Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: RP/00089/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On Friday 22 July 2016	**On Wednesday 27 July 2016**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR DAHIR MOHAMED AHMED
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr T Wilding, Senior Home Office Presenting Officer
For the Respondent: Ms K McCarthy, Counsel instructed by Scott Moncrieff solicitors

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
No anonymity order was made by the First-tier Tribunal. I find that no particular issues arise on the facts of this case that give rise to the need for a direction. For this reason no anonymity direction is made.

DECISION AND REASONS

Background

1. This is an appeal by the Secretary of State for the Home Department. For ease of reference, I refer below to the parties as they were in the First-Tier Tribunal albeit that the Secretary of State is technically the Appellant in this particular appeal. The Secretary of State appeals against a decision of First-Tier Tribunal Judge S J Clarke promulgated on 29 April 2016 ("the Decision") allowing the Appellant's appeal against the Secretary of State's decision dated 28 September 2015 refusing his

human rights claim and ceasing his refugee status ("the Rules"). The Judge accepted that the Respondent was entitled to cease his refugee status on the basis of durable change of circumstances in his home country of Somalia but allowed his appeal on the basis that his deportation there would not be proportionate.

2. The Appellant is a citizen of Somalia and a member of a minority clan in Mogadishu. He came to the UK in 2004 having lived previously in Ethiopia for four years. The Judge accepted that he last lived in Mogadishu when he was five years old ([13]). His family live in the UK. His mother is elderly. He has one brother who is married with his own family to support. Another brother is unemployed and he has a sister who has her own family and is supported by her husband. The Appellant has two children from a relationship in the UK but at present is not able to have contact with them as the Appellant's wife obtained a restraining order against him.

3. The Appellant's mother arrived in the UK in 2001 and was given leave to remain as a refugee in December 2001. It was as a dependent of his mother that the Appellant entered the UK and was granted indefinite leave to remain. On 29 September 2010, the Appellant was convicted for criminal damage and sentenced to six months' imprisonment. He was served with a warning letter regarding his immigration status. On 10 May 2013, the Appellant was once again convicted of an offence of "harassment – put in fear of violence" and was sentenced to twelve months' imprisonment wholly suspended for eighteen months. On 23 August 2013, the Appellant was convicted for breach of conditions and his previously reduced sentence of eight months was activated.

4. The Respondent gave notification on 26 February 2015 of the Appellant's liability to be deported. It is worth noting at this stage that the deportation action proceeds under section 3(5)(a) Immigration Act 1971 (on the basis that his presence in the UK is not conducive to the public good) and not under the automatic deportation provisions of the UK Borders Act 2007. That is because it is accepted by the Respondent that the Appellant does not fall within the automatic deportation provisions because, although he has been sentenced to more than twelve months' imprisonment in total, that is as a result of the aggregation of two sentences and not one sentence of that duration. That becomes relevant when I come to consider the error of law alleged in the Decision. The Respondent gave as a reason for the deportation action that the Appellant had been convicted on nine occasions to a total of thirteen offences between May 2008 and August 2014.

5. On 26 May 2015, the Respondent gave notice to the Appellant of her intention to cease his refugee status. She also informed the UNHCR of that intention on 9 June 2015. She received representations from UNHCR on 3 July 2015. She also received representations from the Appellant and also from his solicitors in relation both to the decision to cease his refugee status and in relation to his human rights. On 26 September 2015, the Respondent made the decision which is under

appeal in this case. When dealing with the Appellant's human rights, the Respondent considered the position applying the Immigration Rules at paragraphs 398, 399 and 399A. It was common ground before me that this was incorrect as the Appellant is not a "foreign criminal" as defined because his sentences only reach the twelve months' threshold by reason of the aggregation of more than one sentence. The Respondent did not decide that the Appellant is a foreign criminal on the basis that his offences had caused very serious harm or that he is a persistent offender applying paragraph 398(c).

6. As I have already noted, by the Decision, Judge Clarke allowed the appeal on the basis that deportation would breach the Appellant's human rights, specifically in relation to Article 8 ECHR. In so doing, she accepted that the Respondent was wrong to have applied the Immigration Rules relating to deportation and Article 8. She found as a result that the Respondent's decision was "not in accordance with the law". She nonetheless went on to consider whether the decision to deport was proportionate. She found that it was not.

