IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003570

First-tier Tribunal Nos: PA/52789/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:

11th January 2024

Before

UPPER TRIBUNAL JUDGE GLEESON
DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

FHM
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr Edward Terrell, a Senior Home Office Presenting Officer
For the Respondent: Ms Emma Fitzsimons, Counsel instructed by Wilsons Solicitors

Heard at Field House on 13 November 2023

Order Regarding Anonymity

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

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 her family.

Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. This is an appeal brought by the Secretary of State against a decision of Judge of the First-tier Tribunal Lawrence dated 17 March 2023, dismissing her appeal against the Secretary of State's decision on 20 November 2020 to refuse her international protection or leave to remain on human rights grounds. The claimant is a national of Somalia. The claimant asserted that upon return to Somalia, she would be at risk of serious harm on the basis of being a lone minority clan female, with no family or clan support, and would experience destitution, contrary to Article 3 ECHR.

Background

2. The claimant arrived in the United Kingdom in November 2014 and made a protection claim, which was refused by the Secretary of State on 24 April 2015. She was appeal rights exhausted on that appeal at the end of December 2015.

The 2015 appeal (the *Devaseelan* starting point)

3. The claimant's core account was set out in First-tier Judge White's 2015 decision at [11], and was, in summary, that the claimant was a national of Somalia from Mogadishu, and was of the Reer Hamar sub clan of the minority clan Benadiri. She asserted that her brother had been killed by members of Al-Shabaab, and that she had faced pressure to marry a member of that group. In April 2014 her house was raided by members of Al-Shabaab. She was robbed and beaten and her mother was shot in the leg. Her husband was also beaten up. They returned to the house to get her in August 2014 but she was able to escape by jumping out of the window. She left Somalia on 28 November 2014, flying to the United Kingdom, where she claimed asylum. She feared returning to Somalia because she would be killed by Al-Shabaab for refusing to marry a member of the organisation or to join them.

4. First-tier Judge White accepted that the claimant was a Somali national and a member of the Reer Hamar clan group, but was not satisfied that members of her family had been killed, that she herself had been targeted or threatened by Al-Shabaab, or that she had lost contact with family with whom she had been living before coming to the United Kingdom. In particular, the Judge noted that whereas the claimant claimed to have poor memory, there was no medical evidence before him to suggest significant psychological problems such as might adversely affect her ability to remember events. The appeal was dismissed.

Refusal letter (20 November 2020)

5. On 10 December 2018, the claimant lodged further submissions, and gave updated information on 26 June 2020. On 20 November 2020, the Secretary of State refused to grant international protection or leave to remain on human rights grounds. In addition to her core account recorded in 2015, the Secretary of State noted his own updated CIPU report on Somalia (January 2019), which indicated no significant change in conditions in Mogadishu.

6. More significantly, the claimant's evidence now was that her mother, sister, and her brother's children were living in the Dadaab Refugee Camp in Kenya and that she had nobody left in Somalia to support her on return. The Secretary of State said in his refusal letter that the claimant had produced no objective evidence of her family's presence in Kenya and treated them as still being in Mogadishu, and able to support her on return to Somalia.

7. The Secretary of State accepted that if the claimant were returning to Somalia without family or clan support, or to an internally displaced person (IDP) camp, she would be at risk and entitled to refugee protection. He rejected the claimant's assertion that she would be destitute on return.

8. In the 2018/2020 submissions, the claimant relied on a medico-legal report dated 1 May 2018 from Dr Deepa Shah, who had worked with Freedom From Torture since 2017 and had 11 years' relevant medical experience. He accepted that Dr Shah had the relevant qualifications and experience to write the report. Dr Shah found the claimant to have one lesion which was 'highly consistent' with being hit by the butt of a gun, and another which was 'consistent with injury sustained while fleeing al-Shabaab'. The claimant had a diagnosis of depression and several features of post-traumatic stress disorder, although she did not meet all of the diagnostic criteria. Dr Shah advised the claimant to consider antidepressant medication and therapy, which had been offered through her GP.

9. The report contained a passage entitled 'Psychological factors affecting the disclosure' which concluded that it was plausible that the claimant might have difficulty giving a clear, detailed and consistent account of what had happened to her. The claimant also provided evidence that she had regained contact with her mother, sister and brother's children, who were now in a refugee camp in Kenya. The claimant asserted that upon return to Somalia, she would be at risk of serious harm on the basis of being a lone minority clan female, with no family or clan support, and would experience destitution, contrary to Article 3 ECHR.

10. The Secretary of State rejected the claim on all grounds. The claimant appealed to the First-tier Tribunal.

First-tier Tribunal decision

11. The appeal came before the First-tier Tribunal without a Presenting Officer. A representative for the Secretary of State informed the First-tier Judge that the Presenting Officer allocated the case was unwell. No adjournment was requested and the appeal was heard without the Secretary of State being represented.

