Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/00002/2015

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision & Reasons Promulgated**
on 8th February 2016	**On 23rd February 2016**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

[S A]

Respondent

Representation:
For the Appellant: Mr M Mathews, Senior Presenting Officer
For the Respondent: Mr S Winter, Advocate, instructed by Latta & Co., Solicitors

DETERMINATION AND REASONS

1. The parties are as described above, but the rest of this determination refers to them as they were in the First-tier Tribunal.

2. The appellant is a citizen of Somalia, born on 6th July 1980. He has not sought an anonymity order. His immigration and criminal history is set out at the beginning of the SSHD's decision dated 19th February 2015.

3. The respondent decided to refuse the appellant's protection and human rights claim; to certify under section 72 of the 2002 Act that he is presumed to have been convicted of a particularly serious crime and to

constitute a danger to the community of the UK; and to proceed with his deportation as a foreign criminal, being conducive to the public good and in the public interest.

4. By decision promulgated on 6th August 2015 a panel of the First-tier Tribunal comprising Judge Kempton and Mr A Armitage allowed the appellant's appeal "on humanitarian protection grounds, human rights grounds and under Immigration Rules 397 and 399A".

5. It became common ground in course of submissions in the Upper Tribunal that the decision contains a typographical error at the end, and that the panel intended to say that the appeal was allowed under Rule 399(a) not 399A.

6. The grounds on which the SSHD was granted permission to appeal to the Upper Tribunal are set out in 11 paragraphs. 1 and 2 are narrative only.

7. Paragraph 3 points out that the panel did not decide whether the presumption in terms of section 72 was rebutted. It is acknowledged that the omission may not be material, but Mr Mathews submitted that it is nevertheless serious because it overlaps with other issues in the case and if the certificate were upheld that would factor into the ultimate assessment.

8. Mr Winter acknowledged there was error in this respect, but said that it is not material.

9. Paragraph 4 of the grounds points out that the respondent's decision also excluded the appellant from humanitarian protection under paragraph 339D of the Immigration Rules. The panel sets out paragraph 339D at paragraph 21 of its decision but goes on at paragraph 45 to find that the appellant "ought to be granted humanitarian protection" without any reference to the exclusion point. This turned on considerations similar to the section 72 presumption. Nor was the panel entitled to find that his appeal should also be allowed "under Article 3 of the ECHR" (also at paragraph 45) without resolving the point. In any event, Mr Mathews submitted, the decision contained no reasons to justify a grant of humanitarian protection, or protection under Article 3, or no adequate reasons.

10. Paragraph 5 goes on to criticise further the adequacy of the reasoning for the panel's Article 3 finding. Insofar as the panel had in mind the appellant's mental health, the high threshold was not approached. Although the panel founded upon the appellant ending up in an IDP camp, it did not explain how that would come about or how it would involve a breach of Article 3. Mr Mathews pointed out that there was no clear analysis in the part of the decision which comes under the heading "Asylum Claim" at paragraphs 42 to 46 and which ends by finding no real risk of persecution on account of a breach of the Refugee Convention. Insofar as the panel notes the appellant's educational background in the

UK, there is no reason to think that it is such that he is particularly disadvantaged in Somalia in the labour market or otherwise. The panel recorded competing submissions regarding the situation in Mogadishu (paragraphs 37 to 39) but did not say why they preferred one submission over the other, and failed to refer to background evidence or to the country guidance case of *MOJ*. Mr Mathews submitted that the panel's findings on the appellant's protection needs simply could not stand.

11. Mr Winter's position on these grounds was again that while error might be disclosed, it was not material to the outcome. He also said that on Article 3 the panel did give adequate reasons to support the conclusion that there was a risk of ending up in an IDP camp.

12. Ground 6 stems from the narration in the respondent's decision at page 2 that on 17th April 2012 an email from the Metropolitan Police confirmed that the appellant had been arrested in Morocco in possession of what was believed to be a stolen UK vehicle. Although he was thereafter excluded from the UK he re-entered (by some unknown means) and came to the attention of the SSHD next when convicted at Trafford Magistrates' Court on 19th May 2014. At paragraph 2 of the decision the panel says that the appellant disputed that he had ever been to Morocco, that there was no evidence of the matter, that it was not pursued at the hearing and that they accordingly concluded it to be an error in the respondent's summary. Paragraph 6 of the grounds says that the panel's assertion is an error, and the fact that the matter was not pursued at the hearing could not mean that there was no exclusion order. Mr Mathews said this disclosed a further error of approach.

13. Mr Winter said that there had been no substantial evidence of the appellant having been in Morocco, and that this was a side issue on which nothing turned.