7. Permission to appeal the Decision was granted by Upper Tribunal Judge Macleman on 16 June 2016 on the basis that it was arguable that, having found that the Respondent's decision was not in accordance with the law, the Judge should not have gone on to consider proportionality. He did not exclude though the Respondent's second ground.

Grounds of appeal and submissions

8. The Respondent raises two grounds. The first is that, having regard to what was said by the Court of Appeal in Mirza and others v Secretary of State for the Home Department [2011] EWCA Civ 159, if the Judge was right to find that the interference was not in accordance with the law at the third stage of Razgar, there was no basis on which to go on to consider proportionality. If the Judge was right in that view, it is submitted, the proper course is to remit to the Respondent to re-take the decision. Mr Wilding accepted that, as this is a case under the post Immigration Act 2014 regime, this would involve allowing the appeal on Article 8 grounds but noting that the Respondent could reconsider the decision applying the right legal principles.

9. The Respondent's second ground concerns the way in which the Judge dealt with the proportionality assessment. It is submitted that the Judge has given inadequate consideration to the public interest in deporting the Appellant as someone with the criminal convictions which he has amassed. In fact, Ms McCarthy very fairly accepted in response to a question from me that it is difficult to see where in the Decision the Judge has given any consideration or weight to that public interest.

10. Mr Wilding also submitted that the Judge was wrong in any event to find that the interference was not in accordance with the law. He accepted that, if the Respondent had made the decision to deport applying the wrong legislation, it would have been open to the Judge to

find that the interference was not in accordance with the law as the Appellant would not then be a person who could be deported under the power used. That though is not this case. The mistake made by the Respondent was in applying the Rules when considering proportionality under Article 8. That did not render the deportation action unlawful. It rendered the Respondent's approach to proportionality mistaken but no more.

11. Under the post Immigration Act 2014 appeal provisions, the issue for the Judge is whether removal (deportation) is contrary to section 6 Human Rights Act 2000. The Tribunal as a public body and in accordance with well-established principles has to consider Article 8 for itself. This is not a case where the Judge was considering under the previous appeal regime whether the decision under appeal was in accordance with the law. Mr Wilding submitted that the Judge appeared to have confused the two.

12. Looking at the way in which the Judge approached proportionality, Mr Wilding submitted that the only consideration of the balance between the Appellant's rights and the public interest appears at [32] of the Decision. That shows no reflection of the public interest in deportation as a result of the Appellant's criminal offending. The only thing there considered is that the Respondent applied the wrong Rules and that there are features in the Appellant's case which are "compelling".

13. I raised with Ms McCarthy how the approach at [32] could be defended as lawful, particularly in the taking into account of the Respondent's mistake as diminishing the public interest. She accepted that the Judge should not have taken that into account but submitted that was not in fact what the Judge had done. She submitted that what the Judge intended to convey was that the application of the wrong Rules logically contaminates the proportionality assessment because the offending is not as serious as the Respondent contended. She accepted that [32] is badly worded but said it was either not an error or, if it was, it was not material. The Judge had considered whether deportation action is outweighed by the factors in the Appellant's case and found that it was. She accepted "compelling circumstances" is the wrong test but submitted that, if anything, this is too high a test and any error could not therefore be material.

14. Ms McCarthy also asked that, if I found that there is a material error I should set aside the Decision as a whole and not simply the finding in relation to the human rights claim. She accepted that the Appellant had not cross appealed in relation to the finding that his refugee status could be revoked and nor had any rule 24 response been submitted on this point. She submitted however that the Respondent's mistake infected her decision to cease the Appellant's refugee status. Put another way, had it not been for the Respondent's mistaken decision, no action would have been taken to revoke his leave as a refugee.

