Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00018/2018

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 19 November 2019	**On 22 November 2019**

Before

UPPER TRIBUNAL JUDGE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ASJ A-S

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr Mills, Senior Home Office Presenting Officer
For the Respondent: Ms Sardar, instructed by Duncan Lewis & Co. solicitors

DECISION AND REASONS

1. I shall refer to the appellant as the 'respondent' and the respondent as the 'appellant', as they appeared respectively before the First-tier Tribunal. The appellant was born in 1960 and is a male citizen of Somalia. The appellant came to the United Kingdom in September 2002 and applied for asylum. He was granted indefinite leave to remain as a refugee on 14

November 2002. By a decision dated 1 August 2007, the respondent decided the deport the appellant. The appellant appealed against that decision and his appeal was allowed by a decision dated 26 June 2009.

2. The appellant has long history of criminal offending. Full details of his criminal history are set out in the First-tier Tribunal decision which is the subject of this appeal at [4-7]. The index offence was committed in November 2012. The appellant assaulted several prison officers whilst held in the health wing of a prison in Birmingham. The First-tier Tribunal judge wrote at:

> "The appellant was convicted on four counts; two counts of assault occasioning actual bodily harm to counts of section 18 wounding. The jury found that the appellant knew perfectly well what he was doing when he committed the offences; he had planned the attack. However, there was psychiatric evidence to establish that the appellant was suffering from a serious mental illness and a recommendation was made for a hospital order. The appellant received an indefinite hospital order under section 37 of the Mental Health Act (with a restriction order under section 41 of the Act)."

3. The appellant was served with a notice under section 72 of the Nationality Immigration and Asylum Act 2002. At [46], following an extensive analysis of the issues, the judge found that the appellant had rebutted the presumption under section 72. That part of her decision has not been challenged by the Secretary of State.

4. By a decision dated 4 January 2018, the appellant was subject to a decision for automatic deportation under the provisions of the 2007 Act. On same date, the Secretary of State refused the appellant's protection and human rights claim. The appellant appealed that decision to the First-tier Tribunal which, in a decision promulgated on 25 September 2018, allowed the appeal 'under the refugee Convention, under article 3 under Article 15 (c) and under Article 8.' The Secretary of State now appeals, with permission, to the Upper Tribunal.

5. At the outset of the hearing, reference was made to the decision of the Upper Tribunal in *SB (refugee revocation; IDP camps) Somalia [2019]* UKUT 00358 (IAC). That case had only been reported on 18 November 2019. Mr Mills, who appeared for the Secretary of State, had a copy of the decision but Ms Samra, who appeared for the appellant, had not seen it. She was given a copy of the decision and I gave her the opportunity to read it.

6. At [54], the judge wrote:

> "I find that the appellant would be particularly vulnerable and return due to his mental health condition; he would be returning without a support network in place and without friends and family to assist him. He is from a minority clan, he has no formal links to Mogadishu, there is nothing before me to establish that the appellant would have clan support, and he will have no ongoing financial support. Pursuant to *MOJ & Others Somalia CG [2014*] UKUT 00443 (IAC), I find that there is a real risk that the appellant will have

> no alternative but to live in makeshift accommodation within an IDP camp, where there is a real possibility that the living conditions will fall below those acceptable in humanitarian terms. He is therefore entitled to protection under Article 15 (c)."

7. Mr Mills submitted that this paragraph is problematic. First, the jurisprudence has developed in a way which renders the judge's finding wrong in law. In *SB*, the Upper Tribunal, held that:

> "(2) The conclusion of the Court of Appeal in Secretary of State for the Home Department v Said [2016] EWCA Civ 442 was that the country guidance in MOJ & Ors (Return to Mogadishu) Somalia CG [2014] UKUT 00442 (IAC) did not include any finding that a person who finds themselves in an IDP camp is thereby likely to face Article 3 ECHR harm (having regard to the high threshold established by D v United Kingdom (1997) 24 EHRR 43 and N v United Kingdom (2008) 47 EHRR 39). Although that conclusion may have been obiter, it was confirmed by Hamblen LJ in MS (Somalia). There is nothing in the country guidance in AA and Others (conflict; humanitarian crisis; returnees; FGM) Somalia [2011] UKUT 00445 (IAC) that requires a different view to be taken of the position of such a person. It will be an error of law for a judge to refuse to follow the Court of Appeal's conclusion on this issue."