14. Neither side seemed quite sure what to make of ground 6, and I find it an odd matter. It is correct that the respondent did not produce the underlying or most proximate source of the information that the appellant left the country and went to Morocco, with the further inference that he re-entered the UK unlawfully. The appellant denied this in his statement, saying he had never been out of the country. Neither side in the First-tier Tribunal appears to have made much of it. In my view, the panel might well have observed that the authorities in Morocco and the Metropolitan Police have no reason to make up an allegation that the appellant was in Morocco, while he has reason to deny it, and he has such a compendious record of dishonesty that everything he says should be treated with suspicion. The panel might have found it difficult to reach a conclusion one way or the other, but I do not see why they should have thought this to be an *error* creeping out of nowhere into the respondent's summary. The present ground logically points out that non-explanation of the issue at the hearing did not mean that there was no exclusion order, but that is not what the panel found. The panel found that there had been no exit from and re-entry to the UK. Why they thought so is a mystery.

15. Paragraph 7 of the grounds complains that the panel give inadequate reasons for the finding that the appellant's ex-spouse now resides in Ghana, and has little or no involvement in the lives of their two children. The ground says that although she provided a statement or a letter she did not attend court and there was no "independent third party evidence e.g. from Social Services to verify that she had permanently left the UK and had therefore no involvement in the children's lives". Mr Mathews submitted that the panel failed to tackle the issue.

16. Mr Winter in response pointed out that the evidence *was* before the panel. In her statement the mother said that she had effectively given up any involvement with the two children. The background was that the behavioural problems of the older child were a principal cause of the breakdown of the relationship. Mr Winter pointed to item X of the appellant's bundle in the First-tier Tribunal, being letters from Springfield Community Primary School regarding the wellbeing of the children. This narrates that the appellant has been known to the school as the custodial parent and that he has been the primary carer for almost four years. It is apparent that there were concerns during the appellant's custodial and immigration detention that there was no other legally identified adult to act regarding their welfare and that without him the children were likely to be taken into care. Mr Winter directed attention in particular to paragraphs 15, 16 and 36 of the panel's decision and said that it was plain that the panel had ample evidence that the mother of the children was in Ghana and had no involvement, and that responsibility lay with the appellant and to a lesser extent with his relatives. He submitted that this was more than sufficient to justify the panel's conclusions at paragraph 52 to 55, which are highly favourable, based on the best interests of the children, with the alternative "very poor and unacceptable outcome" of their being taken into care.

17. Ground 8 makes two points – firstly, that the panel did not adequately explain how and why deportation would be unduly harsh on the children, and secondly that the conclusion that deportation "is not conducive to the public good in terms of Rule 398(b)" is simply wrong in law. Mr Mathews submitted that it was a glaring legal error for the panel to conclude that deportation was not conducive to the public good, an issue settled by statute and not open to the panel to re-visit. He acknowledged that the panel did say at paragraph 64 that there was a public interest in deportation, but that observation was in context of another legal error (ground 10) and did not serve to correct the previous error.

18. Mr Winter on the first point in Ground 8 said that it was simply wrong for the SSHD to say that the appellant "clearly had little involvement in the children's lives". The evidence was entirely to the contrary. On the second point, he acknowledged that the panel's statement was wrong as a matter of law. However, he said that this point also was cancelled out because the panel's answer to the ultimate question was a sustainable one.

19. Paragraph 9 of the grounds says that the panel's treatment of sections 117A to D of the 2002 Act, within the context of the Rules, was inapt, the Rules in respect of deportation of foreign criminals being a complete code – *Bossade* [2015] UKUT 00415. Mr Mathews drew attention also to *KMO* [2015] UKUT 543.

20. Mr Winter submitted that the panel may have been confused in its approach to the interaction between the Immigration Rules and Part 5A of the 2002 Act, but that did not disclose anything material.

21. Paragraph 10 of the grounds criticises the panel for conducting a "brief freestanding Article 8 analysis" and for purporting to allow the appeal on that basis also.

22. Mr Winter similarly submitted that any separate analysis in terms of Article 8 was incidental, and was not the real reason for the favourable outcome.

23. Paragraph 10 does disclose another error. It is well established that the deportation provisions form a complete code, leaving no scope for a separate and freestanding Article 8 analysis. The answer in such a case emerges from the Rules; in this case it must ultimately turn on the "unduly harsh" consideration.

24. There is also an error within an error here, in relation to what the panel said about the impact on the public purse. As the SSHD points out, there is little or no evidence that the appellant has ever provided for his children or that they have ever been other than dependent on the public purse.

25. There will almost inevitably be considerable public expense, whatever the outcome of these proceedings; although the panel may well have been right to the extent that the expense is likely to be even greater, in absence of the appellant.

