Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: AA/11993/2015**

THE IMMIGRATION ACTS

Heard at: Manchester	**Decision & Reasons Promulgated**
On: 11 October 2017	**On: 12 October 2017**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

NO
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the appellant: Ms Brenang, Counsel
For the respondent: Mr McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the Appellant.

1. I have made an anonymity order because this decision refers to the circumstances of the appellant's minor children.

Background

2. The appellant is a citizen of Somalia. He fled Somalia in 2003/4 and lived in Ethiopia until he left in February 2015 to live with his British citizen wife in the UK. They have cohabitated with since his arrival in the UK. Their three children are British citizens and were born in the UK in 2012, 2015 and 2017 respectively.

3. In a decision dated 26 June 2017, the First-tier Tribunal dismissed the appellant's appeal on asylum and human rights grounds. The First-tier Tribunal:

    (i) did not accept the appellant's account of being involved in a long-standing clan / family dispute and rejected his claim to be at risk of persecution in Somalia;
    (ii) accepted that the appellant and his wife cohabitated in the UK since 2015 and were in a genuine and subsisting relationship;
    (iii) accepted that the appellant's wife cares for her sick mother in the UK;
    (iv) accepted that the three children have a close loving relationship with both parents and the appellant undertakes significant day to day care duties;
    (v) found that the appellant's wife and children cannot return with him to Somalia but that he should do so in order to apply for entry clearance, given his immigration history. This involved him avoiding immigration control by entering the UK illegally in 2015 after two failed entry clearance applications;
    (vi) concluded at [58] that the appellant's "*sad position is far from exceptional, and is wholly of his own construction in his decision to enter illegally*" such that there are very strong public policy arguments outweighing the impact of any temporary separation between the appellant and his family members.

4. In a decision dated 27 July 2017 Designated First-tier Tribunal Judge Shaerf granted permission to appeal, having identified arguable legal errors in the approach to Article 8 only. The respondent submitted a rule 24 notice in which it is asserted that the First-tier Tribunal's findings were open to it.

Hearing

5. At the beginning of the hearing Mr McVeety fairly conceded that the First-tier Tribunal committed a material error of law in failing to address section 117B of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act'), in particular the reasonableness of expecting the British citizen children to reside in Somalia – see section 117B(6) of the 2002 Act. Mr McVeety was clearly correct to make this concession. The First-tier Tribunal completely failed to direct itself to or apply section 117B(6). Mr McVeety also acknowledged that the First-tier Tribunal committed other material errors: (i) the finding that the appellant could apply for entry clearance in Somalia omitted to take into account the absence of any such facilities in Somalia and the appellant's illegal status in Ethiopia; (ii) the First-tier Tribunal failed to take into account the difficult humanitarian circumstances in Somalia.

6. Both representatives agreed that I could and should remake the Article 8 decision, but the First-tier Tribunal's factual findings regarding the genuineness of the relationships ought to be preserved.

7. Mr McVeety acknowledged that he was in a very difficult position and did not make any submissions in defence of the respondent's decision. He indicated that he was unable to concede the substantive appeal without obtaining the approval of a senior caseworker. I did not need to hear from Ms Brenang and indicated that I would be allowing the appeal, for reasons contained in this decision.

Re-making the decision under Article 8

8. The only issue in dispute before me relates to Article 8 and I turn my immediate attention to this.

Best interests

9. I begin the Article 8 assessment by evaluating the primary consideration of the interests of the appellant's three British citizen children. I accept that citizenship is a weighty factor. The eldest child, R, has begun school. As the First-tier Tribunal accepted at [43], R is settled in school and there will be a disruption to his education and friendships if he moves to Somalia with his parents. They have a grandmother in the UK, who the family is particularly close to. Their circumstances in Somalia are likely to be very difficult indeed in light of the prevailing political, economic and social circumstances. The country background evidence was summarised in an appendix to the skeleton argument before the First-tier Tribunal. On 26 May 2017 the UN independent expert on the situation of human rights in Somalia reported that: "*Somalia is experiencing one of its worst humanitarian crisis following three years of drought, which has affected more than half the population, creating an acute food and water shortage, child malnutrition and mortality, and loss of livestock*."

10. I conclude, by a significant margin, that the best interests of the children would be best served by remaining in the UK. Whilst the children are sufficiently young to be able to adapt to life in Somalia with the support of their parents (both of whom were born in Somalia) in principle, they are likely to find this very difficult given the prevailing circumstances in Somalia and their particular vulnerability in dealing with the humanitarian crisis given their young ages. Mr McVeety did not dispute this.

Section 117B(6)

11. Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 states as follows:

> "In the case of a person who is not liable to deportation, the public

interest does not require the person's removal where -

> (a) the person has a genuine and subsisting parental relationship with a qualifying child; and
> (b) it would not be reasonable to expect the child to leave the United Kingdom."

12. It is not disputed that the appellant has a genuine and subsisting close relationship with his British citizen children, and therefore meets the requirements of (a). It is agreed that the real question for me is the reasonableness of expecting the children to leave the UK in accordance with (b). I must take all the relevant factors into account when assessing reasonableness and not just the impact upon the children – see MA Pakistan v SSHD [2016] EWCA Civ 705. Relevant countervailing factors include the appellant's immigration history.

