Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: RP/00164/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 17 June 2022	**On the 19 July 2022**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MA
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Toal, instructed by Wilsons Solicitors LLP
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION TO SET ASIDE
under rule 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008

1. This matter first came before me on 1 September 2021 when, for the reasons set out in the attached decision, I concluded that the decision of First-tier Tribunal Judge C Scott promulgated on 29 December 2020 was to be set aside as it involved the making of an error of law.

2. In its decision, the FtT allowed the appellant's against a decision made on 15 October 2018 to revoke his protection status and to refuse a human rights claim. In that decision, the Secretary of State had also decided to cease his refugee status and to refuse his human rights claim. This is not,

however, a case to which section 75 of the Nationality, Immigration and Asylum Act applies as the appellant was sentenced to a term of imprisonment of less than two years.

3. The judge found [62]

> 62. It is for the respondent to satisfy the tribunal that there has been a significant and non-temporary change in the circumstances, so that the circumstances which caused the person to be a refugee have ceased to apply and there is no other basis on which they would be held to be a refugee. I find that the respondent has not satisfied that burden for the following reasons:
>
> …
> (b) The respondent has not provided any reasons as to why the appellant was granted refugee status in 1996. As such, I am unable to concluded that there has been a significant and non-temporary change in the circumstances which caused the appellant to be a refugee; and
>
> (c) Given the appellant's profile as a singer, I find that he would be at risk of serous harm on return to Mogadishu from Al-Shabaab, for the reasons set out above. As such, I find that this is a basis on which the appellant would be held to be a refugee.

4. The respondent sought permission to appeal on two grounds. She relied on identical grounds when renewing her application. The first challenged the findings that the findings summarised at [62 (c)] were inadequately reasons; the second challenge was made with respect to findings made in respect of article 3.

5. I consider, and indeed Ms Cunha accepted, that there is not here a challenge to the finding that the respondent had not challenged the finding identified at [62 (b)] which was an alternative basis on which the appeal fell to be allowed.

6. I note in passing, that in refusing permission in the First-tier Tribunal, Judge O'Keeffe observed [3] that: "The judge's conclusion that the respondent had not satisfied the burden in relation to the cessation of the appellant's refugee status is fully and properly reasoned"

7. Despite that observation, there was no attempt in the renewed grounds to engage with that issue.

8. Subsequent to the grant of permission, the appellant served a notice pursuant to rule 42. That notice, while detailed, does not engage with the point now taken – that is that the grounds did not challenge the finding that the respondent had not challenged the finding that she had not proved cessation of the refugee claim.

9. This point was raised only in Mr Toal's skeleton argument, served on the day of the hearing.

10. I heard submissions from both representatives, having adjourned to allow Ms Cunha time to respond to this novel point. Ms Cunha accepted that the grounds did not, as submitted, engage with the finding on cessation. She sought permission to amend the grounds, although when asked, she could provide no explanation for delay. She did, however, submit that this point was "Robinson" obvious and on a basis that the Secretary of State was entitled to take it on the basis that it goes to the integrity of the Refugee Convention.

11. Having heard full submissions on the issue, including as to the merits of the proposed amendment, I announced that I was not satisfied that permission should be granted to allow the respondent to amend her grounds of appeal. I indicated also that, in all the circumstances, that it would be the correct approach for me to set aside the operative part of my decision relating to the error of law, and to state that the grounds raised no *material* error of law and upholding the decision of the First-tier Tribunal, for reasons to be given in writing.

Discussion

12. The appellant is, in fact, making an application for my decision set aside my decision of 3 September 2021 and to substitute it with a decision that the decision of the First-tier Tribunal did not involve the making of an error of law.