Mr Mills submitted that it was an error of law to find, as the judge has in the instant appeal, that the appellant would be exposed to Article 3 ECHR risk in an IDP camp; Mr Mills submitted that the reference to Article 15(c) was plainly erroneous and that the judge must have intended to refer to Article 3 ECHR, a submission with which Ms Sardar did not seek to disagree. Ms Sardar did, however, submit the judge's findings regarding the appellant's mental health condition were open to her as were the findings which she made regarding the absence of friends or family support in Somalia for the appellant and that may impact upon his mental state. She submitted that the expert medical evidence before the First-tier Tribunal showed that, without the family support which the appellant receives in the United Kingdom, the appellant would simply be unable to 'cope' on his own Somalia.

8. I wish to stress that Judge Robertson who determined this appeal in the First-tier Tribunal has carried out an extremely thorough analysis. It is no fault of hers that the case law upon which she based her analysis has altered in the period since permission to appeal against her decision was granted to the Secretary of State. However, I agree with Mr Mills that the finding which the judge makes at [54] cannot stand in the light of recent developments in the jurisprudence. Assuming that the judge was referring to Article 3 ECHR and not Article 15(c) it now transpires that she should not have concluded that conditions in IDP camps in Somalia contravene Article 3 ECHR.

9. At [51], the judge found that the appellant's mental health problems would prevent him finding employment in Somalia. In the same paragraph, however, she did observe that mental health services are available in Somalia, albeit that the overall picture for provision of such services

remains ‘bleak.’ The judge concluded that the appellant would not be able to ‘obtain the medication he requires to keep him stable and in the absence of medication there is a real risk that his mental health condition is likely to deteriorate.’ Mr Mills submitted that the judge had placed inappropriate reliance upon the case of *Paposhvilli [2017]* Imm AR 867 and had misunderstood the judgement of the Court of Appeal in *AM (Zimbabwe) [2018]* EWCA Civ 64. He submitted that the judge had overstated the extent to which *Paposhvilli* had changed the test in medical Article 3 ECHR cases whilst she had overlooked the principles of *Bensaid v United Kingdom* - 44599/98 [2001] ECHR 82; it was not appropriate to carry out a comparison of medical facilities in the United Kingdom and those available in Somalia. In any event, the appellant’s circumstances did not fall within the provisions of *N (2005)* UKHL 31 which remained good law until the Supreme Court determines otherwise.

10. At [55], the judge found that this was a rare case where the appellant was entitled to Article 3 ECHR protection on the basis of his mental health. Although she found that the appellant’s mental health decline would not necessarily be rapid, she did find that there was sufficient evidence to show that, without medication, it would be irreversible.

11. There may well be much force in that latter finding and, as Mr Mills observed, any delay in the final determination this appeal may mean that it is heard after the Supreme Court has delivered its judgement on the proper application of *Paposhvilli,* a judgement which may well prove to favour the appellant. However, at the present time, and for the reasons given by Mr Mills, I find the judge erred by concluding that the appellant’s mental health condition is and is likely in the foreseeable future to be so poor as to expose him to an Article 3 ECHR risk. The fact remains that, despite being extremely limited, mental health services do function in Somalia and the element of comparison between circumstances there and in the United Kingdom which features in the judge’s analysis was not appropriate. The appellant’s current condition does not arguably fall within the parameters established in *N.*

12. The judge also allowed the appeal under Article 8. Ms Sardar submitted that neither the original grounds filed by the Secretary of State nor the amended grounds make reference to Article 8 and that it was therefore not open to the Secretary of State to challenge the judge’s determination of the Article 8 appeal. Mr Mills submitted that the judge’s reasons for allowing the appeal on Article 8 grounds effectively reiterated her findings as regards Article 15(c) (which both parties appear to agree are inappropriate and wrong in law) and Article 3 ECHR (which Mr Mills submitted, and I agree, was also wrong in law). I agree with Mr Mills. Normally, neither party should be allowed to pursue an appeal in relation to a matter which did not appear in the grounds/amended grounds of appeal. However, given that the judge has set out in terms the basis for allowing the appeal on Article 8 grounds and I find that that entire basis is itself flawed by legal error, it would make little sense to allow the Article 8 decision to stand.

13. In conclusion, I find that the judge has fallen into legal error for the reasons which I have outlined above. I set aside the First-tier Tribunal decision. The findings of fact and conclusions are set aside, save for that in relation to Section 72, which is not challenged. There will need to be a new fact-finding exercise which is better conducted in the First-tier Tribunal and accordingly the appeal is returned to that Tribunal to remake the decision at or following a hearing.

Notice of Decision

The decision of the First-tier Tribunal is set aside. Save for the determination of the decision in respect of section 72 of Nationality Immigration and Asylum Act 2002, none of the findings shall stand. The appeal is returned to the First-tier Tribunal for that Tribunal to remake the decision at or following a hearing.

Signed Date 19 November 2019

Upper Tribunal Judge Lane

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.