Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: UI-2022-003012
UI-2022-003009; (RP/00145/2017)

THE IMMIGRATION ACTS

Heard at Field House
On 13th December 2022

Decision & Reasons Promulgated
On 20th February 2023

Before

THE HON (MRS) JUSTICE THORNTON
UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

AI
(ANONYMITY DIRECTION MADE)
Respondent

Representation:
For the Appellant: Mr R Toal instructed by Wilson & Co Solicitors
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, AI is granted anonymity.

No-one shall publish or reveal any information, including the name or address of AI, likely to lead members of the public to identify the AI. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

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Introduction

1. Both the Secretary of State and the appellant were granted permission to appeal and for clarity we retain the description of the parties as they were in the First-tier Tribunal ("FtT").

2. The appellant is a citizen of Somalia. Following his conviction at Snaresbrook Crown Court in June 2015 and the imposition of a sentence of five years in prison, the Secretary of State informed the appellant in 2015 of an intention to deport him and revoke his refugee status. In 2017 the Secretary of State was informed that the appellant was being treated for paranoid schizophrenia. Nonetheless, by decisions dated 3rd November; 6th November 2017 and 27 October 2021, the Appellant made a deportation order, withdrew the appellant's refugee status and refused the appellant's human rights claims. The Secretary of State also issued a certificate to the effect that the appellant was not entitled to protection under the Refugee Convention (pursuant to section 72 of the Nationality Immigration and Asylum Act 2002).

3. The Appellant brought an appeal before the FTT under Section 82 of the Nationality Immigration and Asylum Act 2002. In broad terms, he appealed on three grounds:

   a. first that he is entitled to the protection of the Refugee Convention or humanitarian protection under the EU Qualification Directive;

   b. secondly, that any removal will be a breach of this rights under Article 3 of the ECHR; and

   c. thirdly, that any such removal will be a breach of his right to enjoy private and family life under Article 8 ECHR.

4. In a decision promulgated on 7th June 2022 FtT Judge Bird ("the judge") allowed the appellant's appeal on humanitarian protection and human rights grounds (Articles 3 and 8).

Grounds of appeal to the Upper Tribunal by the Secretary of State and the Appellant

5. The Secretary of State challenges the decision on humanitarian protection and human rights grounds as well as the judge's refusal to uphold the certificate under Section 72 of the 2002 Act, as follows:

   (i) the judge misdirected herself in relation to humanitarian protection. The judge found the appellant was not entitled to refugee status but failed to consider whether the appellant was excluded from humanitarian protection by virtue of paragraph 333D Immigration Rules because not posing a risk to the community did not itself discount all the exclusions. The appellant was in fact excluded by virtue of paragraph 333D (iv); having been convicted by a final judgement of a particularly serious crime (as defined in Section 72

of the Nationality, Immigration and Asylum Act 2002) on the basis he constitutes a danger to the community of the UK.

(ii) the judge failed to give adequate reasoning for findings on a material matter. The judge in finding at [99] that the appellant would be destitute, failed to have regard to MOJ & Ors (Return to Mogadishu) Somalia CG [2014] UKUT 00442. The judge failed to consider whether the appellant would benefit from any assistance from members of the Brava sub-clan in Mogadishu and had not given reasons why he would have no access to remittances sent from the UK and why he could not access employment or funds from the Facilitated Returns scheme. There was no finding that mental healthcare treatment which was available would not be accessible to the appellant. The judge thus failed to give adequate reasons for finding that the appellant would be at risk of inhuman or degrading treatment on return to Somalia. As such the judge failed to have regard to AM (Zimbabwe) [2020] UKSC 17 which sets out the correct test in Article 3 medical claims.

(iii) The judge did not adequately reason the conclusion that the deportation would result in unduly harsh consequences for the children or apply the extremely demanding test of 'unduly harsh' consequences and as set out in KO (Nigeria) v Secretary of State [2018] UKSC 53. The judge's reasoning simply did not establish the high threshold was made out. The test of 'very compelling circumstances', was the applicable test. The judge had failed to have regard to established case law.

(iv) In her rule 24 response, the Secretary of State, made an application to amend her grounds submitting that the judge had reversed the burden of proof in relation to the Section 72 certificate. It was accepted that the appellant had committed a serious offence and the judge at [69] stated that it was for the *respondent* to show that the appellant was a danger to the community. That was an error of law. The burden was on the appellant. The appellant accepted that he continued to use cannabis. The findings by the judge were fundamentally undermined by the misunderstanding of the legal framework and misdirection.

6. The appellant cross appealed challenging the judge's failure to address the appellant's status under the Refugee Convention, as follows:

(i) the judge failed to approach properly the Refugee Convention because although the judge considered the appellant could qualify as a member of a particular social group on the basis of his mental health [113] and found the discrimination he would suffer on this ground would be likely to be persecutory, she failed to make findings on the appellant's refugee status and revocation. Robinson v Secretary of State [1997] 4 All ER 210 makes clear that

the tribunal itself has an obligation to comply with the Refugee Convention and at least invite submissions on this basis.

The hearing

7. At the hearing before us Mr Toal submitted that the person who had drafted the Secretary of State's grounds had not, in his view, read the decision carefully. The judge had made adequate findings overall. Although he attempted to defend the judge's approach to the Section 72 certificate Mr Toal nonetheless submitted that the judge had made sufficient findings in relation to the revocation of protection and the Article 3 findings should be upheld. There was no misdirection. Mr Toal also took us through the various findings made by the judge in order to persuade that sufficient had been undertaken to sustain the judge's conclusions on article 3.

8. Ms Cunha relied substantially on the written grounds. She submitted that the judge had not considered the background evidence overall and had misdirected herself. She submitted that the appellant could not secure benefit from the Refugee Convention not least because he was subject to the Section 72 certificate but also had the protection of Article 3 if required. In terms of his mental health there was a duty only to show that the facilities were available not that they were of equal standard. The judge failed to consider the treatment.

Analysis

The Refugee Convention

Section 72 certificate

9. Despite the objection by Mr Toal to the Secretary of State amending her grounds of appeal to include a challenge to the consideration of the Section 72 certificate, we conclude that, in accordance with the Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) (rule 5 case management powers) and in light of the obvious and fundamental error by the judge in her misdirection in relation to the Section 72 certificate, the application to amend should be granted.

10. It is clear from section 72(5A) of the Act that a person convicted of a particularly serious crime (as here) is presumed to constitute a danger to the community of the UK. It is open to the appellant to rebut both presumptions. There was understandably no attempt to dissuade the Tribunal that the offence was not a particularly serious crime. <u>EN Serbia</u> [2009] EWCA Civ 630 makes clear that the onus is on the appellant to discharge the burden of showing that he no longer poses a danger to the community. Laws LJ at [66] held

> *"in practice, once the State has established that a person has been convicted of what is on the face of it a particularly serious crime, <u>it will be for him to show either</u> that it was not*

> *in fact particularly serious, because of mitigating factors associated with its commission, or that because there is no danger of its repetition he does not constitute a danger to the community."*

11. The judge when directing herself at [69] stated that 'the second limb of section 72(2) required the *respondent* to show that the appellant is a danger to the community'. The presumption is set out in Section 72 and the respondent had therefore fulfilled that requirement. The judge proceeded at [69], to state '*the respondent has not produced any evidence to show that the appellant continues to be a danger to the community'*. It is apparent that the judge had not understood nor applied the correct test and departed from both statute and case law.

12. We are persuaded on the evidence owing to the appellant's extensive offending (over nearly twenty years), that the appellant needed to rebut the presumption that he remained a danger to the community. We find the judge's misdirection was a material error and set aside her conclusions in relation to the Section 72 certificate.

Refugee Convention – membership of a particular social group

13. The judge found that the appellant may fall into a particular social group (on the basis of his mental health condition) and the discrimination was likely to be persecutory at §113. At paragraph 114 of the decision, the judge recorded that the appellant was not entitled to the benefit of protection under the Refugee Convention on 'the grounds of ethnicity or the basis of his membership of a particular social group.' The Judge's explanation for not doing so was that the point was not argued before her (§114). There were no conclusive findings in relation to the appellant's refugee status on the basis of the appellant's mental health condition.

14. However, Robinson v Secretary of State [1997] 4 All ER 210 makes clear that the tribunal itself has an obligation to apply its knowledge of Refugee Convention jurisprudence. We find that the judge's approach taken to decline to analyse the position conclusively before her as to the Appellant's membership of a particular social group amounted to a material error of law.

Humanitarian protection

15. As Mr Toal conceded, the Judge fell into error in failing to consider whether the appellant was excluded from humanitarian protection by virtue of paragraph 333D (iv)of the Immigration Rules, which provides that:

> *An asylum applicant is excluded from a grant of humanitarian protection for the purposes of paragraph 339C(iv) where the Secretary of State is satisfied that there are serious reasons for considering that the asylum applicant: ....(iv) having been*

convicted by a final judgement of a particularly serious crime (as defined in Section 72 of the Nationality, Immigration and Asylum Act 2002), constitutes a danger to the community of the UK).

16. We find a material error of law in this regard.

Article 3 – ECHR

17. The judge concluded that there are substantial grounds for believing that if removed to Somalia the appellant will be exposed to a real risk of a serious, rapid and irreversible decline in his mental health resulting in intense suffering. The evidence further pointed to there being a real risk of this appellant seeking to end his life. There was therefore a real risk that removal of this appellant from the United Kingdom will be a breach of his protected rights under Article 3 (§136 and 137).

18. The Secretary of State criticizes the judge for failing to apply the country guidance on return to Somalia set down in MOJ & Ors and OA (Somalia) [2022] UKUT 33 (IAC). The latter case was decided in February 2023 and cited in the respondent's skeleton argument, albeit not the grounds.

19. So far as relevant the headnote of OA provides as follows:

> *"1. In an Article 3 "living conditions" case, there must be a causal link between the Secretary of State's removal decision and any "intense suffering" feared by the returnee. This includes a requirement for temporal proximity between the removal decision and any "intense suffering" of which the returnee claims to be at real risk. This reflects the requirement in Paposhvili [2017] Imm AR 867 for intense suffering to be "serious, rapid and irreversible" in order to engage the returning State's obligations under Article 3 ECHR. A returnee fearing "intense suffering" on account of their prospective living conditions at some unknown point in the future is unlikely to be able to attribute responsibility for those living conditions to the Secretary of State, for to do so would be speculative.*
>
> *Country Guidance*
>
> *2. The country guidance given in paragraph 407 of MOJ (replicated at paragraphs (ii) to (x) of the headnote to MOJ) remains applicable.*
>
> *…*
>
> *10. There is a spectrum of conditions across the IDP camps; some remain as they were at the time of MOJ, whereas there has been durable positive change in a significant number of others. Many camps now feature material*

conditions that are adequate by Somali standards. The living conditions in the worst IDP camps will be dire on account of their overcrowding, the prevalence of disease, the destitution of their residents, the unsanitary conditions, the lack of accessible services and the exposure to the risk of crime.

11. The extent to which the Secretary of State may properly be held to be responsible for exposing a returnee to intense suffering which may in time arise as a result of such conditions turns on factors that include whether, upon arrival in Mogadishu, the returnee would be without any prospect of initial accommodation, support or another base from which to begin to establish themselves in the city.

12. There will need to be a careful assessment of all the circumstances of the particular individual in order to ascertain the Article 3, humanitarian protection or internal relocation implications of an individual's return.

13. If there are particular features of an individual returnee's circumstances or characteristics that mean that there are substantial grounds to conclude that there will be a real risk that, notwithstanding the availability of the Facilitated Returns Scheme and the other means available to a returnee of establishing themselves in Mogadishu, residence in an IDP camp or informal settlement will be reasonably likely, a careful consideration of all the circumstances will be required in order to determine whether their return will entail a real risk of Article 3 being breached. Such cases are likely to be rare, in light of the evidence that very few, if any, returning members of the diaspora are forced to resort to IDP camps.

