by reason of his post-traumatic stress disorder and mental health issues.

49. I have had regard to *MOJ and others (return to Mogadishu) Somalia CG* [2014] UKUT 442 (IAC) and in particular to the following passages from the judicial guidance there given:

> "*(xi) It will, therefore, only be those with no clan or family support who will not be in receipt of remittances from abroad and who have no real prospect of securing access to a livelihood on return who will face the prospect of living in circumstances falling below that which is acceptable in humanitarian protection terms.*
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> *(xii) The evidence indicates clearly that it is not simply those who originate from Mogadishu that may now generally return to live in the city without being subjected to an Article 15(c) risk or facing a real risk of destitution. On the other hand, relocation in Mogadishu for a person of a minority clan with no former links to the city, no access to funds and no other form of clan, family or social support is unlikely to be realistic as, in the absence of means to establish a home and some form of ongoing financial support there will be a real risk of having no alternative but to live in makeshift accommodation within an IDP camp where there is a real possibility of having to live in conditions that will fall below acceptable humanitarian standards.*"

50. Those paragraphs are relevant to this appellant's circumstances. The appellant has now been lawfully resident in the United Kingdom for more than half his life (19 of his 36 years) and is a member of a minority clan with no surviving relatives or friends in Somalia. He is socially and culturally integrated here, despite his housing difficulties (currently resolved by the government street homelessness programme) and is making every effort to contribute socially, having rehabilitated himself. I am satisfied that there are significant obstacles arising from his history, his vulnerability, and his ongoing behavioural disturbances and mental health issues, which mean he is unlikely to be able to access either employment or treatment in Somalia and may well end up in an internally displaced persons camp where he would suffer abuse and discrimination, and there is a 'real possibility of [his] having to live in conditions that will fall below acceptable humanitarian standards'.

51. It follows that even if the appellant is a 'foreign criminal', notwithstanding my finding that he is no longer a persistent offender, applying section 117C(3) and (4) of the 2002 Act, the public interest does not require his deportation.

Conclusions

52. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law.

I set aside the previous decision. I remake the decision by allowing the appellant's appeal on human rights grounds.

Signed *Judith AJC Gleeson* Date: 2 October 2020

Upper Tribunal Judge Gleeson