IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00129/2018 (V)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 September 2020	**On 14 October 2020**

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

LA
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr S Walker, Senior Home Office Presenting Officer
For the Respondent: No Attendance by or on Behalf of the Respondent

This has been a remote hearing. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. Neither party objected to a remote hearing prior to the hearing and Mr Walker did not express any concerns at the hearing. I did not experience any difficulties with the process.

DECISION AND REASONS

1. The respondent (hereafter "the claimant") is a citizen of Somalia born in January 1997.

2. The Secretary of State is appealing against the decision of Judge of the First-tier Tribunal Herbert OBE ("the judge") promulgated on 13 January 2020 to allow the claimant's appeal.

3. Neither the claimant nor a representative on his behalf attended the hearing, which was held remotely.

4. On 17 September 2020 the claimant's (former) solicitors wrote to the Tribunal advising that they were no longer instructed. No reason was given and an application for an adjournment was not made.

5. In considering whether to proceed with the appeal in the claimant's absence, I had regard to the overriding objective in the Tribunal Procedure (Upper Tribunal) Rules 2008 to deal with cases fairly and justly including, in particular, the need, as expressed in Rule 2(2)(c), to ensure so far as practicable that the parties are able to participate fully in the proceedings and the need, as expressed in Rule 2(2)(e), to avoid delay so far as compatible with the proper consideration of the issues. After weighing these two considerations, as well as considering more broadly the issue of whether proceeding would be fair and just, I decided to proceed with the appeal. I did so because it was clear that the claimant, through his previous representatives, would have been aware of when the hearing was scheduled to take place but no application for an adjournment was made (or explanation for non-attendance given). Whilst the claimant is free to change representatives as he wishes, that does not mean that the hearing should not proceed as scheduled in the absence of an application, or request supported by reasons, for an adjournment.

Claimant's Background and the Respondent's Decision of 18 June 2018

6. The claimant entered the UK in 2003 with his mother and four siblings. In 2009 they were granted asylum.

7. In 2008 the claimant was convicted of robbery and in 2013 he was convicted of conspiracy to sell heroin and crack cocaine and sentenced to ten years' imprisonment.

8. In 2017 the claimant was sent notice of a decision to deport him and notification of an intention to revoke his refugee status.

9. The claimant did not make any representations in respect of the notice to deport him and revoke his refugee status. However, the respondent nonetheless considered whether he fell within Section 33 of the UK Borders Act 2007, and concluded that he did not.

10. In respect of revocation of the claimant's refugee status, the respondent noted that the claimant's status derived from his mother who suffered persecution due to her

clan membership and ethnicity. The respondent's position was that there has been a significant and durable change in Somalia in respect of persecution on the basis of ethnicity and clan membership such that the circumstances in connection with which the claimant had been recognised as a refugee had ceased to exist.

11. In respect of Article 8 ECHR, the respondent did not accept that there were very compelling circumstances outweighing the public interest in the claimant's deportation.

Decision of the First-tier Tribunal

12. The judge found that the claimant, along with his wife (currently serving a sentence of eleven years' imprisonment) had been groomed from a young age from within the Somali community into a criminal lifestyle. The judge found that the claimant's criminality had been extremely serious, as reflected by his sentence. The judge considered Exceptions 1 and 2 under Section 117C of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). The judge found that Exception 1 applied because:

    (a) The claimant has been lawfully in the UK for most of his life.

    (b) He is socially and culturally integrated, despite his offending. The judge found that:

        > "Whatever the rights or wrongs of that finding, certainly his criminality was born and developed in the United Kingdom and cannot be attributed to his having originated from Somalia notwithstanding the connections to those of Somali origin in the United Kingdom who introduced the appellant to a criminal lifestyle and groomed him from a young age."

    (c) There would be very significant obstacles to integration in Somalia. The judge gave several reasons for this at paragraph 79 of the decision, where he stated:

        > "I find that the very significant obstacles to his reintegration into Somalia would be as follows:
        >
        > I. His inability to speak fluent Somali;
        >
        > II. the fact that his demeanour, behaviour and social interactions which clearly are of a person of Somali origin who has been out of the country for many years;
        >
        > III. his lack of knowledge of cultural norms and mores that would be necessary for surviving in Mogadishu or Somalia today;
        >
        > IV. his lack of protection from a majority clan;
        >
        > V. his lack of protection from any minority clan members;
        >
        > VI. the absence of accommodation;

VII. his inability to obtain employment;

VIII. the fact that any UK qualifications or training as a mechanic would be of very limited value in the current 66% unemployment in Mogadishu;

IX. the appellant himself would face being targeted by criminal gangs or those exploiting his vulnerability upon return to Mogadishu because of factors 1 to 9."

13. In respect of the extant country guidance on Somalia, *MOJ & Ors (Return to Mogadishu) Somalia CG* [2014], the judge stated at paragraph 81:

> "I have also had regard to the case of *MOJ* and note that this case is somewhat dated because it was at that time a belief that Al-Shabaab had been defeated and the security situation would rapidly improve. Neither of those factors has come to fruition."

14. The judge went on to state at paragraph 85:

> "I paid detailed regard to the situation in Mogadishu and rely upon the UNHCR letter of 21 December 2017 which contains a very careful assessment that civilians living in Mogadishu face daily life threats to their life and security; individuals without close relatives remaining in Somalia with limited clan ties may be at risk of serious harm; individuals without close relatives remain in Somalia may become an IDP and face consequential protection issues and a risk on return. There is no sufficiency of protection, careful assessment of clan protection in line with a decision of *MOJ and Others* in respect to the appellant."

The judge concluded that taking all of the factors into considerations there were compelling circumstances over and above Exception 1 of the 2002 Act.

15. The judge also considered the claimant's relationship with his daughter, with whom he does not presently have any contact. The judge stated that the claimant's daughter is an innocent victim and that her loss must be weighed in the balance. At paragraph 92 the judge set out his conclusion in the following terms:

> "In concluding, the appellant has been largely responsible for his own dreadful situation with which he is clearly coming to terms with. That however is a very British problem, sadly aided by those in his own community who I am satisfied groomed him to meet this criminal lifestyle. That simply does mean that he cannot be removed from the United Kingdom and survive in the dangerous environment that are the current circumstances in Mogadishu and Somalia today without regard to his current vulnerability and lack of support networks. Family sending money would not help and may even make him a target."

16. After having assessed the claimant's Article 8 claim in detail in paragraphs 71 to 93, in the second half of paragraph 93 the judge set his entire assessment of the claimant's protection claim, stating:

> "I also find that he faces a clear risk of persecution on account of his perceived status as a westernised Somali man, without clan protection, and upon his return that would place him at serious risk. He therefore entitled to continue to benefit from his refugee

> status and his removal from the United Kingdom would place the United Kingdom in breach of its international obligations under the 1951 Geneva Convention in any event."

Grounds of Appeal

17. The grounds of appeal take issue with various aspects of the decision in respect of Article 8 ECHR.

18. Firstly, it is argued that the evidence did not support the judge's conclusion that the claimant had only a limited ability to speak Somali given that the claimant's own evidence was that he speaks the language, did not leave Somalia until the age of 10, and has remained within a Somali family and associated with members of the Somali community whilst in the UK.

19. Secondly, it is argued that the reasons given in paragraph 79 of the decision (which is quoted above) as to why there would not be very significant obstacles to reintegration into Somalia are deficient because there was not a basis to find that the claimant would lack knowledge of cultural norms in Somalia and would not be well-placed to find employment.

20. Thirdly, the grounds contend that the judge failed to follow *MOJ* in respect of the risk of harm in Mogadishu without explaining why there were sufficient reasons to warrant a departure from it.

21. Fourthly, the grounds note that *MOJ* points to remittances from family in the UK being a factor enabling a return to Mogadishu whereas the judge found, to the contrary, that it would not assist him and would make him a target.

22. Fifthly, the grounds challenge the assessments of the best interests of the claimant's child and are critical of the weight given to the criminal conduct given how serious the offence was.

23. The grounds do not make any reference to the judge's finding at paragraph 93 that the claimant would face a serious risk of harm, such that deportation would breach the Refugee Convention, because of his perceived status as a westernised Somali man and the lack of clan protection.

Analysis

24. The judge allowed the appeal under Article 8, having regard to the considerations in Section 117C of the 2002 Act, because he was satisfied that there were "very compelling circumstances" over and above the exceptions in sections 117C(4) and (5). Although the judge stated that he reached this conclusion because of a combination of reasons, it is apparent that the central reason was his assessment of the situation prevailing in Somalia in general and Mogadishu in particular. At paragraph 89 the judge referred to Somalia as being "exceptionally risky to [the claimant's] life and existence". At paragraph 90 the judge described Somalia as posing "a unique danger to those returning as it does to those who are resident". At paragraph 92 the judge

referred to the "dangerous environment that are the current circumstances in Mogadishu and Somalia today" and in paragraph 93 the judge referred to there being a serious risk of a harm to Somalis perceived as westernised.

25. These findings about the level of risk in Mogadishu to civilians in general, and to westernised Somalis in particular, is inconsistent with the extant country guidance, *MOJ*, where, inter alia, it was not found that a returnee who is an ordinary citizen would be at risk simply on account of having lived in a European country or that a returnee will ordinarily face conditions breaching article 3 ECHR.

26. It is well established that a failure to apply a Country Guidance decision, unless there is good reason explicitly stated for not doing so, constitutes an error in law in that a material consideration had been ignored or legally inadequate reasons for the decision have been given: see, for example, *NA (Libya) v Secretary of State for the Home Department* [2017] EWCA Civ 143.

27. In this case, the only evidence referred to by the judge was the UNHCR letter of 21 December 2017. The letter contains an assessment of the circumstances faced by civilians in Mogadishu and the judge was entitled to give this weight. However, he has not acknowledged that his conclusion is inconsistent with *MOJ*, or adequately explained why this single piece of evidence was considered sufficient to justify a departure from *MOJ* on the level of risk and degree of harshness in Mogadishu. The judge therefore erred by failing to follow *MOJ* or give adequate reasons for not doing so.

28. I also accept the Secretary of State's argument that the judge has not adequately explained why he rejected the claimant's own evidence that he is able to speak Somali and why he departed from *MOJ* on the significance of remittances from the UK.

29. I raised with Mr Walker the fact that the grounds of appeal do not challenge the judge's finding (in the second half of paragraph 93) that the claimant is entitled to the benefit of refugee status because he would be perceived as a westernised Somali man. Mr Walker acknowledged that there was not a specific challenge to this finding, but argued that the lack of reasoning to support this conclusion is so clear that an error should be found.

30. Although it appears no reasons were given to support the judge's finding on refugee status in paragraph 93 of the decision, reading the decision as a whole, it is apparent that the reasoning given earlier in the decision (where the judge, in the context of the article 8 claim, discussed the current circumstances in Mogadishu) is applicable to the conclusion in paragraph 93. Accordingly, I am satisfied that the grounds of appeal concerning a failure to follow *MOJ* are applicable to the judge's findings in respect of the Refugee Convention as well as to his assessment of article 8. The judge erred in his assessment of whether the claimant is entitled to protection under the Refugee Convention not because of an absence of reasons but because of a failure to explain why he departed from *MOJ*.

31. Mr Walker's view was that, given the extent and range of errors in the decision, the appeal should be remitted to the First-tier Tribunal. As the appeal will need to be considered afresh with no findings preserved, having regard to paragraph 7.2(b) of the Practice Statements of the Immigration and Asylum Chambers of the First-tier Tribunal and Upper Tribunal, I agree with Mr Walker that the appeal should be remitted to the First-tier Tribunal.

Notice of Decision

32. The appeal is allowed.

33. The decision of the First-tier Tribunal is set aside and the appeal is remitted to the First-tier Tribunal to be heard afresh by a different judge. No findings from the First-tier Tribunal are preserved.

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

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

Signed

D. Sheridan Dated: 9 October 2020

Upper Tribunal Judge Sheridan