



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: UI-2022-004127  
RP/50131/2021

**THE IMMIGRATION ACTS**

**Field House  
On 25 August 2023**

**Decision Promulgated  
12<sup>th</sup> September 2023**

**Before**

**UPPER TRIBUNAL JUDGE KOPIECZEK  
DEPUTY UPPER TRIBUNAL JUDGE McCARTHY**

**Between**

**MMSS  
(ANONYMITY ORDER MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr F. Aziz, Counsel instructed by Lei Dat & Baig Solicitors Ltd

For the Respondent: Mr E. Terrel, Senior Home Office Presenting Officer

**Order Regarding Anonymity**

**Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant and any member of his family is granted anonymity because this is a protection appeal.**

**No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant or any member of his family. Failure to comply**

**with this order could amount to a contempt of court.**

### **DECISION AND REASONS**

1. The appellant challenges, with permission granted by Upper Tribunal Judge Blundell, the decision and reasons of First-tier Tribunal Judge Andrew Davies, promulgated on 4 July 2022.

#### Background

2. The appellant was born on 30/09/1984 and is from Somalia.
3. By way of background, we record the key events leading to the appeal.
4. The appellant arrived in the UK on 11 April 1992 with his mother and siblings and was granted indefinite leave because of the risks he would face on return to Somalia.
5. Between 24 May 2004 and 30 December 2010, the appellant was convicted of several minor offences, resulting in fines, disqualification from driving, a community punishment order, a community order and unpaid work requirement, and a conditional discharge.
6. On 13 June 2016, the appellant was convicted of wounding with intent to do grievous bodily harm, for which he was sentenced to a term of six and a half years. On the same date, he was convicted of assaulting a person thereby occasioning them actual bodily harm and for assault by beating, for which he was sentenced to a consecutive term of 12 months imprisonment and a concurrent term of 3 months imprisonment.
7. On 13 December 2021, after considering further representations from the appellant, the respondent decided to deport him, to cease his refugee status, and to refuse his human rights claim. This is the decision that was the subject of the appeal before Judge Davies.

#### Permission to appeal

8. The application for permission to appeal was made on four grounds.
9. Permission to appeal was granted primarily in respect of the first ground of application, that Judge Davies erred in determining that the appellant had not rebutted the presumption under section 72 of the Nationality, Immigration and Asylum Act 2002, that he does not constitute a danger to the community of the United Kingdom.
10. Judge Blundell did not restrict the grounds of application, and we have also considered the following arguments.
  - (a) Ground 2: that Judge Davies' decision that the appellant had not rebutted section 72 was irrational.
  - (b) Ground 3: that Judge Davies applied too high a standard of proof

when considering article 3.

- (c) Ground 4: that Judge Davies applied the wrong legal approach when deciding whether the appellant had very compelling circumstances to remain in the United Kingdom.

### Error of law hearing

11. The hearing took place remotely. We were present in Field House whilst the representatives and the appellant connected remotely using MS Teams. We are satisfied that the parties were able to participate effectively and were able to present their arguments in a similar way as if they had been physically present in Field House.
12. At the end of the hearing, we reserved our decision on whether the grounds had been made out. Having deliberated, we have determined that Judge Davies' decision does not contain legal error for the reasons which follow.

### Ground 1

#### *Submissions*

13. Mr Aziz relied on the ground as settled by Mr Ell of Counsel, who had appeared for the appellant before Judge Davies.
14. As written, the first ground focuses on Judge Davies' reference to setbacks in paragraph 48 and alleges that in so doing he failed to adequately assess the current risks to the community arising from the risk the appellant might commit a similar particularly serious crime. This is because the consideration of setbacks was a different question and one that employs a much lower risk assessment than required.
15. Mr Aziz sought to amplify the ground. He took us to paragraph 28, where Judge Davies found that the letter from a trainee probation officer was unsatisfactory evidence because it left various unanswered questions. He took us to paragraph 34, where Judge Davies recorded that there was no OASys report. Mr Aziz argued that having noted the lack of relevant evidence, the judge should have adjourned to enable relevant evidence to be obtained. Mr Aziz submitted that the appellant could not have foreseen that Judge Davies might reject the evidence from the trainee probation officer or rely on the absence of an OASys report and could not have been expected to anticipate the issue.
16. In responding, Mr Terrel reminded us that the issue about fairness necessitating an adjournment was a new argument and not one that links to the grounds on which permission to appeal was granted. As such, procedurally, we should not allow Mr Aziz to pursue this argument. In any event, Mr Terrel argued that Judge Davies had to decide the appeal on the available evidence. There was no indication that Mr Ell had such a concern, either before Judge Davies or when settling the grounds of

application.