26. Paragraph 11 of the grounds submits, "It is simply not clear how the absence of a recidivist criminal who has limited involvement with the children would be unduly harsh on them". This ground encapsulates the ultimate issue, but it is again plainly wrong on the facts. The appellant is a recidivist criminal (although it might be observed that his more serious sentences and periods of custody are prior to his life as a parent) but the SSHD's quarrel with the panel's view of what would be unduly harsh for the children is *not* based on a correct appreciation of the evidence and of the panel's conclusions in this respect. The ground repeats the assertion of limited involvement, which does not accord with the findings in fact, and would not be justified on any sensible view of the evidence.

27. I have recorded the grounds and competing submissions, and to some extent sought to resolve them point by point, prior to dealing with the ultimate submissions.

28. Having heard all the submissions, as mentioned above, both sides were in agreement that for paragraph 399A the decision should read 399(a). Mr

Mathews thought the reference to paragraph 397 was also an error. He accepted in light of the evidence and findings to which Mr Winter referred that the criticism in the SSHD's grounds that the appellant had little involvement in the children's lives went too far.

29. The final submission for the SSHD was that the decision disclosed a series of legal errors, such that the final conclusion on whether the impact on the children would be unduly harsh could not be sustained.

30. Mr Winter's final submission was that while it could not be said that the decision was free from error, it did identify and answer the ultimate question whether deportation of the appellant would be unduly harsh in respect of the effect on the children, and therefore did not require to be set aside and re-visited.

31. The panel has gone significantly astray on several legal aspects. These errors have been picked off one by one in the grounds, and need not be repeated. However, the SSHD's grounds go wrong and are indeed misleading on the nature of the evidence and of the facts. The appellant is a recidivist whose deportation would be conducive to the public good, but there was ample evidence before the panel, clearly recorded in its decision, to justify its conclusions that they are more active and much happier having their father back; that there is no other carer and it is highly likely that they would be taken into care, with "far-reaching consequences" especially for the older child; and that the appellant is an excellent father and the children love living with him where they feel safe and secure, with a big improvement in their behaviour since he returned (paragraph 55). At paragraph 67 the panel concluded that these were:

> "… given the considerable weight of family and professional witness evidence … in support of the appellant … very compelling circumstances, taking into account the needs of his children and the lack of any other person in the family able or willing to look after them".

32. The further conclusion at paragraph 67 that deportation would have "devastating and life changing effects on the children" does not go any further than the panel was entitled to hold.

33. While preparing this decision I have noted the case of *Suckoo* [2016] EWCA Civ 39, which has only just been reported and probably would not have been available to representatives. The case was somewhat similar to this one, in that the Court of Appeal found that the Upper Tribunal in allowing a deportation appeal had not followed the case law. The UT had failed:

> "… to recognise that the public interest in deportation of foreign criminals and Article 8 rights are not held in a suspenseful balance. As this court has repeatedly reiterated … the scales are weighed in favour of deportation unless there are circumstances which are sufficiently compelling (and therefore acceptable) to outweigh the public interest in deportation … there must be something very compelling to outweigh that public interest …"

The Court held that the UT had not made findings sufficiently compelling to outweigh the public interest, and that the legal error was not such that the UT decision could nevertheless stand. There had been "an insufficiently rigorous approach to Article 8, and the decision reached cannot be said to be the only decision open to a rational Tribunal on the evidence before it" (paragraph 44).

34. If the facts were as set out in the SSHD's grounds of appeal i.e. (a) there was no good reason to believe that the mother was absent from the children's lives, and (b) the appellant had little or no involvement with his children, then plainly the present decision would fall not only to be set aside but to be reversed. However, the SSHD's grounds (which are not the responsibility of Mr Mathews) are even more misleading on the facts than the First-tier Tribunal's decision is shaky on several points of law.

35. Notwithstanding that legal fragility, I find that the panel's resolution of the ultimate question, based on the facts of the case, is a legally justified one.

36. Each case is different. Although with some initial hesitation, given the errors along the way, I have come to the view that the First-tier Tribunal's conclusions on the unduly harsh consequences for the children of remaining in the UK without the person who is to be deported are so well justified that those legal errors played no significant part in their ultimate analysis. The legal side issues were thoroughly muddled, but the correct ultimate question in terms of Rule 399(a) was arrived at. The rest is immaterial. The panel's analysis of the *facts*, going to that ultimate question, was clear and well justified. There is nothing legally wrong with the conclusion that the facts of the case amounted to the very compelling circumstances required by the scheme of the statute law and the Immigration Rules.

37. The decision of the First-tier Tribunal is **set aside** and remade to the extent only of reformulating the outcome thus: the appeal is **allowed under paragraph 399(a) of the Immigration Rules**.

Upper Tribunal Judge Macleman

16 February 2016