15. Mr Wilding objected to me dealing with the Judge's finding in relation to the cessation of status. He pointed out that the Respondent's action was to deport under the 1971 Act which was and is legally correct. It was as a result of that deportation action that a decision was taken to cease the Appellant's status as it followed that, unless that was done, the Appellant could not be physically deported in any event. The Respondent had written to the Appellant about ceasing his refugee status months before the decision under appeal where the mistake was made in relation to the Article 8 consideration. That mistake had no bearing on the decision to revoke status. The Judge had considered cessation and made a finding that status could be revoked based on a durable change in circumstances. That finding should stand irrespective of my finding in relation to the human rights claim

16. Both parties accepted that, if I found a material error of law, the appeal should be remitted to the First-tier Tribunal. The parties submitted that in fairness to the Appellant it was appropriate that there should be a proper first-instance assessment of proportionality as the Judge had made only limited findings in relation to the Appellant's family and private life ties. If I found there to be a material error in relation to ground one, however, Mr Wilding accepted that the appeal would fall to be allowed in any event and it would then be a matter for the Respondent whether to remake the decision applying Article 8 outside the Rules.

Discussion and conclusions

17. In order to consider the way in which the Judge approached Article 8, it is necessary to set out the relevant passage of the Decision as follows:-

> "[27] The Respondent made an error of law when she considered Article 8 in the Immigration Rules 398 and 399. Although this is a complete code in deportation cases, in this case, the Respondent wrongly concluded the Appellant is a "foreign criminal" when he does not fall within this category. The course left for me to take is to consider Article 8 outside the Immigration Rules. I conclude that there are compelling circumstances in this case requiring me to make an outside assessment. They include that no consideration can be made within the Rules, and that the Appellant had refugee status which has been removed, he has children with whom he would like to make contact with and their prospective right has not been considered.
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> [28] The Appellant has a family life with his adult relatives because they live together in the same accommodation and the Appellant is dependent upon them for financial as well as emotional support. Even if I am wrong about this finding, he clearly has a developed private life having lived in the UK since his arrival and his family members are a significant part of that private life.
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> [29] If the Appellant is deported there would be an interference with the family and private life. He would not see his adult family members who have been granted refugee status unless they visit Somalia, a country they fled. He has worked in the UK but is as yet not able to work. He has children in the UK and whilst there is an order restraining contact with the

wife and children, there is no evidence as to whether supervised contact could be resumed.

[30] The decision taken by the Respondent is not in accordance with the law because the Respondent wrongly concluded the Appellant is a "foreign criminal" when he does not fall within this category. In light of this error of law, the case should be allowed, because the Respondent has concluded that the Appellant should be deported when it is not in every case a convicted criminal faces deportation.

[31] Section 117B of the Nationality, Immigration and Asylum Act 2002 has to be considered when considering the issue of proportionality and weight given to the public interest in removal of the Appellant. I note that he speaks English, he had leave when he built up his family and private life in the UK. Clearly the Appellant does not have a genuine and subsisting parental relationship with his children.

[32] I move on to consider whether it is proportionate for the Appellant to be deported and I conclude that it is not proportionate because of the error of law by the Respondent as well as other features in the case which I have concluded are compelling circumstances. These outweigh any public interest in removing the Appellant because he entered with leave which was only removed when the refugee status was removed, and the trigger for that removal is the error of law by the Respondent in labelling the Appellant as a "foreign criminal". Looking at all of the features in the round, I allow the appeal."

18. The difficulties with the Decision in fact stem from [30] of the Decision. However, even before that point, it is not clear whether the Judge understood the process which an analysis of the Appellant's human rights required. I say that because, although the Judge notes at [27] that the Article 8 claim fell to be considered outside the Rules because the Rules did not apply in this case, she appears to have felt the need to justify that by reference to the Respondent's mistake in considering the claim within the Rules as well as requiring compelling considerations. This is not a Nagre type situation where the Rules apply unless there are factors outside the Rules which need to be considered in that context. This is a deportation case and therefore ordinarily the Rules would apply as a complete code. However, that complete code did not apply. The Judge should therefore have directed herself that the proper approach is the standard proportionality assessment outside the Rules applying the Razgar principles.

19. However, although those principles are not set out, I accept that this does appear to be the exercise which the Judge was embarking on at [28] and [29]. However, when the Judge reached the third question (whether the interference is in accordance with the law), the Judge has fallen into error. This is because the Judge has confused the consideration of the Article 8 claim with the decision which is the operative interference. The decision which was made to deport the Appellant in fact pre-dates the refusal of his human rights claim which is the decision under appeal.

