Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers:
UI-2021-001143; HU/06735/2017
UI-2021-001144; PA/00520/2021

THE IMMIGRATION ACTS

Heard at Field House
On the 7 October 2022

Decision & Reasons Promulgated
On the 09 November 2022

Before

UPPER TRIBUNAL JUDGE KEBEDE
DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MOHAMED HASSAN ISSE
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr S Kotas, Senior Home Office Presenting Officer
For the Respondent: Ms H Masood, instructed by OTS Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Mr Isse's appeal against the respondent's decision to refuse his protection and human rights claims

further to a decision to deport him under section 32(5) of the UK Borders Act 2007.

2. For the purposes of this decision, we shall hereinafter refer to the Secretary of State as the respondent and Mr Isse as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant is a citizen of Somalia, born on 1 July 1992. He entered the UK in 1993, at the age of six months, with his mother and five siblings and was granted leave to enter as a visitor for six months. Further periods of leave were granted until 25 November 2000 and on 22 November 2002 the appellant was granted indefinite leave to remain in line with his mother and siblings, as his mother's dependant. The appellant's mother and siblings were subsequently naturalised as British citizens, but the appellant was refused naturalisation as a result of his criminal convictions.

4. On 2 April 2009, the appellant was convicted on two counts of supplying a controlled drug and two counts of supplying a controlled drug with intent to supply, for which he was sentenced to an 18-month detention and training order. Deportation action was not pursued by the respondent at that point because he was a minor, but he was sent a warning letter. On 1 May 2012 the appellant was convicted of conspire/possessing a controlled drug, class A heroin and cocaine, with intent to supply, for which he was sentenced to three years' imprisonment. He was detained under immigration service detention following the completion of his custodial sentence on 22 June 2013 and absconded after being granted bail in July 2013. On 23 May 2014 he was convicted of one count of conspiring to supply a controlled drug, class A heroin and one count of conspiring to supply a controlled drug, class A crack cocaine, for which he was sentenced to six years' imprisonment.

5. The appellant was then notified, on 4 August 2015, that the respondent intended to make a deportation order against him in accordance with section 32(5) of the 2007 Act. Representations were made, initially in person and then on his behalf by his solicitors, on 21 February 2017, which included letters from the Offender Management Unit confirming that he did not require a full OASys assessment due to the nature of his offending and that he had been assessed as posing a low risk of harm to the community. The appellant was detained under immigration service detention on 28 February 2017 when his custodial sentence came to an end. On 6 March 2017 a signed deportation order was obtained and on 7 March 2017 he was served with a decision refusing his human rights claim, which was certified under section 94B of the Nationality, Immigration and Asylum Act 2002. In response to a pre-action protocol letter the decision was reconsidered and on 25 May 2017 a new decision was made refusing his human rights claim, but with a right of appeal, which he exercised. On 2 June 2017 he was released on bail and on 11 February 2019 an OASys assessment was completed, maintaining the previous assessment of him posing a low risk of re-offending.

6. Prior to the appellant's appeal being heard he made an asylum claim, on 15 July 2019, on the basis of being a member of a minority clan and at risk on

return to Somalia. He was interviewed about his claim. In January 2020 the appellant married Sawreen Ahmed, a British citizen, in an Islamic ceremony, after meeting her in 2018. They had a son born on 4 March 2020. Further representations were made to the respondent on 22 December 2020 informing her of these developments and making representations on Article 8 grounds. In the meantime, on 3 November 2020, the appellant was invited to seek to rebut the presumption under section 72 of the Nationality, Immigration Act 2002 that he had been convicted of a particularly serious crime and constituted a danger to the community. The appellant responded to that letter.

7. On 4 January 2021 the appellant was served with a decision refusing his protection and human rights claim. The decision did not address the appellant's representations of 22 December 2020. The respondent considered that the appellant had failed to rebut the presumption in section 72(2) of the NIAA 2002 and certified that the presumption applied to him. The respondent concluded accordingly that the Refugee Convention did not prevent his removal from the UK. The respondent noted the appellant's claim, that he had been pressurised out of fear to sell drugs in the UK and that he could not return to Somalia due to his length of residence in the UK, that he lacked links and connections to Somalia, that there were problems with Al Shabaab in Somalia and that members of his tribe, the Maratan, were persecuted and further that he would be persecuted because of being westernised. However, the respondent considered that the appellant had failed to demonstrate that he was a member of a minority clan and that he had failed to provide any information as to who was persecuting his tribe in any event. The respondent considered that the appellant did not fall into any of the categories of people who were likely to be targeted by Al Shabaab and did not accept that he would be persecuted by Al Shabaab or by any other party on return to Somalia. Applying the most current country guidance in MOJ & Ors (Return to Mogadishu) Somalia CG [2014] UKUT 00442, the respondent did not accept that the appellant would be persecuted on the basis of being westernised or that there was any other reason for him to be at risk of persecution and concluded that he would not be at risk on the basis of the general living conditions in Mogadishu. The respondent considered that the appellant would not face an Article 3 or Article 15(a) and (b) risk of harm on return to Somalia, that he did not qualify for humanitarian protection and that he was in any event excluded from a grant of humanitarian protection under paragraph 339D of the immigration rules as a result of his conviction and sentence.

