



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number:  
DA/00478/2013

**THE IMMIGRATION ACTS**

**Heard at North Shields**

**Determination**

**On 21<sup>st</sup> August 2014**

**Promulgated**

**Signed on 21<sup>st</sup> August, 2014**

**On 28<sup>th</sup> August 2014**

**Before**

**UPPER TRIBUNAL JUDGE RICHARD CHALKLEY**

**Between**

**A.S. D**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr T Lay, Counsel

For the Respondent: Mr P Mangion, Senior Home Office Presenting  
Officer

**DETERMINATION AND REASONS**

1. In this appeal, both the Secretary of State for the Home Department and A.S.D., have appealed the decision of the First Tier Tribunal. I have therefore continued to refer to them as they were referred to before the First Tier Tribunal.
2. The Appellant is a citizen of Somalia who was born on the 26 March 1979. He appeals the decision of a Panel of the First Tier Tribunal (First-tier Tribunal Judge Swaniker sitting with Mr M E Olszewski) at Taylor House on the 11 February 2014 to refuse to revoke the deportation order by virtue of Section 52 of the Immigration Act 1971 and discharge the certification under Section 72 of the Nationality, Immigration and Asylum Act, 2002.
3. The Panel considered a number of detailed medical reports before them and noted that the Secretary of State had certified the Appellant's claim under Section 72 of the 2002 Act. His conviction on the 10<sup>th</sup> July 2004, was for robbery and his sentence was for a term of three years. The Tribunal found that the Appellant had been convicted of a 'particularly serious offence' and that the Appellant presented a danger to the community.
4. They noted in particular, a report of Dr Anderson and at paragraph 17 said:

“We note with interest her distinction between the Appellant's robbery offence and other offending to date and her opinion that substance abuse and intoxication were more directly relevant to the majority of the Appellant's offending behaviour when his diagnosis was for schizophrenia paragraphs 13.3.3 and 13.3.4. She noted that the Appellant had not engaged in any substance misuse treatment and did not appear to consider this an option therefore she considered despite a change in the Appellant's insight his risk of substance abuse was unchanged at present.”

5. The Tribunal went on to say:

“We find no credible evidence before us pointing the Appellant having undergone any therapy or remedial treatment programme addressing the issue of what appears to have been a long history of substance misuse and we are unable to conclude from the evidence before us that the Appellant would not continue to engage in such activity behaviour given the opportunity. He was released on immigration bail on the 31 January 2014 and we do not consider that there has been suitable period of proof of abstinence for us to be able to conclude the Appellant now has his substance abuse under control so that he would not reasonably likely engage in further acts of criminality.”

6. The Appellant challenged this determination on the basis that the Tribunal did not properly ask itself the correct test. It was suggested that the correct test was set out by the Court of Appeal in ***EM Serbia [2007] EWCA Civ 630*** and that the Tribunal failed to consider the correct test as to whether or

not the Appellant in fact constituted a danger to the community as at the date of the hearing. They found that there was a real risk of serious harm to others if the Appellant had a relapse to mental illness, but as Counsel pointed out, this had the effect of introducing a contingent and spent cumulative prediction of harm and of a risk that the correct test was whether or not the Appellant in fact posed a danger.

7. Mr Mangion pointed out that the medical reports make it clear that the Appellant has on occasions failed to self medicate and that this poses a risk. He suggested that the Panel had carefully examined the evidence before it, including the very detailed medical reports and was entitled to reach the conclusion it had.
8. Mr Mangion and I were both slightly hampered in that the Appellant's bundle submitted for the purposes of the First-tier Tribunal appeared to be missing from the file. Counsel very helpfully provided copies of documents that Mr Mangion and I needed to refer to.
9. Counsel suggested that what the Tribunal had done, is to 'assess the risk of a risk' rather than consider whether the Appellant actually poses a risk of danger to the community. There is, if he fails to take medication and relapses into misuse, a risk that the Appellant will offend, but Counsel pointed out, that would not necessarily mean that he would commit a 'particularly serious crime'. Counsel drew attention to the Appellant's previous record set out on pages 1 and 2 of the Home Office letter of the 5 February 2013. The offence which led to the making of the deportation order is detailed at paragraph 7; since that time there have been other offences committed by the Appellant but none of them could be properly regarded as being serious and some appear to have been connected with whilst drinking.
10. Despite having committed a further nine offences between 2002 and 2011, none of them are for serious offences and despite having been on bail since February of this year, he has not been in any further difficulties. Mr Lay suggested that the appeal against the refusal to discharge the deportation order should be looked at again by the First-tier Tribunal given that it will need to carefully analyse the medical reports.
11. I then heard submissions from Mr Mangion in respect of the Home Office challenge to this determination. In their determination the panel went on to find allow the Appellant's appeal on human rights grounds under Article 3. They noted that the Appellant had left Somalia at the age of 16 years and had lived in the United Kingdom for some 19 years. They

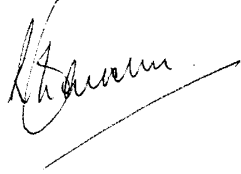
noted also that he was able to speak Somali but considered him to be obviously anglicised in his appearance and demeanour.