13. When considering reasonableness, it is also relevant to take into account the SSHD's policy and its relevance to the reasonableness test. This has been addressed in MA (Pakistan) (supra) and SF and others (Guidance, post-2014 Act) Albania [2017] UKUT 120 (IAC). In the latter case at [10] it was held that the Tribunal ought to take the respondent's policy into account if it pointed clearly to a particular outcome.

14. Paragraph 11.2.3. of the IDI on Family Migration provides the respondent's decision-makers with guidance on cases involving British children. The August 2015 version states that, save in cases involving criminality, the decision maker must not take a decision in relation to the parent or primary carer of a British Citizen child where the effect of that decision would be to force that British child to leave the EU, regardless of the age of that child. The decision would not force these children to leave the EU because they can remain in the UK with their British citizen mother, for the reasons set out in detail in VM Jamaica v SSHD [2017] EWCA Civ 255.

15. However, the policy also states that:

> "where a decision to refuse the application would require a parent or primary carer to return to a country outside the EU, the case must always be assessed on the basis that it would be unreasonable to expect a British Citizen child to leave the EU with that parent or primary carer".

16. The respondent's decision to refuse the application would require the appellant ('a parent') to return to a country outside of the EU, Somalia. In such circumstances, the policy states that the case must be assessed on the basis that it would be unreasonable to expect the British citizen children to leave the EU with that parent. In such cases, the policy states it will usually be appropriate to grant leave, provided that there is evidence of a genuine and subsisting parental relationship. The policy then states:

> ”It may be appropriate to refuse to grant leave where the conduct of the parent or primary carer gives rise to considerations of such weight as to justify separation, if the child could otherwise stay with another parent or alternative carer in the UK or in the EU. The circumstances envisaged could cover amongst others:
> Criminality…
> A very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules”

17. The policy clearly envisages that countervailing circumstances may mean that it is appropriate to refuse leave. I acknowledge that the appellant has a poor immigration history. However, this needs to be viewed in context. The appellant applied to join his sister in the UK in 2004. This was refused and the appellant respected this decision. After getting married in 2010 to a British citizen, the appellant applied to enter the UK as a spouse. This was refused on the basis that there was no evidence to confirm that they were married or in a subsisting relationship. An appeal against this decision was dismissed in 2011. It has now been accepted that the relationship is genuine. I accept the difficulties outlined by the appellant in his witness statement. His wife visited him in Ethiopia between 2010 and 2012, and their first child was born in 2012. He did not have legal status in Ethiopia, in common with many other Somalians living there, and lived a very difficult and uncertain existence over the course of many years. He entered the UK illegally in 2015 because he was desperate to be with his wife and child. I acknowledge that such an approach is to be deprecated and is in breach of the immigration laws. I also acknowledge that the appellant made an asylum claim, found to be incredible. However, as outlined above, there are mitigating factors for the appellant’s behavior. When the appellant arrived in the UK on 23 February 2015 he sought to bring himself immediately to the attention of the authorities by claiming asylum the next day.

18. Having considered all the relevant circumstances, the Appellant has a poor immigration history and this is a relevant factor to be taken into account when assessing reasonableness. I have already concluded that the humanitarian circumstances in Somalia are such that the children’s most basic entitlement to food, water and shelter are likely to be adversely impacted. Whilst their mother was born in Somalia, she has not been there for a lengthy period and cares for her own mother in the UK.

19. In all the circumstances, even when the appellant’s immigration history is factored in, it would not be reasonable to expect the children to leave the UK and section 117B(6)(b) is not met.

Balancing exercise

20. Proportionality is the “public interest question” within the meaning of Part 5A of the 2002 Act. By section 117A(2) thereof I am obliged to have regard to the considerations listed in section 117B. I

consider that section 117B applies to this appeal in the following way:

(a) The public interest in the maintenance of effective immigration controls is clearly engaged. The appellant has been unable to meet the requirements of the Immigration Rules, in order to remain as a spouse.

(b) The appellant has used an interpreter and there is an infringement of the "English speaking" public interest.

(c) The economic interest is engaged. The appellant and his wife are not employed and the children benefit from education at public expense.

(d) The private life established by the appellant during the entirety of his time in the UK qualifies for the attribution of little weight only.

21. In my judgment, when all of the above matters are considered in the round, together with the children's best interests, the appellant's removal constitutes a disproportionate breach of Article 8. It will be practically impossible for the appellant to obtain entry clearance in Somalia. Obtaining entry clearance is likely to involve serious delay. This is likely to impact upon the children negatively given the appellant's day to day care for them and his wife's responsibilities for the care of her mother.

22. Having applied the facts to section 117B of the 2002 Act and considered the general principles applicable in a case raising family and private life under Article 8 of the ECHR, I find that the appellant's removal from the UK would constitute a disproportionate breach of Article 8.

Decision

23. The decision of the First-tier Tribunal contains an error of law and is set aside.

24. I remake the decision by allowing the appellant's appeal pursuant to Article 8 of the ECHR.

Signed: Ms Melanie Plimmer Dated: 11 October 2017
Judge of the Upper Tribunal