Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: UI-2022-002012**
On appeal from PA/04147/2016

THE IMMIGRATION ACTS

Heard at Field House
On the 1st September 2022

Decision & Reasons Promulgated
On the 11th January 2023

Before

UPPER TRIBUNAL JUDGE GLEESON
DEPUTY UPPER TRIBUNAL JUDGE WILDING

Between

MA (SOMALIA)
(ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Emma Doerr, Counsel, instructed by Duncan Lewis Solicitors
For the Respondent: Mr Steven Walker, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Somalia born on the 8th July 1988. It is a relevant feature to note that he is from Somaliland, which declared independence from Somalia in 1991, although not all countries recognise Somaliland as an independent state.

2. The appellant is a foreign criminal with a lengthy criminal record, as a result of which the respondent has decided that he should be deported. The decision to deport and refuse the appellant's protection claim, the subject of this appeal, was taken on the 8th April 2016.

3. Following a remote hearing on 23rd February 2021, First Tier Tribunal Judge Khawar dismissed his appeal in a decision promulgated on the 17 January 2022 against the Respondent's decision to refuse a human rights claim.

Background

4. The Appellant entered the United Kingdom with his mother, father and siblings on 30th September 1990 when he was aged 2. He was born in Hargeisa, which was then in Somalia but is now in Somaliland.

5. The Appellant's family claimed asylum. This claim was refused. However, the family were granted Exceptional Leave to Remain on 15th February 1993. Such leave was extended on a number of occasions until February 2000. On 16th February 2000 the family were granted Indefinite Leave to Remain in the United Kingdom.

6. The appellant has a lengthy criminal record. After two convictions in 2006, and two earlier in 2007, on 21 December 2007 at Wood Green Crown Court the Appellant was convicted of robbery for which he was sentenced to 2 years' imprisonment.

7. Following the 2007 conviction, deportation proceedings commenced, resulting in an appeal. On 14 October 2008, the First-tier Tribunal allowed the appeal against deportation on human rights grounds, on the basis that the appellant's length of residence, age, and strength of connections in the UK, and his domestic and compassionate circumstances, taken together, outweighed the public interest in deportation. The Tribunal was satisfied that the appellant would be at real fisk of suffering treatment contrary to Article 3 ECHR if returned to Somalia: see [26] of the 2008 decision.

8. Unfortunately, that was not the end of the appellant's offending history. He was convicted on a further 8 occasions, of a further 13 offences.

9. On 8 May 2014 at Wood Green Crown Court the appellant was convicted of two counts of assault occasioning actual bodily harm and one count of destroy or damage property. He received 2 concurrent sentences of 2 years' imprisonment for the offences of assault and 2 months consecutive for the third offence.

10. On 9 July 2014, the appellant was issued with notice of liability for deportation and given the opportunity to make representations. He made none. On 1 December 2014, he was issued with a deportation decision, and responded with protection and human rights representations on 14 January 2015.

11. On 21 April 2015, the appellant was issued with a section 72 warning, inviting him to rebut the presumption that the 2014 offences were particularly serious and that his continued presence in the UK constituted a danger to the community.

12. The appellant continued to offend. On 16 May 2015, he was convicted at West Glamorgan Magistrates' Court of driving a motor vehicle with excess alcohol, otherwise than in accordance with a licence, and uninsured. He was fined and disqualified from driving.

13. On 7 April 2016, the respondent made a deportation order pursuant to section 32(5) of the UK Borders Act 2007 and on 8 April 2007, she refused the appellant's international protection and human rights claims.

14. On 6 October 2016 at Cardiff Crown Court, the appellant was convicted of possession with intent to supply crack cocaine and possession with intent to supply heroin. On the same day the Court imposed two concurrent sentences of 6 years' imprisonment for each offence.

First-tier Tribunal decision

15. The First-tier Tribunal dismissed the appellant's appeal. The reasons for doing so were, in summary, that the appellant would not be at risk on return to Somaliland. He had some degree of community engagement with the Somali community in the UK and so would be able to return to Somaliland and establish himself there. He has clan links with Hargeisa and with the region, meaning he would be able to find assistance as necessary on return.

16. The First-tier Judge found that he had not been provided with any adequate or reliable evidence to challenge the analysis of the respondent in the refusal letter and as such the protection appeal was dismissed.