12. The Judge heard oral evidence from the claimant, and from another sister of hers who lives in the UK. He also had a witness statement from the claimant's mother, stating that she lived in a refugee camp in Kenya.

13. The First-tier Judge correctly treated the 2015 decision of First-tier Judge White as the *Devaseelan* starting point for his own consideration of the appeal. At [21], the First-tier Judge observed that whereas Dr Shah did not have the claimant's GP records before her when providing her report, the records had been produced for the First-tier Tribunal hearing. The First-tier Judge was satisfied that 'no conflict with Dr Shah's opinion is apparent' from those records.

14. The Judge considered at [23] that there was now sufficient evidence to enable him depart from the findings of fact made by Judge White in 2015. He accepted the appellant's core account as set out at [2] above, including accepting that her only surviving family are presently living as undocumented displaced persons in a refugee camp in Kenya; and that she and her family presently know nobody in Somalia.

15. The First-tier Judge held at [30]:

> "…I am persuaded that the [claimant's] characteristics are such that it is reasonably likely that she would be at risk of sexual and gender-based violence on return to Mogadishu notwithstanding the availability of such assistance, which would necessarily be of a finite nature. To recap, those characteristics are the [claimant's] gender, her relatively young age, her single status and her position as a single parent of two young children, her lack of family or any other established connections in Somalia, her lack of formal education or work experience, the inability of her sister … or her former partner … to provide money to the [claimant], and the mental health problems described by Dr Shah that would worsen significantly if she were to return to Mogadishu and be without social support from neighbours or friends."

The Judge found that the proposed removal of the claimant to Somalia would be in breach of the UK's international obligations under the Refugee Convention and the appeal was allowed. The Secretary of State appealed to the Upper Tribunal.

Permission to appeal

16. The Secretary of State's grounds of appeal asserted that the First-tier Judge erred in law in the following manner (in summary):

(i) in his assessment of Dr Shah's report, on the basis that Dr Shah did not have the claimant's GP records before her, and the Judge failed to adhere to guidance set out in *HA (expert evidence; mental health) Sri Lanka* [2022] UKUT 00111 (IAC) when placing determinative weight upon the opinion of Dr Shah;

(ii) contrary to the First-tier Judge's finding, there were in fact extracts from the claimant's GP records which conflicted with Dr Shah's opinion; namely that the records:

(a) did not refer to any ongoing treatment for mental health problems or a diagnosis of depression or anxiety based disorder; and

(b) contained a letter dated September 2015 from Waltham Forest IAPT Mental Health Services, regarding the Appellant's self-referral to that service in 2015 stating: ' …does not meet the criteria to enter our service and they have referred to the Somali women's Association…';

(iii) at [20], the First-tier Tribunal erroneously reversed the burden of proof in relation to the claimant's ability to demonstrate that her mother was residing in a refugee camp in Kenya, by stating 'The [Secretary of State] has not suggested any form of supportive evidence that it would expect to see';

(iv) the First-tier Judge misapplied the *Devaseelan* principles: the Judge should have had regard to the fact that in 2015, when First-tier Judge White decided the original appeal, the claimant must already have known that her family were in a refugee camp in Kenya and had not produced the evidence then, such that the evidence should now be treated with 'suspicion from the point of view credibility'.

17. Permission to appeal was granted by Upper Tribunal Judge Sheridan in a decision dated 7 October 2023:

> "1. It was arguably inconsistent with *HA (expert evidence; mental health)* Sri Lanka [2022] UKUT 00111 (IAC) to rely, to a significant extent, on expert evidence on an [claimant's] mental health when the report was prepared without the expert having seen the [claimant's] GP records.
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> 2. It is also arguable that the judge, who unlike the expert, had the GP records before him, failed to adequately engage with (and give reasons in respect of) the question of whether the expert report was consistent with the GP records. In this regard, I note the observation in the grounds that the GP records do not refer to any ongoing treatment for mental health problems or include a diagnosis of depression or anxiety based disorder.
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> 3. All grounds can be pursued."

Rule 24 Reply

18. In a reply given under Rule 24, Tribunal Procedure (Upper Tribunal) Rules 2008, the claimant argued, in summary, that the Judge had not erred in law in allowing the claimant's appeal. The claimant referred in some detail to the contents of the GP records, and averred that there was no material distinction to be drawn from the content of those records, and Dr Shah's conclusions.

19. That is the basis on which this appeal came before us.

Upper Tribunal hearing

20. We have heard from Mr Terrell for the Respondent and Ms Fitzsimons for the Appellant, and we are grateful for their assistance in this matter. For his part Mr Terrell relied upon the Secretary of State's grounds of appeal but did not pursue grounds (iii) and (iv) with any vigour.

21. For the appellant, Ms Fitzsimons relied upon her Rule 24 reply and made oral submissions to the effect that there were no material errors of law in the Judge's decision.