13. Following EP (Albania) & Ors (rule 34 decisions; setting aside) [2021] UKUT 233 (IAC), I consider that I can apply rule 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008 to that request. In doing so, I consider and apply also the principles identified in AZ (error of law: jurisdiction; PTA practice) Iran [2018] UKUT 245 (IAC) at [47] to [58]. It is my view that although not circumscribed by rule 43, those principles ought to be seen through the lens of the rule which provides as follows:

> **43. — Setting aside a decision which disposes of proceedings**
> (1) The Upper Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision or the relevant part of it, if—
> (a) the Upper Tribunal considers that it is in the interests of justice to do so; and
> (b) one or more of the conditions in paragraph (2) are satisfied.
>
> (2) The conditions are—
> (a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;
> (b) a document relating to the proceedings was not sent to the Upper Tribunal at an appropriate time;
> (c) a party, or a party's representative, was not present at a hearing related to the proceedings; or
> (d) there has been some other procedural irregularity in the proceedings.
>
> (3) Except where paragraph (4) applies, a party applying for a decision, or part of a decision, to be set aside under paragraph (1) must make a written

application to the Upper Tribunal so that it is received no later than 1 month after the date on which the Upper Tribunal sent notice of the decision to the party.

(4) In an asylum case or an immigration case, the written application referred to in paragraph (3) must be sent or delivered so that it is received by the Upper Tribunal—

(a) where the person who appealed to the First-tier Tribunal is in the United Kingdom at the time that the application is made, no later than twelve days after the date on which the Upper Tribunal or, as the case may be in an asylum case, the Secretary of State for the Home Department, sent notice of the decision to the party making the application; or

(b) where the person who appealed to the First-tier Tribunal is outside the United Kingdom at the time that the application is made, no later than thirty-eight days after the date on which the Upper Tribunal sent notice of the decision to the party making the application.

(5) Where a notice of decision is sent electronically or delivered personally, the time limits in paragraph (4) are ten working days."

14. This application was not brought on written notice but I am satisfied that, absent any objection by the respondent, that it would be in the interests of justice, given that there was the opportunity to make submissions, the requirements of written notice and time can be dispensed with.

15. Given that the effect of the claimed irregularity is that a finding that the appellant is a refugee was wrongly overturned, the interests of justice are engaged.

16. I turn next to the conditions in rule 43 (1)(b).

17. This is a case based on a submission that an obvious point (that the decision was impugned in the grounds on only one of the two bases on which it was made) which would have defeated the respondent's submissions on the error of law point, albeit that the point was not taken before me.

18. This is not a case in which permission to appeal was given on a basis not argued in the grounds of appeal, or where the judge granting permission gave permission on "Robinson obvious" grounds. Rather, it is an argument that the decision finding an error of law is vitiated by a failure to note an obvious point.

19. Is that a procedural irregularity? In the sense that a (now) obvious point was not addressed in the finding that there was an error of law, there is an irregularity giving rise to injustice; it is sufficiently clear that, absent an amendment of the grounds, there should have been not finding that the decision of the First-tier Tribunal involved the making of an error of law. Even if I am wrong on that, I am satisfied that this gives rise to very

exceptional circumstances in that an obvious point was missed. This is the sort of point which would fall within the ambit of rules 45 and 46 of the Tribunal Procedure (Upper Tribunal) Rules 2008 had it disposed of proceedings and would result in the decision being reviewed and overturned.

20. I turn next to the interests of justice which includes a consideration of the request to amend the grounds of appeal out of time.

21. The correct test is set out and is explained in R (on the application of Onowu) v First-tier Tribunal (Immigration and Asylum Chamber) (extension of time for appealing: principles) IJR [2016]UKUT 00185

22. The test set out three steps which I must take when considering whether or not to extend time:
    (a) Is the delay serious or significant?
    (b) Is there a good reason for the delay?
    (c) I must then look at all the circumstances of the case.

23. The delay in this case is undoubtedly serious. The decision under challenge was promulgated on 29 December 2020 and the deadline for the renewed application for permission was 11 February 2021, well over a year ago.

24. The Secretary of State advances no explanation for the delay.

25. The circumstances are unusual. The defect in the grounds is clear and was noted by the FtT when refusing permission, yet neither party appear to have noticed the defect until recently.

26. I do not accept the respondent's submission that this is a "Robinson" obvious point.

27. As was noted in SSHD v AS [2018] UKUT 000254 at [64]:

> 64. In its application to asylum law, the "Robinson" approach applies only in favour of the individual, who is seeking asylum; not in favour of the Secretary of State. An exception, however, arises where the point identified concerns a possible breach of the Refugee Convention, which would result from recognising a person as a refugee who is, in fact, covered by one of the exclusion clauses in the Refugee Convention (see, in this regard, paragraph 21.38 of MacDonald's Immigration Law and Practice (Ninth Edition) and *A (Iraq) v Secretary of State for the Home Department [2005] EWCA Civ 1438* .