20. There is also an indication in this paragraph that the Judge has confused the question of whether a decision is in accordance with the law and whether the Respondent's interference with the Appellant's

rights is in accordance with the law. It is perhaps understandable that the Judge confused the two due to the difference in the pre-Immigration Act 2014 and post 2014 Act schemes. However, the decision in which the mistake was made by the Respondent is not the decision to deport the Appellant which was made in February 2015 based on the (correct) legal power that his presence was not conducive to the public good. That is the decision which constitutes the interference. That was not unlawful; the Respondent had and has the power to deport the Appellant on the basis she employed. Accordingly, the interference with the Appellant's family and private life by reason of the decision to deport him is in accordance with the law. The Judge was wrong to find that it was not.

21. I also agree with the Respondent that, if the Judge had been right to find that the interference was not in accordance with the law, there was no basis on which to consider whether the interference was disproportionate. The assessment stops there. However, since I accept that the Judge was wrong to find that the interference was not in accordance with the law and since the Judge has gone on to assess proportionality, I also need to consider her findings in that regard since, if she has not erred in law in that assessment, any error in relation to the third question in Razgar would be immaterial.

22. The Judge rightly considered at [31] section 117B Nationality, Immigration and Asylum Act 2002. She was right to ignore section 117C as the Appellant is not a foreign criminal as defined for the purposes of that section. However, the public interest in deportation is not irrelevant simply because section 117C does not apply. As Mr Wilding pointed out, prior to the Rules and section 117C, the public interest in deportation of criminal offenders was already recognised as weighty (see OH (Serbia v Secretary of State for the Home Department [2008] EWCA Civ 694 at [16]). That public interest had to be considered and weighed in the balance.

23. In spite of Ms McCarthy's valiant attempts to defend [32] of the Decision as showing that the Judge adopted the right approach, I am quite unable to read into that paragraph any consideration of the public interest in deportation. Indeed, it seems to me that the Judge has committed a further error in taking into account the Respondent's mistaken approach as in some way reducing the public interest. That is irrelevant in the exercise which the Judge should have been carrying out of assessing Article 8 for herself. Conversely, though, there is no mention of the very relevant fact of the Appellant's offending as counterbalance to the weight to be given to the interference with the Appellant's family and private life.

24. For the above reasons, I find that the Judge made a material error of law in allowing the appeal on the basis that deportation would breach the Appellant's Article 8 rights.

25. As discussed at the hearing, the appropriate course is for the appeal to be remitted to the First-tier Tribunal for re-hearing of the human rights claim before a different Judge. I reject Ms McCarthy's submission that the Decision should be set aside in relation to cessation of the Appellant's refugee status. The Respondent's decision to revoke refugee status was made as a result of the Respondent's decision to deport the Appellant. As I have already noted, there is no unlawfulness in that decision and there is therefore no infection of the decision to cease status by the later mistake as to the application of the Article 8 Rules. The decision to cease status was made on the basis that there has been a durable change of circumstances in Somalia such that the Appellant's status can be revoked. It is of course the case that, absent the decision to deport the Appellant, the Respondent may not have taken that action. However, the decision to deport the Appellant is not infected by the mistaken approach to the Article 8 claim. The Judge has upheld the decision to cease status by application of the correct principles and law. There was no cross appeal in relation to those findings.

26. I therefore set aside the Decision insofar as it allows the Appellant's appeal on Article 8 grounds. I do not preserve any findings as a proper analysis of the proportionality assessment will require more in depth findings than have currently been made both in relation to the Appellant's family and private life and in relation to his criminal offending. In any event, his Article 8 rights will need to be assessed based on the circumstances pertaining at the date of the further hearing.

DECISION

The First-tier Tribunal decision did involve the making of an error on a point of law.

I set aside the Decision insofar as it allows the Appellant's appeal on Article 8 grounds. I remit the appeal to the First-Tier Tribunal for re-hearing with the direction that it be heard by another Judge of the First-Tier Tribunal.

Signed  Date 27 July 2016

Upper Tribunal Judge Smith