12. He has been diagnosed suffering with paranoid schizophrenia and while his father belonged to the Hawiye clan he is not a person with any family or other social contacts with established links with Somalia so that the risk to him on return to Mogadishu have to be examined in that context. They believe that he would not be either welcomed or taken in by members of his father's clan and given that he had been away from Somalia for so many years and has not proof of family or social links there and is also suffering from a mental illness he would be at risk.
13. They noted that a diagnosis that he made that his paranoid schizophrenia is a severe and enduring mental illness which requires management by specialist health professionals. One report spoke of people with schizophrenia needing considerable social support including stable housing to reduce their risk of relapse and they tend to relapse under stressful conditions. They concluded that taking into account his serious mental health and substance misuse issues they have concluded that the Appellant is not reasonably likely to be able to find a means of sustaining and/or maintaining himself on return to Somalia and nothing in the evidence which would lead them to conclude that his father's clan would extend a protective arm to him on account of his father's clan membership.
14. They noted also the mental health care services situation in Somalia and found no credible evidence that the Appellant would be able to access treatment and/or be able to pay for such medication as was required to address his condition. He has no family support in the country, no demonstrable means of support and/or assistance there and accordingly found that there was a risk that his condition would seriously deteriorate and that he would be at real risk of inhumane and degrading treatment or punishment quite apart from other general risk reasonably likely to be imposed to a person in his condition in Somalia. They believed that there was a reasonable likelihood that he would end up on the streets and on account of the vulnerabilities created by his mental health issues faced a real risk of serious mistreatment and abuse. They found that an internal flight was not an option for the Appellant.
15. The Respondent challenged the determination and suggested that the Tribunal had failed to set out the test in ***TS and EO Article 8 Health Issues India [2012] UK UT00397 IAC*** and in addressing me Mr Mangion sought to rely on those grounds.

He suggested that effectively the Tribunal had not correctly identified the threshold for Article 8 in terms of case law. Counsel pointed out that the Tribunal had considered that the Appellant would not be able to relocate and that their consideration of the Appellant's Article 8 claim was not flawed. The Tribunal make it clear that they found favour with submissions in his skeleton argument that the Appellant's condition would seriously deteriorate and given that the treatment of the mentally ill in Somalia were entitled to conclude as they did.

16. I have concluded that the panel of the tribunal did err in its consideration of the Appellant's challenge against refusal of the Secretary of State to discharge the deportation order and certification. I believe that the task facing the tribunal was a difficult one; namely to establish whether on the evidence before it the Appellant constituted a present danger to the community. What they did actually did was to find that he presented a risk of becoming a present risk of danger to the community and did not consider whether there was a real risk of him committing a particularly serious crime.
17. Both representatives agreed that in the circumstances, a remittal to the First-tier Tribunal would be the appropriate course and in respect of the Appellant's challenge to the certification of the deportation order that is what I propose to do. The matter will be heard afresh by the First-tier Tribunal comprising a judge other than Mr Swaniker, and if it is considered necessary for a Non-Legal Member to sit with the judge, then it shall not be Mr Olszewski.
18. Insofar as the Respondent's challenge is concerned I do not believe that the panel has erred. I believe that in the particular circumstances of this Appellant this is one of those rare cases the Tribunal spoke of in **GS** and **EO**. The Appellant fails to take his medication regularly unless he is supervised. On his return to Mogadishu he is likely to be questioned and the manner in which he answers the questions posed to him may or may not cause the questioner some concern, assuming he is allowed out of the airport. There is a danger that he will, as the tribunal have found, find himself on the streets and because of his illness, be at serious risk of ill treatment or harm. I believe the tribunal were entitled, on the evidence before them, to reach the conclusion that they did and I do not believe that they erred. The findings of the First Tier Tribunal Judge are preserved.
19. In summary therefore I find that the Tribunal did err in law in its consideration of the challenge against the refusal of the Secretary of State to discharge the certification of the

deportation order and I remit that part of the appeal to the First-tier Tribunal. The Tribunal's findings in respect of Article 3 are upheld. The hearing is to be allowed for half a day.

A handwritten signature in black ink, appearing to read 'Chalkley', with a long horizontal stroke extending to the right.

**Signed**  
**Judge Chalkley**  
**Judge of the Upper Tribunal**