Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/13002/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 February 2020	**On 16 June 2020**
Extempore	

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DAYIB [I]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms S Cunha, Home Office Presenting Officer
For the Respondent: Miss A Radford, Counsel, instructed by Wilson Solicitors LLP

DECISION AND REASONS

The Secretary of State appeals with permission against a decision of First-tier Tribunal Judge Ross promulgated on 6 November 2019 allowing the respondent's appeal against a decision of the Secretary of State to refuse a human rights claim consequent upon a decision to make a deportation order against him which in turn was precipitated by the index offence, causing grievous bodily harm, for which he was convicted and sentenced to six years' imprisonment. That was subsequent to an earlier appeal against a deportation

order which had been allowed, that order being made on account of the respondent having amassed 23 convictions for 36 offences.

The respondent's case is primarily, as set out in the decision, that his deportation to Somalia would be in breach of the United Kingdom's obligations pursuant to Article 3 of the Human Rights Convention. This is because, it is said, he has suffered from serious mental illness, particularly, complex post-traumatic stress disorder, and schizophrenia, which appears to have been diagnosed at some point when he was in prison. This resulted in the prescription of antipsychotic and antidepressant medication and his referral on release to specialist treatment within the community. He appears also to have been referred to the Traumatic Stress Clinic. The medication which he receives is set out in the report of Dr Balasubramaniam and includes quetiapine, which is prescribed for schizophrenia, as well as other drugs, particularly mirtazapine, diazepam and zopiclone.

The Secretary of State's case as set out in the refusal letter focuses primarily on the respondent not being at risk in his home area, in this case Somaliland, the respondent having originated from Hargeisa. The Secretary of State rejected the protection claim, concluding that he would not be at risk at any time spent in Mogadishu awaiting a connecting flight were that the case, that he could travel directly to Somaliland and that there was no reason why he would be at risk as a result of what had happened to him in Somalia prior to his departure, noting that the respondent was a member of the Isaaq clan, who are the primary inhabitants of Somaliland.

The Secretary of State then went on to consider Article 8, concluding that in light of the respondent's criminal behaving he did not meet any of the exceptions set out in the Immigration Rules; that there were in fact no very compelling circumstances in this case; and, with respect to Articles 2 and 3 that although he claimed to have suffered from mental health issues he had failed to provide any medical evidence in support of his claim.

The situation had, however, changed when the appeal came before Judge Ross. By this point there were medical reports including an independent psychiatric report, a letter from the respondent's mental health social worker in Camden as well as extensive medical records from the general practitioner. I shall turn to these in due course but it is sufficient to note that the diagnosis of complex posttraumatic stress disorder, the diagnosis of schizophrenia are mentioned in the letter from Camden and Islington NHS and that the long-term prescription for antipsychotics were referred to in the report of Dr Balasubramanian, and . It is also apparent from the notes from the GP at page 65 that the respondent has seen psychiatrists. It is also evident that the diagnosis of paranoid schizophrenia was made certainly by 10 August 2017. In addition to the medical evidence the judge had before him a significant amount of material regarding the position of the mentally ill in Somalia. I will turn to that in detail in due course.

The judge noted this evidence and the submissions from the respondent's representative that the evidence shows that the mentally ill in Somalia are

contained by the use of chains both in rural and urban areas and that it was common both in Somaliland and Puntland where people were chained for in excess of six months. The judge then went on to conclude that:

it was likely that due to the nature of the respondent's mental health conditions he would be identified as a mentally ill person in Somalia, be stigmatised and would not receive proper care;

the lack of acceptable care was not determinative, what being required are substantial grounds for believing that the respondent, although not at imminent risk of dying, would face a real risk on account of the absence of appropriate treatment or the lack of access to such treatment of being exposed to a serious, rapid and irreversible decline in his/her state of health, resulting in intense suffering or to a significant reduction in life expectancy;

the country evidence in relation to Somalia is such that there is a lack of access to treatment for mental ill health and that generally people who suffer from mental ill health are at real risk of suffering inhuman or degrading treatment.

The judge then went on to allow the appeal on the basis that the Article 3 threshold had been met and subsequently to allow the appeal on Article 8 grounds. It is of note in passing that the judge had upheld the Section 72 certificate. There is no challenge to that.

The Secretary of State sought permission to appeal against the decision with respect of Article 3 on two principal grounds:

(i) the judge misdirected himself in law on a material matter in that he had failed to apply the correct test of **N v the Secretary of State** and that he had wrongly relied at paragraph 40 on the decision in **Paposhvili v Belgium** in the light of the Court of Appeal having held in **AM (Zimbabwe)** confirming that **N v the Secretary of State** is still binding precedent, it being averred also that Article 3 would only prevent removal of someone with a naturally occurring illness to a country with inferior facilities for treatment in deathbed cases, "in the appellant's case where he suffers from PTSD, depression and schizophrenia, there is no such prognosis to suggest that this would be a deathbed case";

(ii) the respondent could not succeed on the basis of **Paposhvili** and had found that there was a lack of access to treatment for mental health at paragraph 41 that the judge had failed to undertake in reaching that conclusion any assessment on the evidence with respect to the three elements identified in **Paposhvili**, it being said that glossing over the test without properly applying it to the facts is insufficient.