8. The respondent considered that Article 8 was not engaged on family life grounds since he was an adult and had not demonstrated any level of dependency upon his mother or siblings, or vice versa, and noted that he had adduced no evidence of the relationship to his girlfriend. Although he had been lawfully resident in the UK for most of his life, it was not accepted that he was socially and culturally integrated here because of his serious convictions, namely 6 convictions for 11 offences between 30 April 2009 and 23 May 2014. The respondent considered that there were no very significant obstacles to the appellant's integration in Somalia and considered that he could not meet the requirements of paragraph 399A of the immigration rules on the basis of his private life. The respondent considered that there was no evidence to support

the appellant's claim to suffer from asthma and no evidence to show that he would be exposed to treatment contrary to Article 3 in that respect. The respondent concluded that there were no very compelling circumstances outweighing the public interest in the appellant's deportation and considered that there were no reasons to revoke the deportation order previously made against him.

9. The appellant's appeal against that decision, and the previous decision of 25 May 2017, was initially listed on 8 July 2021. The hearing was adjourned to enable the respondent to issue a supplemental refusal letter addressing the birth of the appellant's child, but in the event no further decision was made. The appeal was then heard on 23 August 2021 in the First-tier Tribunal by Judge Paul.

10. The judge, in his decision, considered the appellant's case, that he fled Somalia with his family during the civil war when their house was bombed and had not returned since, that he had been absent from Somalia for his entire life, that he had no nuclear family or contacts in Somalia, that he had had no contact with his father and that his mother and siblings and extended family members were all in the UK, that he was from the Midgan (not the Maratan) minority clan and was unlikely to be able to access assistance from clan members, that he would not be in receipt of financial remittances from abroad and would not have the benefit of any grant under the Facilitated Returns Scheme, that it would be up to him to bring in his own income but had no work experience and had limited education and skills, that he spoke only broken Somali and no Arabic, that he would be disadvantaged as member of a minority clan and would have no real prospect of securing employment or a livelihood on return, or establishing a home and that he would therefore fall into poverty on return and would be an IDP and/or fall into destitution and would be forced to live in conditions resulting in intense suffering. The judge noted further that the appellant was claiming not to have committed a serious crime justifying exclusion from humanitarian protection as his conviction was not for a violent offence and that, in any event, his removal to Mogadishu would be contrary to Article 3 and would be disproportionate under Article 8.

11. The judge found that the appellant had been lawfully resident in the UK for virtually all his life. He found that the appellant had not demonstrated that he was at risk of persecution for the reasons given in the refusal letter. He considered that, for the reasons advanced on his behalf, the appellant should not be excluded from the right to humanitarian protection, that he had "crossed the threshold of s.72" and that the grounds for humanitarian protection had been established. The judge found further that the appellant was culturally and socially integrated in the UK, that he had no meaningful ties to Somalia and that his entire social and family network was in the UK and concluded that there would be very significant obstacles to his integration in Somalia. The judge found further that the effect of the appellant's deportation on his partner and child would be unduly harsh and concluded that there were very compelling circumstances making his deportation disproportionate. He accordingly allowed the appeal on human rights and humanitarian protection grounds.

12. Permission to appeal against that decision was sought by the respondent on the grounds that the judge had failed to provide adequate reasoning in relation to the s.72 certification; that the judge had failed to take into account relevant matters when finding there to be very significant obstacles to integration in Mogadishu; that the judge had made his findings without considering the appellant's credibility; that the judge had failed to have regard to established caselaw in respect to Article 3; that the judge had failed to give adequate reasons for finding that the appellant's deportation would result in unduly harsh circumstances for his wife and child; that the judge's erroneous findings on these matters infected his conclusion in regard to very compelling circumstances; and that the judge's decision contained no consideration of the serious nature of the appellant's offending.

13. Permission was initially refused in the First-tier Tribunal but was granted in the Upper Tribunal on a renewed application on the same grounds, with particular reference to the judge's findings on Article 3.

14. The matter then came before us, and we heard submissions from both parties.

Hearing and Submissions

15. Mr Kotas submitted, with regard to the judge's decision on s.72, that no reasons had been given for the conclusion reached and the respondent was unable to understand why she had lost. In addition, the judge appeared, by his wholesale acceptance of the appellant's evidence, to have thereby accepted that the appellant's crime was not serious, and to have considered that in his conclusion on the s.72 certificate, which he submitted was a further error. Mr Kotas submitted that there was no reasoning by the judge as to why the appellant qualified for humanitarian protection or under Article 3. As for the conclusion on 'very significant obstacles', there were no reasons given by the judge other than those related to social and integration in the UK and there was no forward thinking. The judge had said nothing about the 'stay' scenario in relation to 'unduly harsh' and had given no reason why the appellant's deportation was unduly harsh on his son. The reasons given by the judge for there being 'very compelling circumstances' was just a composite of exceptions 1 and 2 and he had not said why the appellant's circumstances went beyond the bare 'very significant obstacles' case. On the other side of the scales, the judge had given no consideration to the public interest and had not undertaken a proper balance sheet approach.