14. It will 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 would be reasonable for internal relocation purposes.

15. There is some mental health provision in Mogadishu. Means-tested anti-psychotic medication is available".

20. Dr Galappathie and Ms Harper, the country expert, both gave evidence in OA as well as in the present case. Ms Harper's evidence was accepted in OA as being helpful in relation to the importance of remittances for those

in need but was treated with some caution particularly in relation to IDP camps and employment. Moreover, the Upper Tribunal said this:

> *"229. We accept Ms Harper's evidence that conditions in Mogadishu for returnees are difficult; her assessment was consistent with the broad thrust of the background materials to which we were referred. We accept that many returnees will face considerable practical challenges when seeking to establish themselves in a city to which hundreds of thousands have been, and continue to be, displaced.*
>
> *…*
>
> *256. We find that a returnee with family and diaspora links in this country will be unlikely to be more than a small number of degrees of separation away from establishing contact with a member of their clan, or extended family, in Mogadishu through friends of friends, if not through direct contact.*
>
> *…*
>
> *280. But we do not accept that a criminal record or drugs problem in the United Kingdom places a returnee at an enhanced degree of risk of societal or clan-based rejection.*
>
> *…*
>
> *310. We do not consider the evidence relating to the overall prevalence of crime and human rights abuses in Mogadishu to demonstrate that there are substantial grounds for concluding that IDPs are at a real risk of being subjected to mistreatment of this nature beyond the risk faced by an 'ordinary' citizen of Mogadishu.*
>
> *…*
>
> *339. If there are particular features of an individual returnee's circumstances or characteristics that mean that there are substantial grounds to conclude that there will be a real risk that, notwithstanding the availability of the FRS and the other means available to a returnee of establishing themselves in Mogadishu, residence in an IDP camp or informal settlement will be reasonably likely, a careful consideration of all the circumstances will be required in order to determine whether their return will entail a real risk of Article 3 being breached. Such cases are likely to be rare, in light of the evidence that very few, if any, returning members of the diaspora are forced to resort to IDP camps."*

21. In relation to the evidence on mental health provision, the following was said (not relying on the evidence of either Dr Galappathie or Ms Harper):

> *"349. We accept Mr Hansen's submissions that there is limited but nonetheless meaningful provision of mental health medication in Mogadishu; the evidence demonstrates that mental health medication has been available for some time, and that some, albeit limited, provision is available for those with mental health conditions. ……*
>
> *350. The Forlanini Hospital has a mental health centre with a staff of 32 and 100 inpatient beds. According to 2020 TANA Medical Region of Origin Information for Somalia report referred to above, the staff include a specialist psychiatric doctor, a psychologist, a general practitioner, specialist nurses, a pharmacist and a lab technician. The TANA report records that questions have been raised about the prospect of physical force being used in the hospital, but that the study upon which the report is based found no sign of any rough treatments being used in the hospital. A doctor interviewed by the authors of the report said that only sedatives and medications are used to treat the patients, and that the condition of most improves immediately upon the commencement of the treatment. Elsewhere the report states that Olanzapine is available at four hospitals; chlorpromazine is available in at least three; haloperidol is available in five; risperidone in at least four; and sertraline in at least two hospitals. At Forlanini, patients who cannot afford the consultation fees are treated free of charge, including 'drug abusers' referred by the police. The hospital treats those from poor socio-economic groups, and, of those who do pay on their first visit, 60% are not charged any fees for their second visit."*

22. Turning to the decision in the present case: the decisions of MOJ and OA are considered in the most detail in the context of the Judge's consideration of the Refugee Convention (§88 – 113), alongside reference to Ms Harper's report. The judge's analysis leads to the conclusion that if the appellant is returned to Mogadishu, because of his deteriorating mental health he is likely in time to be forced to live in an IDP camp or a similar alternative (112) whereupon the Judge immediately concludes that "The circumstances in which he will be living will in themselves fall below what is acceptable and will amount to inhuman and degrading treatment." There is a further passing reference to OA in the context of general findings in relation to article 3 at [115] to [117] which include findings that

> *"115. I have before me credible evidence from the witnesses who gave evidence before me that there is no family living in Somalia and the family here will not have the resources to support the appellant financially in Somalia. The appellant is a member of a minority clan, speaks very little Somali, has been absent from Somalia for over three decades and more significantly has severe mental health issues and will have*

> *very little if any hope of accessing the treatment that he will need.*
>
> *116. Even if as the UT state in OA the appellant will be returned with some money, this will not be of help to the appellant if he is ousted from any accommodation he secures because his mental health deteriorates as he is unable to access the treatment that he needs. The objective evidence shows that he will be subject to inhuman and degrading treatment if forced to live in an IDP camp.*
>
> *117. The rapid decline in his mental health will lead to treatment from those around him which in all likelihood will be, in light of the information provided by the country expert, inhuman and degrading and a breach this appellant's rights under Article 3.*

23. The appellant's mental health is then addressed at §127 – 135, in particular the evidence of Dr Galappathie and Dr Cordwell and the Appellant's diagnosis of paranoid schizophrenia and the need for '*very specific treatment' and the dangers of relocation.* The findings lead to a conclusion at [134] that:

> '… *when these opinions are added to the report of the country expert showing the lack of the relevant treatment this appellant needs and the fact that he will be unable to access family support and suitable accommodation in Somalia I find the evidence shows that there is a real risk that the appellant's mental health will deteriorate rapidly'*.

24. OA stipulates that there will need to be a careful assessment of all the circumstances of the particular individual in order to ascertain the Article 3 implications of an individual's return. In this regard, the judge's findings do not engage with the guidance in OA at [10] as to the spectrum of conditions in the camps (or SB (refugee revocation; IDP camps) Somalia [2019] UKUT 358 (IAC) (whereby MOJ did not include any finding that a person who finds themselves in an IDP camp is thereby likely to face Article 3 ECHR harm)). The judge makes only passing reference to any assistance from the Facilitated Returns Scheme on the basis that the Appellant's mental health difficulties will overwhelm him. She made no reference to paragraph 256 of OA and the limited degree of separation from establishing contact with a member of their clan. She does not engage with the analysis of the availability of health facilities in OA relying instead on the evidence of Dr Galappathie and Dr Cordwell at 129 – 135 which made no comment on facilities in Somalia. Ms Harper is a country expert rather than a medical expert and her evidence on medical facilities was not relied upon in OA. The judge considered from Miss Harper's report that the appellant would be '*at an increased risk of serious harm'* owing to his criminal record but this factor was specifically dismissed in OA. The judge does not engage with the finding in OA that

anti-psychotic medication is available. In Savran v Denmark (Application no.57467/15) (7 December 2021) the appellant said to be experiencing schizophrenia was not said to reach the threshold set by Article 3 because it did not appear the appellant ran a risk of harming himself. Neither Dr Galappathie nor Dr Cordwell commented on the availability of medication in Somalia. When considering 'serious harm', the judge identified that the family here will not have resources to support the appellant financially in Somalia [at [118] to [122] yet at [35] the evidence was that the wife may be able to send the appellant some money if he was returned to Somalia, albeit it would be difficult.

25. We conclude that the judge's errors in this regard are material.

Article 8

26. We also accept that the judge failed in his assessment of Article 8 to apply properly the tests of 'unduly harsh' and 'very compelling circumstances' when considering Section 117Cof the 2002 Act in relation to the children.

27. The judge observed from the independent social worker report of Mr P Horrocks and dated 18th March 2021 that the appellant played a stabilising role in his children's lives but simply commented that the removal of the appellant would be '*contrary to the wishes and feelings of the children*' and they would '*suffer great distress and trauma and suffer harm to their emotional development*' and that '*they have to be considered as being at risk of experiencing long term , if not permanent harm to their emotional , their educational and their social development if their father is deported*'. It was clear that the children did not live with the appellant and since his release from prison had only spent time with the appellant over the weekend. The judge's approach does not satisfy the demanding test of undue harshness out in **HA (Iraq)** [2022] UKSC 22 and, without more, cannot thereby satisfy the test of very compelling circumstances. The errors by the judge in relation to protection and Article 3, render the errors in relation to the 'unduly harsh' test when contributing to the finding of 'very compelling' circumstances, material because reliance on Article 3 to make good Article 8 is no longer available.

Relief and notice of decision

28. The Judge erred materially for the reasons identified above. Bearing in mind the number of material legal errors identified, as well as the nature and extent of the findings to be made, we set aside the decision and remit the matter to the FtT with no preserved findings (Section 12(2)(a) and (b)(i) of the Tribunals Courts and Enforcement Act 2007 and paragraph 7.2 (b) of the Presidential Practice Statement)

Signed Helen Rimington Date: 30th January 2023

Upper Tribunal Judge Rimington