A third ground is parasitic on the first two as it submits that the Article 8 findings are defective in that they rely on the findings pursuant to Article 3.

At the outset of the hearing Ms Cunha for the Secretary of State sought permission to amend the grounds of appeal and to seek the admission of a witness statement from the Presenting Officer who had appeared below. In essence, although the ground was not put to me in any written form and was not made in any formal, nor on notice, permission was sought to permit the Secretary of State ought to be allowed permission to challenge the finding that Article 3 would be breached in paradigm ill-treatment grounds on the basis that there had been a failure to make proper findings of fact as to the extent to which family could assist the respondent on return to Somalia, it being said that they had returned there in the past to assist an ill relative and that they would be able to assist in providing adequate mental health which would in effect result in him not being identified as mentally ill, and appropriate medication being available such that he would remain symptom-free as he is relatively symptom-free in the United Kingdom given support from his family.

I am not satisfied that it was appropriate or in the interests of justice to permit at this stage of the proceedings an amendment to the grounds of appeal. The Secretary of State did not make the application on proper notice and no proper reason appears to have been given as to why this was so. This is not a new issue as the averred defect must have been apparent from the decision being received by the Secretary of State, yet did not form part of the grounds or the renewed grounds. Further, it is difficult to discern that the grounds have merit. The witness statement records only that one of the respondent's witnesses in cross-examination informed the Tribunal she had visited Somaliland with her mother and stayed for approximately three months to care for her grandmother. The evidence showed that the family had travelled to Somaliland on their British passports. It does not record that any of the points that the Secretary of State now wishes to rely upon as points the judge did not address were in fact put to him.

It is thus difficult to construct from Ms Cunha's submissions that any arguable error of law is disclosed If the Secretary of State's case had been that the family could assist the respondent this would need to have been made as a submission to the judge. There is no indication that that was the case. There is no indication that it was put to the judge that medication could be made available or any submissions as to the risk or otherwise of the respondent being chained as was raised by the respondent and is described in the material put before the judge. Given the lack of merit in the grounds and given the late stage at which it has been introduced, I am not satisfied that it was in the interests of justice to permit this ground to be raised nor for that matter for the witness statement of Ms Godfrey to be introduced.

I turn to the grounds as pleaded. I am satisfied that the judge did materially err in law in his approach to **N** and **Paposhvili** insofar as it was relevant to this case. For reasons to which I will turn in due course I am not satisfied that that error was material. The judge should when considering the scenario within **N** or **Paposhvili**, that is whether there would be an Article 3 breach if someone did not receive proper care for his condition, have applied **N**, which is binding on him. He should not have approached the case on the basis of **Paposhvili**. The court decision of **AM (Zimbabwe)** makes that clear. The fact that that

might be overturned by the Supreme Court is beside the point. On no basis should the judge have gone down that route. Ground 2, insofar as it relates to **Paposhvili**, is also made out but the criticism of what the judge found at paragraph 41 is framed entirely of a failure to apply the test in **Paposhvili** and, for the reasons to which I intend to turn, that was not a material error.

It is important to stand back and reflect on what this appeal is about. It is, as Ms Radford submitted, about the ill-treatment that the respondent would receive on return to Somalia, specifically in this case, Somaliland. The case as put to the judge as set out in the skeleton argument put to the First-tier Tribunal is that there are in this appeal substantive grounds for believing that the respondent, if removed faces a real risk of being subject to torture or inhuman or degrading treatment or punishment in the country of deportation.

The judge had found that there was a real risk of that occurring and I conclude that that was a conclusion open to him. There is substantial evidence put before him of the ill-treatment of those who are mentally ill in Somalia. It is evident from the U.S. State Department Human Rights Report which appears in the bundle at page 300, from extracts that appear at pages 315 to 316, that

> "without a public health infrastructure few services existed to offer support or education for persons with mental disabilities. It was common for such persons to be chained to a tree or restrained within their homes. Local organisations advocated for the rights of persons with disabilities with negligible support from local authorities."

Again, in the UNHCR report which appears in the bundle at page 480 it said that containment of the mentally ill through the use of chains is a widespread practice throughout Somalia in both urban and rural areas and also in refugee camps.

> "Chaining people with a mental disorder is a harmful practice that often amounts to the violations of the human rights of the person. Chaining is practised for both men and women, is often an act of despair by family members who feel they have no other way to handle the problem."