17. In submissions on the substantive points, Mr Terrel said that Judge Davies applied the section 72 test correctly, applying the judgment of the Court of Appeal in EN (Serbia) [2009] EWCA Civ 630, which he set out at paragraph 44 of the decision. Mr Terrel submitted that the arguments relating to paragraph 48 about Judge Davies' reference to setbacks was taken out of context. In paragraph 46, Judge Davies drew on his earlier findings. At paragraphs 47 and 48, he brings into the mix the letters from family and acquaintances, and the appellant's current presentation, which continues at paragraph 49 when Judge Davies considered the matter of rehabilitation. Mr Terrel argued that the structure showed that Judge Davies was engaging with Mr Ell's submissions, as recorded at paragraph 43.
18. Mr Terrel began submissions about paragraph 14 of the grounds of application but stopped when Mr Aziz interjected to say he was not pursuing the argument that there were different tests regarding asylum and humanitarian protection.
19. In response to Mr Terrel's submissions, Mr Aziz added that Judge Davies should have alerted the parties to the fact that he was unhappy with the written evidence so they could have dealt with his concerns.

### *Discussion*

20. We find that Mr Aziz's argument about procedural fairness does not relate to the grounds on which permission to appeal was granted because the grounds focus solely on Judge Davies' analysis. We record that there has been no application by the appellant to expand the grounds on which permission to appeal was granted. This is sufficient reason why we are cautious in considering the new argument.
21. We have examined the argument. We find that Mr Aziz's argument is in fact an allegation that Judge Davies should have given the appellant a further opportunity to secure alternative, and presumably more persuasive evidence.
22. This argument is bound to fail for two key reasons. First, it was for Judge Davies to determine the appeal on the evidence provided. It was not for him, nor the First-tier Tribunal in general, to interfere in how each party decided to prepare its case, or the advice provided to the appellant.
23. We recall that the appellant was legally represented throughout the appeal and that Mr Ell of Counsel appeared for him at the hearing. We note that Mr Ell did not raise any concern about procedural fairness at the hearing or in the grounds of application he settled.
24. Second, there is substantial case law about procedural fairness, none of which was presented by Mr Aziz. We do not propose to explore the case law about procedural fairness as it is enough that we recall as general

principles that fairness means fairness to both sides and that there must be proper consideration of each party's case (see Bano (procedural fairness, withdrawal of representatives) [2019] UKUT 416 (IAC)).

25. In this context, we find that Judge Davies acted fairly in proceeding and there was no reason for him to adjourn.
26. Turning to the substantive points, we accept Mr Terrel's argument that the first ground seeks to take Judge Davies' findings at paragraph 48 out of context. When read as a whole, there is a clear structure to Judge Davies' analysis of the evidence and his findings, which led him to conclude that the appellant failed to discharge the onus on him because the evidence provided was insufficient.

## Ground 2

### *Submissions*

27. Mr Aziz relied on the ground as settled by Mr Ell of Counsel, who had appeared for the appellant before Judge Davies.
28. As written, the second ground argues that the finding in respect of the section 72 presumption was irrational, because Judge Davies failed to explain why the following evidence did not establish that the presumption was rebutted.
  - (a) The pre-sentence report: the appellant's risk of reconviction within a two-year period was low, the risk of serious recidivism was low, the risk of serious harm to the public in general from physical violence although high could be effectively managed.
  - (b) Judge Lamb's sentencing remarks: the appellant had shown encouraging steps to recognise what he had done, the strides he had made in his attitude.
  - (c) The documents about his business, his involvement with community projects.
  - (d) The time that had passed since the index offence without re-offending.
29. Mr Aziz submitted that although there is a high threshold to establish irrationality, this is such a case because Judge Davies did not explain why these four matters did not persuade him that the section 72 presumption was rebutted.
30. Mr Terrel submitted that this ground was not about irrational findings but was a complaint that various factors had not been taken into consideration by Judge Davies. That allegation could not be sustained because at paragraph 16 of the decision, Judge Davies confirmed he had considered all the evidence, both written and oral, and throughout the decision,

answers the issues raised by the appellant. At paragraph 41, Judge Davies records the appellant's involvement in a business. At paragraph 42, Judge Davies begins his analysis by referring to the evidence he recorded.

### *Discussion*

31. Neither the written grounds nor Mr Aziz's submissions allege that Judge Davies failed to take all the available evidence into consideration. As Upper Tribunal Blundell recorded, Judge Davies considered all the evidence mentioned. The argument is limited to whether the finding reach was irrational.
32. We have examined the decision and recognise that Judge Davies gives a detailed examination of each piece of evidence, clearly having regard for what were positive factors and what were negative factors. It is clear from the first sentence of paragraph 42 that he brings that analysis into his assessment of whether the appellant has rebutted the section 72 presumption.
33. After setting out the representatives' submission in the remainder of paragraph 42 through to the end of paragraph 45, Judge Davies gives his reasons for finding the appellant has not rebutted the presumption. In summary, Judge Davies identifies significant weaknesses in the appellant's evidence, which mean the appellant has not rebutted the presumption.
34. We find this to be a rational conclusion that derives from the evidence and demonstrates no irrationality.

