Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/12253/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29 November 2021	**On 16 December 2021**

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

W D S
(ANONYMITY DIRECTION MADE)

Respondent

Anonymity Order
Unless the Upper Tribunal or a court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, the original appellant and the original respondent. Any failure to comply with this direction could give rise to contempt of court proceedings.

Representation:
For the Appellant: Mr T Lindsay, Senior Presenting Officer
For the Respondent: Ms N Nnamani, instructed by Direct Access

DECISION AND REASONS

Introduction

The appellant in this matter is referred to as the 'Secretary of State' in the body of this decision, the respondent as the 'claimant'.

The Secretary of State appeals against a decision of Judge of the First-tier Tribunal Atreya ('the Judge'), who allowed the claimant's appeal against a decision to refuse him leave to remain on international protection grounds, or alternatively on human rights grounds. The decision of the Judge was sent to the parties on 14 May 2021.

By a decision dated 7 July 2021 Judge of the First-tier Tribunal Saffer granted the Secretary of State permission to appeal on all grounds.

Anonymity Order

The Judge made an anonymity order. Neither party requested that it be set aside. The order is confirmed above.

Background

The claimant is a national of Somalia, ethnically Bajuni and a Christian. He is currently aged 26. In 2001, when aged 6, he entered the United Kingdom as a minor child accompanying his mother, who sought asylum. The Secretary of State refused the mother's asylum claim in May 2001 but granted her exceptional leave to remain. The claimant was granted leave in line with his mother and was subsequently granted indefinite leave to remain in November 2005.

Between March 2009 and November 2013, the claimant received non-custodial sentences in respect of eight offences.

On 28 September 2015, the claimant was convicted at Snaresbrook Crown Court of burglary and on 26 October 2015 he was sentenced to eighteen months' detention in a Young Offenders Institution.

The claimant has not been convicted since the index offence. He has relocated within this country and resides with his partner and their child, both of whom are British citizens. He has qualifications as a painter and decorator and also as a plumber.

Grounds of Appeal

The Secretary of State relies upon three grounds of appeal identified as:

The First-tier Tribunal made a material misdirection of law in concluding that the claimant would be at risk on return to Somalia because he is a Christian convert in circumstances where it was detailed in the grounds of appeal that he was born a Christian.

The First-tier Tribunal materially erred in law in finding that the claimant would be at risk of destitution and ill-treatment on return to Somalia where he has a history of employment in this country and there was no finding that his mental health will preclude his employment in Somalia.

The First-tier Tribunal failed to have regard to the established thresholds in respect of what is to be considered as unduly harsh and has failed to give adequate reasons for finding that the claimant's deportation would result in unduly harsh consequences.

Decision on Error of Law

Ground 1

The challenge to the Judge's decision on the Refugee Convention appeal is a narrow one, as identified within the Secretary of State's written grounds:

> "At [57] the FtTJ finds that the [claimant] would be at risk on return to Somalia because he is a Christian convert. It is submitted that the FtTJ has failed to acknowledge the [claimant's] grounds of appeal, which state that he has been a Christian since birth [17]. This distinction is significant. It is therefore submitted that the FtTJ errs in finding at [55] that the [claimant] *'may be at risk on the lower standard of proof from Al Shabab which is a violent organisation because of a perception that his* ***conversion from Islam to Christianity*** *is a betrayal/rejection of Islam and it is clearly documented that any apostasy is punishable under Sharia law by death in Somalia."* [Emphasis added].

I observe that the grounds of appeal filed with the First-tier Tribunal at the outset of the appeal process, drafted in this matter by the appellant's former legal representatives, is a document which does not constitute evidence. I further observe that a Tribunal can properly expect it to be a document drafted on instructions, though it appears that the appellant has never been asked as to whether he was provided with a copy of the document before it was filed.

Mr Lindsay sought to assert that there was a conflict of evidence before the Judge which she was required to properly consider. The difficulty for the Secretary of State is that there is no evidence before this Tribunal that her case before the First-tier Tribunal was that the claimant was born Christian and so was not a 'convert'. Being mindful of the duty of candour, Mr Lindsay informed me that the respondent was in possession of a note prepared by Mr Lowton, the Presenting Officer who appeared before the First-tier Tribunal, which suggests that on the day the appeal was considered on the basis that the claimant was a Christian convert. Mr Lindsay is correct to observe that this is a post-hearing note, but nothing within the note states that Mr Lowton advanced the Secretary of State's case as being that the claimant was not a convert, but someone born as a Christian.

I observe the claimant's witness statement dated 4 November 2019 where he confirms at paragraph 37 that he and his family have identified as Christian since 2003, eight years after his birth. I note his evidence in the same

statement, “we practised Christianity for some years before our arrival to the UK.” I am satisfied that the natural reading of this assertion is consistent with the family having converted, rather than establishing that the appellant was born as a Christian. Having read the witness statement as a whole, I am satisfied that it is not possible to identify the appellant as asserting anywhere that he was born as a Christian. In the circumstances, I find that there is no merit to this ground.

In any event, as acknowledged by Mr Lindsay, the Secretary of State has not challenged the alternative judicial finding that the claimant possessed a well-founded fear of persecution consequent to being a member of the Bajuni clan, at paragraphs 53 and 57 of the decision. The Judge considered the specific facts arising in the case and relevant country background, as required by existing country guidance: *KS (Minority Clans – Bajuni - ability to speak Kibajuni) Somalia CG* [2004] UKIAT 00271.

Consequently, even if ground 1 established an error of law it could not be said to be material as there was no challenge to the second, independent, limb upon which the Judge allowed the claimant’s refugee appeal. In the circumstances, the Secretary of State’s challenge on this ground is dismissed.

Ground 2

The Secretary of State’s second ground of appeal is that the Judge made a material misdirection of law in her consideration of article 3 ECHR. Complaint is made that she failed to make any findings of fact as to the availability of mental health care provision in Mogadishu and the finding that the appellant would be at risk of destitution on return to Somalia is fatally flawed by the failure to take into account his history of employment in this country.

The challenge is directed to paragraphs 59 to 61 of the Judge’s decision:

> “59. It is not disputed and I find that the appellant left Somalia at the age of 3 and has lived in the UK since the age of 8 [sic]. He lived in Kismayo (Kenya) with family between the ages of 3 and 8. I am prepared to accept that he has not been back to Somalia nor returned his connection with Somalia. I accept he is unable to speak any language of Somalia and that he has no connection to Somalia because he has never lived there nor does he know anyone in Somalia.
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> 60. I also accept that he has no assets, family or support networks in Somalia and no family member could send any or any regular remittances for him to Somalia. His mother was not working at the date of hearing and is responsible for two dependent children. His partner is also on maternity leave following the birth of their British Citizen child and intends to return to work to earn money to support their child and I accept she cannot support her own child in London and support the appellant in Somalia. He would return to Mogadishu having no employment, no home, no remittances to rely on.
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> 61. There is accepted to be clan violence in Somalia and the appellant would be at risk as a vulnerable adult from a minority clan returning

> from the west to Somalia with no living memory of life in Somalia, no language skills, no contacts, (CPIN 2019) and the MOJ and others makes clear that those with no connections with Mogadishu no financial support and no access to funds will struggle to gain employment and accommodation which will be compounded in the appellant's case because he has never lived in Mogadishu nor does he speak the language. There continue to be attacks from Al Shabab and without support he is likely to be destitute and/or live in **conditions** which fall below humanitarian standards and is at real risk of intense suffering prohibited by Article 3 ECHR."

Though indicating that she wished to defend this element of the decision, Ms. Nnamani accepted that there were difficulties with the Judge's reasoning.

I observe that the Judge's decision predates that of the Upper Tribunal in *Ainte (material deprivation – Art 3 – AM (Zimbabwe))* [2021] UKUT 00203 (IAC). The Tribunal confirmed that the Court of Appeal judgment in *Secretary of State for the Home Department v. Said* [2016] EWCA Civ 442, [2016] Imm. A.R. 1084 is not to be read to exclude the possibility that article 3 can be engaged by conditions of extreme material deprivation. Factors to be considered include the location where the harm arises, and whether it results from deliberate action or omission. The Tribunal further confirmed that in cases where the material deprivation is not intentionally caused the threshold is the modified '*N* test' set out in *AM (Zimbabwe) v. Secretary of State for the Home Department* [2020] UKSC 17, [2021] A.C. 633.

The decision of *Ainte* confirms that the question for a judge is whether conditions are such that there is a real risk that the individual concerned will be exposed to intense suffering or a significant reduction in life expectancy. This is a fact specific assessment. When considering the circumstances of return to Somalia, the Tribunal identified in *MOJ & Ors (Return to Mogadishu) Somalia CG* [2014] UKUT 00442 (IAC) relevant considerations to include:

- circumstances in Mogadishu before departure;
- length of absence from Mogadishu;
- family or clan associations to call upon in Mogadishu;
- access to financial resources;
- prospects of securing a livelihood, whether that be employment or self employment;
- availability of remittances from abroad;
- means of support during the time spent in the United Kingdom;
- why his ability to fund the journey to the West no longer enables an appellant to secure financial support on return.

The Judge's focus was upon factors favourable to the appellant. There is no identifiable engagement with factors favourable to the respondent, for example the appellant's history of employment in this country. I note the Secretary of State's complaint that the Judge failed to observe that the claimant's limited mental health concerns would not impact upon his ability to find work in Somalia but, surprisingly, the claimant's health concerns are not addressed in

respect of article 3 and destitution, though it is subsequently assessed in the 'very significant obstacles' proportionality assessment undertaken in respect of paragraph 399A of the Immigration Rules. I am satisfied that the simple failure to place the appellant's employment capability into the assessment is, on the facts of this case, an error of law in respect of the Judge's consideration of article 3 and destitution.

However, as accepted by Mr. Lindsay before me, as the appellant succeeded in his Refugee Convention appeal in respect of possessing a real risk of persecution due to his being a member of the Bajuni clan, the identified error of law is not a material one. I note that the Judge found within the first sentence of paragraph 61 of her decision that the appellant would be at real risk of serious harm upon return to Somalia because of his membership of the Bajuni clan and this conclusion has not been challenged. In the circumstances, the Judge's conclusions as to the article 3 appeal are not adversely affected by material error of law, and so the Secretary of State's appeal is dismissed on this ground.

Ground 3

The third challenge is founded upon the Judge's purported failure to have regard to the established thresholds in respect of what is to be considered as unduly harsh, and an accompanying failure to give adequate reasons in finding that the claimant's deportation would result in unduly harsh consequences.

It is said that when considering that it would be unduly harsh to expect the claimant's partner to remain in this country without him there was a failure to give adequate reasoning. It is further said that there is no finding that the claimant's partner would be unable to cope with the care of their child on her own. The respondent observes that the partner has employment to return to on completion of her maternity leave and there are supportive family members who can assist her with the care of her child. In the alternative she may access support from Social Services. It is therefore contended by the Secretary of State that the Judge has failed to give adequate reasons for finding that the claimant's deportation would result in unduly harsh circumstances for his partner and child, such as to breach their protected article 8 right to family life.

The representatives confirmed before me that the relevant paragraphs in respect of this ground of challenge are paragraphs 82 and 83 of the decision.

> "82. I find that it would be unduly harsh for the British Child to lose the close relationship with his father who is actively involved in his every day life.
>
> 83. In my judgment on the balance of probabilities it is in the best interests of a British Citizen child […] to have continuity of care from his father who has been involved in his life from birth and continued development of that relationship. I take judicial notice of evidence in the public domain not presented before me of the importance of fathers to the development and well-being of boys. The reality is that if the appellant is deported it will be more difficult for the appellant's

> partner to work and make an economic contribution to society and specifically to return to her job at the Post Office with consequent adverse financial impact through loss of the appellant's income as well as loss of her own, increased reliance on benefits to survive and/or push into poverty for a single parent family."

Popplewell LJ confirmed in *AA (Nigeria) v Secretary of State for the Home Department* [2020] EWCA Civ 1296, [2021] Imm AR 114, at [9], that Appellate Tribunals should assume in respect of the unduly harsh assessment that experienced judges in specialised Tribunals correctly apply relevant principles, without the need for extensive citation, unless it is clear from what they said that they have not done so.

He further confirmed at [9] that there is an expectation that the Judge will reference the guidance provided to the unduly harsh assessment by the Supreme Court in *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53, [2018] 1 WLR 5273 and *HA (Iraq) v Secretary of State for the Home Department* [2020] EWCA Civ 1176, [2021] 1 WLR 1327.

In *KO (Nigeria)* the Supreme Court confirmed that the criterion of undue harshness in section 117C(5) of the Nationality, Immigration and Asylum Act 2002 sets an elevated bar which carries a much stronger emphasis than mere undesirability. In *HA (Iraq)* the Court of Appeal held that the question for Tribunals under section 117C(5) is whether the harshness which the deportation would cause for the offender's partner and/or child is of a sufficiently elevated degree to outweigh the public interest in deportation. The statutory intention is that the hurdle representing the unacceptable impact on a partner or child should be set somewhere between the low level that applies in the case of a person who is liable to ordinary immigration removal and the very high level that applies to an offender who has been sentenced to a period of imprisonment of four years or more, namely very compelling circumstances.

The Judge noted that it was in the best interests of a British citizen child to have continuity of care from the claimant, their father. Judicial notice was then taken of evidence that was not before the Tribunal and of which the respondent had no ability to address. The third limb of the assessment was that deportation would make it more difficult for the claimant's partner to work, and so have an adverse impact upon her, without any adequate consideration as to whether she could secure suitable help from friends and family.

I am mindful of Popplewell LJ's observation in respect of experienced judges and the application of relevant principles. However, having read the decision of the Judge with care, I am satisfied that there was a clear failure to adequately identify the elevated test at paragraphs 82 and 83 of the decision. In the circumstances I am satisfied that the Judge erred in law.

However, being mindful that the Tribunal is considering a human rights (article 8) appeal, Ms. Nnamani and Mr. Lindsay agreed before me that such error was not material. The Secretary of State has not appealed the favourable conclusion reached by the Judge that the claimant met the requirements of paragraph 399A of the Immigration Rules and so has not challenged the judicial

finding that his deportation to Somalia would be a disproportionate interference with his private life rights, as protected by article 8 ECHR.

In the circumstances the error identified above was not material to the ultimate consideration of the claimant's article 8 appeal. I therefore dismiss ground 3.

Postscript

This is a matter where proper consideration should have been given by the First-tier Tribunal to the confirmation in *OK (PTA; alternative findings) Ukraine* [2020] UKUT 00044 (IAC) that permission should not be granted on grounds as pleaded if there is, quite apart from the grounds, a reason why the appeal would fail. All three of the grounds of challenge advanced failed to engage with the fact that other, independent, reasons were given for allowing the appellant's appeals on Refugee Convention and human rights (articles 3 and 8) grounds.

I also take the opportunity to observe that it is unfortunate that the decision was issued by the First-tier Tribunal with tracked changes visible.

Notice of Decision

The decision of the First-tier Tribunal dated 14 May 2021 did not involve the making of material error on a point of law.

I therefore confirm the following:

The claimant's Refugee Convention appeal is allowed.

The claimant's human rights (article 3) appeal is allowed.

The claimant's human rights (article 8) appeal on private life grounds is allowed.

The anonymity order is confirmed.

Signed: D O'Callaghan Date: 13 December 2021
Upper Tribunal Judge O'Callaghan

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed: D O'Callaghan Date: 13 December 2021
Upper Tribunal Judge O'Callaghan