The report in question also records that chaining is also widely practised within both public and private mental health facilities in Somalia, commonly used as a form of punishment when patients refuse to follow orders, exhibit aggressive behaviour or try to escape. It is also widely practised in religious healing centres, with the use of restraints often not monitored or recorded, and used for prolonged periods, sometimes indefinitely.

Further, there is an article from the Channel 4 News at pages 508 to 509 which confirms that it occurs in Hargeisa and it is not unusual. It is also confirmed by an article from the Globe and Mail from 30 April 2018 at pages 514 to 516.

The World Health Organization's analysis of the situation of mental health in Somalia, which although it is from 2010 is the most recent such report which is available, reports that people with mental illness may be ostracised, the fear of stigma may be even more powerful, mental illnesses are widely addressed solely in a repressed and outmoded manner, the mentally ill are generally

chained and/or confined, that this occurs in the North East as well as South Central Somalia. Detailed statistics at section 3.3.2 show how often this happens. The level at which this occurs is such that, 90% of the treated patients were treated by chaining. The statistics in the tables show that certainly in Hargeisa that at least 31% of people were chained, which is the second highest of all limited facilities there are. Chaining, it is said, also leaves psychological scars and physical injuries, that people are chained not only during an acute crisis but throughout their life and that the practice leads to increased societal stigma.

There is also limited evidence of any support by the state. There is no public health infrastructure and there is no indication of the state taking any steps to prevent the chaining of people.

I consider that the judge was in light of the evidence entitled and to which he referred, to conclude that there was evidence that people who suffer from mental ill health such as the respondent were at real risk of suffering inhuman or degrading treatment. I conclude that it was open to him given the chances of somebody being chained for an extensive if not unknown period meet that threshold. Even were I to have permitted the amended to the grounds proposed by the Secretary of State's, which I have not admitted, it is difficult to see how family would be able to prevent this. That would be unduly speculative, there being no indication that there would be family in Somalia or Somaliland prepared to look after the respondent, who could prevent him from being chained and there is little or no evidence that appropriate medication would be available. Still less was there evidence that the family from the United Kingdom would be able to be with him indefinitely to look after him.

Going back then to the case law, I consider that what was made out here and was open to the judge to conclude was that this was a case of the type referred to in **N** at paragraph 31 in the Court of Human Rights decision that Article 3 principally applies to prevent a deportation or expulsion where the risk of ill-treatment in the receiving country emanates from intentionally inflicted acts of the public authorities there or from non-state bodies when the authorities were unable to afford the applicant appropriate protection. That is of course the paradigm Article 3 test and I conceded that it was made out in this case, albeit that the reasoning from the judge could have been more detailed.

On the basis of the material the conclusion was justified. The respondent suffers from serious mental health problems. He is a paranoid schizophrenic. The evidence records that he hears voices and has in the past acted out on that. He also suffers from complex posttraumatic stress disorder. The evidence was sufficient to show that the respondent was consequently at risk of being chained up in Somaliland. On that basis that would be an inhuman or degrading treatment or punishment. Whilst that would appear to flow from non-state bodies, there being no public health authorities, although that is less clear in the case of the hospitals in Hargeisa, there is no evidence of any willingness to afford appropriate protection to those in their situation. It is evident from the material that this is how the mentally ill are treated in Somalia. There is no indication of any state intervention to prevent it.

In the circumstances, the criticism raised in ground 2 is not made out because it relates to what the Secretary of State says was an improper approach to **Paposhvili** in reaching the conclusion at paragraph [41].

For these reasons I conclude that the errors of law complained about in grounds 1 and 2 were not material. As I have found that the judge's decision that the respondent's deportation to Somalia would engage article 3 and thus that the appeal was properly allowed on human rights grounds. For that reason, the findings with respect to Article 8 are irrelevant and it follows that ground 3 is not made out. Accordingly, I conclude that the decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

Addendum

I do, however, wish to record my concern that the respondent's representatives do not appear to have approached the issue of whether the respondent required a litigation friend properly. If they were concerned that the respondent did not have capacity, then a proper application should have been made to the First-tier Tribunal and/or to the Upper Tribunal if there had been a material change in circumstances. That was not done.

Perhaps as worryingly, the medical report does not set out adequately or properly in any way the appropriate test for capacity under the Mental Health Act 2005. The test for capacity is in respect of a particular matter. That is not addressed or specified and while the report refers to the first part of the test including that the respondent's mind is disordered, it does not adequately explain why, by reference to section 3 (1) he is unable to make a decision, a decision which in any event is not specified.

Given the failure to analyse in any way what decisions the respondent could make in respect of his appeal or his understanding of what was happening, it is difficult to see that this report could have founded a successful application for the appointment of a litigation friend.

Notice of Decision

1. The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

Signed Date 28 February 2020

Upper Tribunal Judge Rintoul