### Ground 3

#### *Submissions*

35. Mr Aziz relied on the ground as settled by Mr Ell of Counsel, who had appeared for the appellant before Judge Davies.
36. As written, the third ground alleges that Judge Davies applied too high a standard of proof when considering article 3 of the human rights convention because he expected the appellant to prove a negative. Mr Aziz added to this argument that Judge Davies failed to give appropriate weight to the fact the appellant has lived in the UK since he was 7 years old and that the judge had placed too much weight on the repatriation package without analysing all the evidence.
37. In responding, Mr Terrel reminded us that Judge Davies was applying the leading country guidance case, OA (Somalia) CG [2022] UKUT 00033 (IAC), and as a result he was not simply looking at the repatriation package.

### *Discussion*

38. We are satisfied that Judge Davies examined the appellant's evidence about whether his expulsion from the UK would breach article 3 of the

human rights convention. This is clear from his self-direction in paragraph 52. At paragraph 54, the judge recalled that the appellant left Somalia when he was 7 years old. At paragraph 55, Judge Davies assessed the appellant's evidence about having no relatives or clan members to whom he could turn for support and explained why the appellant's evidence was wanting. At paragraph 56, Judge Davies took account of the appellant's limited ability to speak Somali, and difficulties he may have with finding work and accommodation.

39. At paragraph 53, Judge Davies recorded the submissions for the respondent, and at paragraph 58, those for the appellant. At the end of paragraph 58, the judge records that Mr Ell referenced the country guidance case, OA (Somalia). Thereafter, Judge Davies gave a clear and cogent explanation about why the appellant's expulsion from the UK would not breach article 3.
40. The factor at the heart of the third ground is whether Judge Davies required the appellant to prove a negative. We find that is based on a misreading of paragraph 60 because Judge Davies recalls that the appellant's case is not that he is without any links whatsoever in Somalia but that his ties are limited. This has to be read alongside paragraph 61, where Judge Davies explains why it is reasonable to infer that the appellant would be able to make the necessary contacts with family in Somalia and paragraphs 62 and 63, where Judge Davies applies the country guidance about gaining in-country assistance from a clan.
41. Turning to the issue raised by Mr Aziz regarding the repatriation package, again we find that the arguments misrepresent what Judge Davies found at paragraph 65. Looked at in the round, it is clear that Judge Davies explained how the appellant could be expected to support himself during the initial period after arrival, before securing support from others. His analysis in paragraphs 60 to 86 covers the period immediately upon return, the medium and long term.
42. We find Judge Davies has carefully examined the evidence in light of the country guidance and has made sound findings that the appellant will not face a real risk of inhuman or degrading treatment in Somalia contrary to article 3. There is nothing to support the allegation that he applied too high a standard of proof.

#### Ground 4

##### *Submissions*

43. Mr Aziz relied on the ground as settled by Mr Ell of Counsel, who had appeared for the appellant before Judge Davies.
44. Mr Aziz did not add significantly to the written ground other than to suggest that Judge Davies failed to give appropriate weight to the close relationship between the appellant and his children, and that his expulsion

from the UK would be unduly harsh on them.

45. In responding, Mr Terrel adopted the observations of Upper Tribunal Judge Blundell that this ground is based on a failure to read the decision as a whole. Mr Terrel submitted that the fourth ground is mere disagreement with the findings made by Judge Davies.

### *Discussion*

46. At the heart of this ground is whether Judge Davies had regard to the law relevant to article 8 and the deportation of foreign criminals. We record that at paragraph 13, Judge Davies directed himself to the relevant legal provisions, and he expanded his self-direction at paragraphs 94, 96, 97, 102, 107, 108 and 109. Throughout the rest of paragraphs 93 to 116, Judge Davies applies the legal tests to the evidence. In light of this clarity, we are unable to identify any aspect of the law that Judge Davies failed to apply. Furthermore, the detailed examination undertaken is exemplary in ensuring that all factors were appropriately considered and assessed.
47. We have considered the other points made in the written ground and by Mr Aziz at the hearing. Mr Aziz's submissions that Judge Davies failed to give adequate weight to the impact the appellant's deportation would have on his children is unsustainable given the clear and cogent findings at paragraph 105 that the appellant had failed to establish that his expulsion would be unduly harsh on them.

### Conclusion

48. As none of the appellant's grounds establishes legal error in the decision of First-tier Tribunal Judge Andrew Davies, our decision is as set out below.

### Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

The decision to dismiss the appeal stands.

**Judge John McCarthy**

Deputy Judge of the Upper Tribunal  
Immigration and Asylum Chamber

12/09/2023