16. Ms Masood submitted that the judge had found that the s.72 presumption had been rebutted and the reasons for that, as stated at [68], were "the reasons advanced on behalf of the appellant", which clearly related back to [32] and [46]. Ms Masood relied on HA (Iraq) v Secretary of State for the Home Department [2022] UKSC 22 in that respect, where the Supreme Court considered how the seriousness of an offence was assessed. She submitted that there had been adequate reasoning for the decision on the s.72 certificate. When concluding that the appellant was entitled to humanitarian protection, the judge had properly directed himself by reference to Ainte (material

deprivation, Art 3, AM) (Zimbabwe) [2021] UKUT 203 and his conclusion had to be read in the light of his acceptance of the appellant's submissions at [40]. Ms Masood submitted that the judge had directed himself impeccably in relation to the 'unduly harsh' issue and consistently with the Supreme Court's decision in HA (Iraq). He had considered the 'stay' scenario at [78] of his decision. The respondent's objections were no more than a disagreement with the judge's findings. As for the findings on 'very significant obstacles' the judge had considered the appellant's integration in Somalia in terms of a 'broad evaluative judgement' consistent with the decision in Secretary of State for the Home Department v Kamara [2016] EWCA Civ 813. As for his decision on 'very compelling circumstances', the judge had directed himself impeccably and had clearly taken account of the nature and seriousness of the appellant's offending, as consistent with HA (Iraq).

Discussion

17. As a starting point we have to say that the judge's decision is difficult to follow, and it is not clear where he is making findings and where he is simply summarising the evidence and submissions. Although under the heading of relevant caselaw, the judge appears to commence his consideration of the private life exception to deportation at [60], but then subsequently commences his findings at [66] under his conclusions and reasons. That is aside from the errors identified in the grounds which we now consider.

18. The first ground challenges the judge's decision on the section 72 certification, asserting that it was not clear what his decision was at [68] and that no reasons had been given for that decision. Ms Masood relied upon the judge's words "for the reasons advanced by the appellant" in submitting that [68] did not stand alone and that it should be read together with [30] to [32] and [43] to [46] where the judge considered the appellant's evidence. However, we are not persuaded by that argument, and we agree with Mr Kotas that there was a lack of any proper assessment or reasoning by the judge. There were factors which the respondent had raised against the appellant but none of those were considered by the judge who simply adopted the appellant's arguments without any analysis of the various competing factors.

19. The same can be said of the judge's findings on humanitarian protection and Article 3 where again, the judge simply adopted the appellant's submissions but gave no reasons for concluding, at [68], that the grounds for humanitarian protection were met. The fact that he set out the relevant caselaw including MOJ & Ors (Return to Mogadishu) Somalia CG [2014] UKUT 00442 and Ainte (material deprivation - Art 3 - AM (Zimbabwe)) [2021] UKUT 203 and the appellant's submissions on the country guidance cannot possibly be a substitute for undertaking his own assessment of the case, analysing the case put by both parties and making properly reasoned findings.

20. As for the judge's decision on Article 8, Mr Kotas accepted that there were findings made by the judge in regard to the appellant's social and cultural integration in the UK, but he submitted that there was no forward-looking consideration into the appellant's ability to integrate in Somalia. Indeed, the

only part of the judge's decision addressing the question of very significant obstacles to integration into Somalia appears at [73] and [74] which consists simply of extracts from two authorities and a conclusion that there were very significant obstacles. Again, the judge did not undertake any analysis of the evidence or of the case put by the respondent. Although there was some form of assessment of the 'unduly harsh' question at [77] and [78] we find that the judge's assessment involves a similar lack of proper analysis and reasoning as to why the effect on the appellant's son would be unduly harsh and fails to include any detailed consideration of the impact of deportation on his wife. We agree with Mr Kotas that such failings infect the judge's findings on 'very compelling circumstances' and that his conclusions in any event include scant regard to or consideration of the public interest and fail to follow a full and proper 'balance sheet' approach.

21. For all these reasons we find the Secretary of State's grounds to be made out and conclude that the judge's decision cannot stand and must be set aside.

22. Mr Kotas submitted that he would not resist the judge's findings at [69] to [72] in regard to social and cultural integration in the UK being preserved and on that basis the matter could be retained in the Upper Tribunal. Ms Masood did not object to that in the event that we found in favour of the respondent in this appeal. However, it seems to us that this is a case where it would be appropriate for the matter to be remitted to the First-tier Tribunal to be heard afresh, given the paucity of the judge's analysis, findings and reasoning on the evidence as a whole.

23. We therefore remit the matter to the First-tier Tribunal to be heard *de novo* by a different judge.

DECISION

24. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside. The appeal is remitted to the First-tier Tribunal to be dealt with afresh, pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(a), before any judge aside from Judge Paul.

Signed: S Kebede
Upper Tribunal Judge Kebede

Dated: 12 October 2022