Discussion

Grounds (i) and (ii)

22. It is settled law that the weight to be given to an expert report is a matter for the fact-finding judge. We remind ourselves that the Secretary of State did not arrange representation before the First-tier Tribunal, nor did she seek an adjournment of the hearing to do so. In considering the correct approach to the GP records, and to Dr Shah not having seen them, we are guided by the Upper Tribunal's reported decision in *HA(expert evidence, mental health) Sri Lanka*, and in particular by paragraph [5] of the judicial headnote:

> "*(5) Accordingly, as a general matter, GP records are likely to be regarded by the Tribunal as directly relevant to the assessment of the individual's mental health and should be engaged with by the expert in their report. Where the expert's opinion differs from (or might appear, to a layperson, to differ from) the GP records, the expert will be expected to say so in the report, as part of their obligations as an expert witness. The Tribunal is unlikely to be satisfied by a report which merely attempts to brush aside the GP records*."

23. The relevant issue is whether the Judge's observation that was no conflict between the GP records and Dr Shah's opinion was open to him. The Secretary of State identified in his grounds of appeal a number of places in which the GP records are said to conflict with Dr Shah's report.

24. It is to be recalled that Judge White heard the claimant's first appeal in December 2015. The GP records demonstrate that from June 2015 to December 2015 the claimant was consulting her GP regarding her mental health. Ms Fitzsimons focused on the June 2015 to December 2015 records, because that represented the period leading up to the time when the claimant gave evidence in the 2015 appeal.

25. In 2015, there were records of reduced eye contact and rapport; heart palpitations secondary to anxiety; feeling faint with palpitations; having difficulty sleeping and not staying asleep; her mood was occasionally low; and she was referred to counselling. There are further references to low mood and stress. The claimant adopted certain coping strategies of her own, finding prayer helpful, and there was a reference to IAPT (Improving Access to Psychological Therapies) and two references on 28 August 2015 and 3 September 2015 where she had attended for counselling.

26. We additionally note that the GP records make further reference to stress on 16 June 2017; being very anxious on 8 June 2017; feeling very dizzy on 15 July 2016; and experiencing stress and palpitations on 17 March 2016. Dr Shah herself conducted a physical examination of the claimant in or around April 2018 shortly prior to the making of her report in which the claimant experienced stress during the re-telling of her personal circumstances, and told Dr Shah that she was experiencing palpitations. Dr Shah measured the claimant's pulse which was running at 130 beats per minute whilst seated.

27. Dr Shah did not make any diagnosis or conclusion in her report which differed materially from the contents of the GP records, and the First-tier Judge was entitled to form the view that there was no real difference between Dr Shah's conclusions and the contents of the GP records. . As per paragraph 2(iv) of the Court of Appeal's judgement in Volpi & Anor v Volpi [2022] EWCA Civ 464, the weight which the trial judge gives to evidence is pre-eminently a matter for him, and further, as per paragraph 2(v) of that judgment, an appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable. We do not find that test to be met. The Secretary of State's first and second grounds of appeal cannot succeed.

Ground (iii)

28. The claimant's case was that her mother and the rest of her remaining family were living in the Dadaab refugee camp in Kenya and that she now had no family members in Somalia who might be available to provide her with support on return to that country. The Secretary of State, both in his refusal letter and in his review in these proceedings sought 'cogent evidence …that the family live in the refugee camp in Kenya' and analysed her case on the basis that they were still in Mogadishu.

29. In the claimant's reply to the Secretary of State's review, it was explained that no formal documentation could be provided by the claimant's mother to support her being a resident in that refugee camp, as she was not formally registered as

a refugee in Dadaab. The Secretary of State was not represented at the First-tier Tribunal and so did not cross-examine the claimant or challenge the mother's witness statement.

30. At [20] the First-tier Tribunal observed that: 'The [Secretary of State] has not suggested any form of supportive evidence that [he] would expect to see...". That is not a reversal of the burden of proof: the Secretary of State was impermissibly requiring corroboration which the claimant had explained her inability to provide. In the absence of any contrary evidence or submission by the respondent, it was open to the First-tier Judge to accept the evidence of the claimant, her UK sister and her mother that the rest of the family are now in Kenya, undocumented in the Dadaab refugee camp.

31. Ground (iii) is no more than a disagreement with a finding of fact which was open to the First-tier Tribunal on the evidence before it and on the Secretary of State's own case, likely to be determinative of her appeal.

Ground (iv)

32. The claimant's evidence, which the First-tier Tribunal accepted, was that she only found out sometime in 2016 where her mother was. There is no *Devaseelan* error here.

33. For all the reasons set out above, we uphold the First-tier Tribunal decision and dismiss the Secretary of State's appeal.

Notice of decision

34. For the foregoing reasons, our decision is as follows:

The decision of the FTT did not involve the making of an error on a point of law.

We do not set aside the decision but order that it shall stand.

Rory O'Ryan

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

Date: 3 January 2024