IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00007/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 December 2015	**On 15 January 2016**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ADNAN SHARIF MOHAMUD

Respondent

Representation:
For the Appellant: Mr S Whitwell, Home Office Presenting Officer
For the Respondent: Mr J Howard, Fountain Solicitors

DECISION AND REASONS

Background

1. For the sake of continuity I will refer to the parties as they were before the First-tier Tribunal although technically this is an appeal to the Upper Tribunal made by the Secretary of State.

2. The appellant appealed against the respondent's decision dated 24 February 2015 to make a deportation order under section 32 of the UK Borders Act 2007. On 28 July 2008 the appellant was convicted of rape

and conspiracy to commit rape and was sentenced to a period of nine years in prison. On 20 May 2013 the respondent wrote to the appellant to say that his liability to deportation had been considered, but in the circumstances, the Secretary of State had decided not to take deportation action against him.

3. The last paragraph of the letter stated as follows:

> "I should warn you therefore that if you should come to the adverse notice in the future, the Secretary of State will be obliged to give further consideration to the question of whether you should be deported. If you commit a further offence, and are over 18 years of age, the Secretary of State would also need to consider the automatic deportation provisions of the UK Borders Act 2007. You should be aware that under such circumstances, the Secretary of State may be legally obliged to make a deportation order against you."

4. On 6 January 2014 the respondent notified the appellant of her intention to cease his existing refugee status. The appellant was granted leave in line with a cousin in 2002. The respondent informed the UNHCR of her intention to cease the appellant's refugee status, and in the decision that accompanied the deportation order dated 24 February 2015, the respondent gave reasons for certifying the Refugee Convention claim under section 72 of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002"). The letter also gave reasons why the respondent ceased the appellant's refugee status under Article 1C of the 1951 Refugee Convention. The primary reason for ceasing his refugee status was said to be a durable change in circumstances in Somalia with reference to the relevant country guidance.

5. The appellant appealed the decision to the First-tier Tribunal. The appeal was heard by Designated Judge of the First-tier Tribunal Shaerf ("the judge") on 16 July 2015.

Procedural issue

6. A procedural issue has arisen that requires me to set out the further chronology of events. On 23 July 2015 the judge promulgated a decision allowing the appeal on "immigration" and human rights grounds ("the first decision"). Shortly after, in a decision notified on 28 July 2015, the judge issued a notice setting aside the first decision pursuant to rule 31 of The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. The first decision was promulgated as a result of a clerical error. Another decision was promulgated on the same day ("the second decision").

8. On the same day, 28 July 2015, the Secretary of State lodged an application for permission to appeal to the First-tier Tribunal against the first decision. Given the timing of the second decision, and the application for permission, it is understandable that, at that stage, the Secretary of State had no knowledge of the second decision.

9. The First-tier Tribunal refused permission to appeal on 7 August 2015. A renewed application for permission to appeal was lodged with the Upper Tribunal on 19 August 2015. It is clear from the grounds of appeal that were lodged with the renewed application that, by that stage, the Secretary of State had received the second decision. The grounds expressly applied to appeal against the decision sent on 28 July 2015.

10. Upper Tribunal Judge Coker granted permission to appeal on 21 September 2015. It seems clear from the terms of her order that she may not have appreciated the fact that two decisions were promulgated one after another. She found that it was at least arguable that the First-tier Tribunal may have made an error of law because the failed to make any findings regarding risk on return or in relation to whether the appellant met the requirements of Part 13 of the immigration rules. A panel of the Upper Tribunal noted the confusion on 10 November 2015 but due to time constraints on that day the matter was adjourned for the Secretary of State to consider the position.