28. I do not accept the submission that the respondent is assisted by SSHD v Devani [2020] EWCA Civ 612; that decision is plainly distinguishable on its facts. There was no "slip" here.

29. This is not a case in which, on the findings made by the judge, the appellant ought to have failed. On the contrary, this is a case in which the issue – cessation – had been fully addressed in the refusal letter and dealt

with at length by the judge who came to a conclusion on the facts before her that the appellant's refugee claim had not ceased.

30. Further, as Mr Toal submitted, any ground advanced by the respondent would need to demonstrate that, arguably, the relevant finding of fact was vitiated by an error. The ground as formulated, orally and not in writing, does not in my view so do.

31. It is also easily overlooked that, in R. v Secretary of State for the Home Department Ex p. Robinson [1997] EWCA Civ 3090, [1998]QB 929 the Court of Appel found that a point if not taken had to be obvious:

> If there is readily discernible an obvious point of Convention law which favours the applicant although he has not taken it, then the special adjudicator should apply it in his favour, but he should feel under no obligation to prolong the hearing by asking the parties for submissions on points which they have not taken but which could be properly categorised as merely "arguable" as opposed to "obvious"

32. The error, if it be such, is not obviously discernible from the decision; mere arguability is not sufficient The judge directed herself as to the law and made findings of face on the evidence, or rather lack of it, before her. The decision in Durueke (PTA: AZ applied, proper approach) [2019] UKUT 197 (IAC) does not assist the respondent.

33. There would, in this case, be significant prejudice to the appellant in permitting the amendment. There would also be further delay as it would be necessary to hear argument, at a further hearing, as to whether there was merit in the amended ground.

34. That said, the point that the grounds as pleaded were defective, is not a point taken in his behalf until now.

35. But, the defect in the grounds has been there since they were drafted. As drafted, they did not identify a material error, and it is questionable whether permission should therefore have been granted.

36. I accept that in my error of law decision, I did not address this issue; but, at that hearing, the appellant was represented by experienced counsel and by experienced solicitors. The point was not drawn to my attention.

37. Had the hearing proceeded properly, and the cessation point been put to me on 1 September, the position would have been the same. The respondent would have had to make an application well out of time to address an obvious point. Why the respondent did not address the point, even when it was flagged up in the refusal of permission by the First-tier Tribunal I do not know.

38. Taking all of these factors into account, I conclude that this is unusually a case in which I should set aside and vary the decision in which I concluded that the decision of the First-tier Tribunal involved the making of

an error of law. Had I not done so, and concluded that the appeal should have proceeded, I would have had to set aside my decision on review.

39. Further, I consider that the proposed ground of challenge was not one which has merit. It is sufficiently clear that the judge did consider fully the issue of the basis on which it was said the appellant's status should be ceased. There is no allegation that she misdirected herself in law. She was entitled to take account of the fact that no proper evidence as to the circumstances had been provided, and reality the proposed ground was nothing more than a disagreement with a properly reasoned finding of fact reached by the judge.

40. Accordingly, in the absence of any arguable merit in the proposed amendment, I am not satisfied that the respondent should be given permission to seek to amend the grounds out of time.

41. In all the circumstances, and given the effect on the appellant, I am satisfied that it is in the interest of justice to set aside my decision on the issue of error of law and to substitute the following:

    Given that the decision of the judge was, as is set out in paragraph 62 of her decision, that the appeal fell to be allowed on <u>two</u> bases, and that the respondent has identified errors in only one ground, that is that he is at risk from Al-Shabaab, any error in that respect is not capable of affecting the outcome.

    Accordingly, I find that the decision of the First-tier Tribunal did not involve the making of an error of law affecting the outcome and I uphold it

Notice of Decision

1. I set aside the decision made on 3 September 2021 and I substitute the following notice of Notice of Decision:

    "The decision of the First-tier Tribunal did not involve the making of an error of law affecting the outcome and I uphold it."

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

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

Signed Date 22 June 2022

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul