UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER Appeal number: DA/00963/2014

THE IMMIGRATION ACTS

Heard at: Birmingham
On: 13 August 2015

Decision & Reasons Promulgated
On: 10 September 2015

Before

Upper Tribunal Judge Pitt

Between

Secretary of State for the Home Department

Appellant

and

JMI
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr Smart, Senior Home Office Presenting Officer
For the Respondent: Mr Bedford, instructed by Genesis Law Associates

DETERMINATION AND REASONS

1. This appeal is against the decision of First-tier Tribunal Judge Grimmett and Mr Getlevog promulgated on 22 December 2014 which allowed the respondent's appeal against deportation on Article 8 ECHR grounds.

2. The Secretary of State is the appellant here as she has appealed the decision of the First-tier Tribunal, permission being granted by First-tier Tribunal Judge Holmes in a decision dated 13 January 2015.

3. JMI has also cross-appealed, however, permission being granted by Deputy Upper Tribunal Judge Chamberlain in a decision dated 9 June 2015.

4. Both parties are appellants before me, therefore, and for ease of reference for the purposes of this decision I refer to the Secretary of State as the respondent and to JMI as the appellant, reflecting their positions before the First-tier Tribunal.

5. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an 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, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so in order to avoid a likelihood of serious harm arising to the appellant from the contents of his protection claim.

Background

6. JMI is a citizen of Somalia and was born in 1982.

7. His history is set out in detail in [1] of the determination of Judge Grimmett and I do not repeat it in full here. The applicant came to the UK in 1994 and his offending began in 1999 when he was convicted of possessing a bladed article in public and common assault. He has accrued at least 18 further offences since then, the most recent being 21 March 2013. The most serious is a robbery for which he was sentenced for 2½ years in July 2001. He also went to prison on a sentence of 6 months in 2011 in connection with an earlier suspended sentence for possession of an offensive weapon. He has committed 6 offences involving weapons, the last being in 2010.

8. Meanwhile, the respondent granted the appellant indefinite leave to remain on 19 March 2001. He was granted a travel document on 16 June 2003. He married a Somali national in Ethiopia in 2005 and she was granted entry clearance in October 2007. The couple now have four children, the oldest child, a Somali national, being born in Ethiopia in 2005 and the other three children, all British, being born in the UK after the wife came here in 2007.

9. It will be obvious even from the limited summary above why the respondent wishes to deport the appellant and that he relies on his family and private life to defeat deportation.

The Respondent's Grounds of Appeal - Article 8 ECHR

10. Judge Grimmett and Mr Getlevog did not find that the requirements of paragraphs 399 and 399A were met; see [5]. They found that it was reasonable for the children to go to Somalia where their mother was Somali and her family were still there.

11. I mention in passing that the references to reasonableness at [5] indicate that the panel applied the wrong test under paragraphs 399 and 399A, the version in force

applying the "unduly harsh" test for the children under 399 and a "very significant obstacles to his integration" test under 399A. There was also no assessment of whether it was "unduly harsh" (or reasonable) for the children to remain in the UK without the appellant. Those were not points raised before me, however, the parties appearing to agree that they were not material as the appellant could not meet the correct provisions of the Immigration Rules.

12. At [7] the panel proceeded to consider whether there were "exceptional" circumstances that could defeat deportation, finding that there were. For what it is worth, the correct test from paragraph 398 that the panel should have applied is "very compelling circumstances"; nothing material arose before me on that point.

13. In any event, there is no reference at all in the "exceptionality" consideration to the mandatory requirements of sections 117A-C of the Nationality, Immigration and Asylum Act 2002. Weight had to be given to the public interest in deportation under paragraph 117C and to the public interest in effective immigration control under paragraph 117B. The panel at [7], [9], [11] and [12] appears to undermine these provisions by finding the failure to take deportation action earlier meant that the respondent "has not shown why there is now a public interest" in deporting the appellant. Consideration had to be given to the finances of the family under s.117B. The appellant's private life can rightly be characterised as precarious given his offending since 1999, notwithstanding his indefinite leave; see AM (S 117B) Malawi [2015] UKUT 0260 (IAC). There is no reference to this or to the family's finances in the determination.

14. The failure to apply sections 117A-C, in my view, was a material error on a point of law such that the decision has to be set aside to be re-made.

15. Further, there is no reference to the undisputed failure to meet the Immigration Rules and need to look for something very compelling beyond those provisions. That was not in accordance with the guidance of Court of Appeal on the need to approach the exceptionality assessment "through the lens of the new rules" as in SSHD v AJ (Angola) [2014] EWCA Civ 1636 at [39] and [40]. The assessment had to identify very compelling matters beyond those already provided for by paragraphs 399 and 399A.

16. The failure to approach the "very compelling circumstances" assessment correctly was also a material error on a point of law such that the decision had to be set aside to be re-made.

The Appellant's Grounds of Appeal – the Refugee Convention

17. The appellant raised asylum and Article 3 ECHR grounds before the First-tier Tribunal in his appeal form at boxes 1 and 2. He maintained those grounds in his witness statement at [30] and it was put to the First-tier Tribunal in the skeleton argument at [16] to [18]. The First-tier Tribunal decision does not show any consideration or decision on those matters. Mr Smart did not concede the ground but indicated that it was a difficult one to defend. In my judgement it is a clear error of law requiring set aside and re-making of the asylum and Article 3 claims.

Decision

18. The decision of the First-tier Tribunal disclosed an error on a point of law and is set aside and will be remade *de novo* on all grounds.

19. Following paragraph 7.2 (b) of Part 3 of the Senior President's Practice Statement dated 25 September 2012, that the nature of the fact finding that will have to take place if an error of law is found is such that it is appropriate to remit the appeal to the First-tier Tribunal to be re-made.

Signed:  Date: 8 September 2015

Upper Tribunal Judge Pitt