17. In relation to Article 8 ECHR, the Judge took a structured approach. He found that the appellant could not meet the Exceptions to deportation found in section 117C of the 2002 Act, due in no small part to his significant criminal activity. The judge found further that the appellant's deportation would not be unduly harsh in all the circumstances on his wife and children.

18. Considering the matter through the section 117C(6) prism of whether there are very compelling circumstances over and above those found in Exceptions 1 and 2, the Judge relied upon his previous findings and concluded that the appellant's deportation would be proportionate.

Grounds of appeal

19. The appellant brings 8 substantive grounds of appeal:

(i) Judge Khawar made his decision 11 months after the hearing, the consequence of this delay has been that the decision fails to engage with significant parts of the evidence.

(ii) The judge failed to properly apply the principles from Devaseelan (Second Appeals – ECHR - Extra Territorial Effect) Sri Lanka* [2002] UKIAT 00702;

(iii) The judge failed to consider adequately the expert evidence from Dr Markus Hoehne, which in part included the evidence that the Somaliland authorities do not accept those with criminal convictions to return to the country;

(iv) Perverse reasons for rejecting the independent social worker evidence;

(v) There was inadequate assessment of the impact on his children were he to be deported;

(vi) There was no consideration of the evidence from his probation officer;

(vii) No consideration of the very significant residency in the UK; and

(viii) There was a failure to consider, in light of the evidence from Dr Hoehne, the feasibility of the appellant's return to Somaliland.

20. Permission to appeal was granted on all grounds by First-tier Judge Boyes, in a decision dated 9th March 2022. No response from the respondent was filed.

Upper Tribunal hearing

21. At the hearing Mr Walker, on behalf of the Secretary of State conceded that in light of the "excessive delay" and the failure to consider the "vital" evidence before him, the Judge fell into error.

Discussion

22. We accept Mr Walker's concession, and give some further elaboration. The delay in this case between the hearing date and the date of promulgation is 11 months, that delay in, and of, itself is not necessarily an error of law. However, when a delay is significant, and we agree with Mr Walker's description that it could be said to be "excessive", the Judge has to identify a) that there has been a delay and b) address the impact, or otherwise, of it on their decision.

23. The First-tier Judge in this case does neither. It is clear that the delay has had an impact on the case because of the significant oversight in the decision in failing to engage and analyse key reports from a country expert, as well as independent social worker and probation officer reports.

Engagement with that evidence was critical, and plainly material, to the outcome of the appeal.

24. The error becomes more acute when one considers that the First-tier Judge found that on the evidence before him that he could go behind the 2008 decision, which was the *Devaseelan* starting point, in which the judge held that the appellant was at risk on return. In particular, in light of the previous decision, and the expert evidence relied on the Judge's conclusion on the protection aspect that:

> "121. I have not been provided with any adequate or reliable evidence to challenge the assertions, analysis and conclusions of the Respondent as set out in the aforesaid paragraphs 41 to 55 of the 05/2016 decision, which paragraphs should be taken as being specifically traversed and incorporated into this decision."

25. In a statutory appeal this finding is inadequate, the Judge was tasked with considering the evidence in the round, and assessing whether the appellant is at risk. In doing so the appellant is not restricted showing the reasons in the refusal letter have fallen into any public law error as he would be if this was a judicial review.

26. This finding however fails to take into account the previous decision from 2008, and fails to consider the expert evidence relied on.

27. For similar reasons the First-tier Tribunal's Article 8 analysis has failed to engage in an assessment of all the relevant considerations for the reasons set out in the grounds of appeal and as conceded by Mr Walker. There is no meaningful analysis of the evidence as a whole regarding the impact on his children, nor any assessment as to the significant residence in the UK, since he was 2 years old.

28. Similarly the Judge has not considered the probation officer report at all, has given perverse reasons for rejecting the entire social worker report, and has consequently undertaken an inadequate assessment of the Article 8 claim.

29. The First-tier Judge's errors were unarguably material and his decision is set aside. This case has been before the First-tier Tribunal twice already, and this is the second time it has been before the Upper Tribunal. We have considered whether that history should mean the Upper Tribunal should retain the matter.

30. However, given the fact that the case will need to be heard afresh, with no preserved findings of fact or credibility, we have reluctantly concluded that the decision in this appeal will need to be remade afresh in the First Tier Tribunal.

Decision

The First Tier Tribunal materially erred in law. The decision is set aside.

The case is remitted to the First Tier Tribunal to be heard afresh.

Signed*:* T.S. Wilding Date: 1st September 2022
Deputy Upper Tribunal Judge Wilding