11. The matter came before me today to decide whether the Tribunal has jurisdiction to hear the appeal. After discussion with both legal representatives, who did not object to this course of action, I decided that the pragmatic way forward would be for me to make a decision within my role as a Judge of the First-tier Tribunal[1]. The renewed application included an application to appeal the second decision dated 28 July 2015. I can consider that application as a Judge of the First-tier Tribunal. Given the crossover between the initial application for permission to appeal and the setting aside of the first decision I consider that there are grounds to justify extending time in relation to the application to appeal the second decision. For the same reasons given by Upper Tribunal Judge Coker I agree that permission to appeal should be granted.

Decision and reasons

12. The appeal relates to the second decision that was promulgated on 28 July 2015. Both parties made submissions in regard to whether the decision involved the making of an error of law.

13. The judge set out the procedural background to the case in some detail in paragraphs 1-12 of the decision. At paragraphs 14-19 he recorded the submissions made by both parties at the hearing. His findings are found from paragraph 20 onwards in the decision. The judge correctly referred to the deportation decision being made under section 32 of the UK Borders Act 2007. At paragraph 22 he noted the contents of the respondent's letter dated 20 May 2013, in particular, the paragraph that I quoted above, which suggested that no deportation action would be taken against the appellant unless or until he committed a further offence.

14. The judge went on to consider the public interest considerations set out in sections 117A–D of the NIAA 2002. He took into account the serious nature

[1] Section 4(1)(c) Tribunals, Courts and Enforcement Act 2007

of the offence and the progress that the appellant had made in terms of rehabilitation. However, at paragraph 25 of the decision he returned to the letter dated 20 May 2013. He found that it created a legitimate expectation that the appellant would not be deported unless he came to the adverse attention of the authorities at a later date. He concluded that that legitimate expectation went to the core of the appellant's private life and was sufficient to amount to a breach of his rights under Article 8 of the European Convention.

15. In paragraph 31 he concluded the decision with the following statement:

> "This decision does not mean that the respondent is prevented from reconsidering the appellant's refugee status in the context of Article 1C(v) of the Refugee Convention if there has been a change of circumstances in his country of nationality such that the circumstances in connection with which he had been recognised as a refugee have ceased to exist and he can no longer properly continue to avail himself of the protection of the country of his nationality."

16. There is no question that the respondent had the power to make a deportation decision under section 32 of the UK Borders Act 2007. As such, it was incumbent upon the judge to conduct a full assessment of all the circumstances of the case, which should have included an assessment of whether the reasons for ceasing the appellant's refugee status contained in the reasons for deportation letter were sustainable.

17. In conducting a full Article 8 assessment it was also necessary for the judge to do so through the lens of the immigration rules: *SSHD v AJ (Angola)* [2014] EWCA Civ 1636 & *SSHD v AQ (Nigeria)* [2015] EWCA Civ 250. While the judge correctly referred to public interest considerations set out in sections 117A-D, at no point did he consider whether the appellant could show "very compelling circumstances" under paragraph 398 of the immigration rules, which was the relevant test for the purpose of this particular appeal. The undoubted weight that would need to be placed on the public interest in deportation needed to be balanced against the appellant's personal circumstances, which could of course include consideration of the letter dated 20 May 2013 in light of the relevant case law: see *Mehmood (legitimate expectation)* [2014] UKUT 00469 and *GC (legitimate expectation – entry clearance) (Romania)* [2005] UKAIT 0142.

18. Although the judge was entitled to place weight on the letter from the Home Office dated 20 May 2013 it was only one matter amongst a number of issues that needed to be considered for the purpose of assessing whether there were very compelling circumstances that outweighed the public interest in deportation. Unfortunately, the fuller assessment that was required was lacking in this particular decision.

19. For these reasons I conclude that the First-tier Tribunal decision involved the making of an error on a point of law and I set aside the decision. With the agreement of both parties it is appropriate to remit the matter to the First-tier Tribunal for a fresh hearing.

DECISION

The First-tier Tribunal's decision involved the making of an error on a point of law

I set aside the decision and remit the case to the First-tier Tribunal

Signed  Date 14 January 2016

Upper Tribunal Judge Canavan