



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/01826/2016

THE IMMIGRATION ACTS

Heard at Field House
On 11 June 2018

Decision & Reasons Promulgated
On 21 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

Miss HALIM MOHAMED
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms P Solanki (counsel) instructed by IHRC Legal

For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Cohen promulgated on 8 August 2017, which dismissed the Appellant's appeal.

Background

3. The Appellant was born on 1 January 1955 and is a national of Somalia. On 23 March 2016 the Secretary of State refused the Appellant's application for leave to remain in the UK.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Cohen ("the Judge") dismissed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 25 April 2018 Upper Tribunal Judge Kekic gave permission to appeal stating

The appellant, a Somali national, challenges the decision of First-tier Tribunal Judge Cohen dismissing the appeal on human rights grounds (articles 3 and 8)

The application is filed two days late. There are arguments about it being unfair for the time to be calculated from the date of the dispatch rather than the date of receipt but those are without merit given that that is the norm. However, given the short delay, I extend time.

The grounds argue that the Judge erred in his approach to the country, expert and medical evidence for the reasons which are set out therein.

It is arguable that the Judge erred in the way alleged.

The Hearing

5. (a) For the appellant, Ms Solanki moved the grounds of appeal. She reminded me that there are three grounds of appeal

- (i) That the Judge erred in his approach to the country expert report
- (ii) That the Judge erred in his approach to the medical evidence produced, and
- (iii) That the Judge erred in his consideration of the background material relating to the availability of medical facilities in Somalia and in Tanzania.

(b) Ms Solanki took me to [21] of the decision and said that the Judge's reasons for placing little weight on a report prepared by Prof Aguilar are fundamentally flawed. She told me that the Judge failed to give adequate consideration to Prof Aguilar's experience and expertise, and failed to consider the reasoning leading to Prof Aguilar's succinct conclusions. She told me that the Judge placed undue weight on a typographical error, and then misinterpreted the role of plausibility in the report. She told me that the Judge's treatment of the expert report was superficial.

(c) Ms Solanki turned to the third ground of appeal and told me that the Judge had failed to take account of evidence and submissions in relation to the availability of medical facilities in Somalia and Tanzania. She read, at length, from the 24 page skeleton argument which was placed before the First-tier Tribunal and then took me to [22] and [23] of the decision. She told me that [22] of the decision contains “*a classic Mibanga error*”, because, there, the Judge uses his own credibility findings to reject medical evidence. She told me that [23] demonstrates the Judge did not understand the submissions made, because at [23] and [24] the Judge deals with article 3 ECHR – even though it has never been part of the appellant’s appeal that article 3 is engaged. Submissions in relation to the appellant’s mental health and the availability of adequate treatment drive at the article 8 ECHR grounds of appeal only. The appellant’s argument has always been that there are very significant obstacles to reintegration so she meets paragraph 276 ADE(1)(vi) of the rules. She told me that the Judge simply does not engage with the relevant legal test.

(d) Ms Solanki turned to the second ground of appeal and told me that at [22] the Judge’s rejection of the medical evidence is tied to his credibility findings, so that what is said at [22] is an error in terms of *Mibanga* 2005 EWCA Civ 367. Ms Solanki took me through a psychologist’s report, a letter from the appellant’s GP and a psychiatric report all of which were contained in the appellant’s bundle before the First-tier Tribunal.

(e) Ms Solanki urged me to set the decision aside and to remit this case to the First-tier Tribunal so that an entirely new fact-finding exercise can be undertaken.

6 (a) For the respondent, Mr Tarlow told me that the decision does not contain material errors of law. He told me that the Judge’s conclusions at [21] (in relation to the expert report) are conclusions that the Judge is entitled to reach. He told me that at [20] the Judge correctly took an earlier determination (relating to the appellant) as a starting point. Mr Tarlow told me that if there is an error at [22] of the decision, it is not a material error because the Judge’s conclusion is unassailable.

(b) Mr Tarlow told me that the decision contains conclusions well within the range of reasonable conclusions available to the Judge. He urged me to dismiss the appeal and allow the decision to stand.

Analysis

6. Between [1] and [12] the Judge sets out the background to the appellant’s appeal to the First-tier Tribunal. Between [6] and [9] the Judge sets out the appellant’s immigration history, and that the appellant’s earlier appeal was refused in a determination promulgated on 3 February 2014. The Judge correctly takes guidance from *Devaseelan* [2002] UKIAT 702 at [20] & [21] of the decision. Against that background the Judge moves on to consider the expert report at 21 of the decision.

7. At [21] the Judge finds that there is insufficient contained within the expert report to displace the finding in the 2014 decision of the First-tier Tribunal that the appellant has not lived in Somalia since 1998. One of the reasons given relies on a spelling error and is not a good reason for giving little weight to an expert report, but the other reasons are that there is a lack of detail in the expert report, that the conclusions are inadequately reasoned and that the expert relies on an assessment of plausibility.

8. At [22] the Judge turns to the medical evidence. The appellant's bundle contains a report from a psychologist, a report from a consultant psychiatrist and a letter from the appellant's GP. The Judge accepts the diagnoses provided, but then says that the illnesses have all occurred for reasons other than those given by the appellant, and for reasons other than those accepted by the authors of the medical reports.

9. In Ex parte Virjon B [2002] EWHC 1469, Forbes J found that an Adjudicator had been wrong to use adverse credibility findings as a basis for rejecting medical evidence without first considering the medical evidence itself. That too was the view of the Court of Appeal in the case of Mibanga 2005 EWCA Civ 367.

10. The error that the Judge makes is that he relies on his assessment of credibility to reject significant parts of the medical evidence. Detailed medical evidence is produced which provides the diagnoses that the Judge accepts, and which specifically identify the causes of the appellant's illnesses as the appellant's experience in Somalia. It is open to the Judge to reject that evidence but before doing so he must take a holistic view of all of the evidence and then provide clear reasons.

11. The error at [22] is material because it goes to the core of the appellant's claim, and, had the error not been made, a different conclusion could have been reached.

12. The Judge's error is compounded at [23] and [24] where the Judge considers article 3 ECHR grounds of appeal. That is not something that was before the Judge. What was argued before the First-tier is that the appellant's medical conditions form part of her article 8 ECHR grounds of appeal. There is then inadequate analysis of the impact of the appellant mental health conditions in the consideration of paragraph 276 ADE(1)(vi) of the rules.

13. I therefore find that the decision is tainted by material errors of law because the conclusions that the Judge reaches are not supported by adequate reasoning and the Judge's approach to the medical evidence is falwed - so that it is impossible for the objective reader to see how the Judge reached his conclusions. A fuller fact-finding exercise might have resulted in a different outcome to this appeal. I set the decision promulgated on 8 August 2017 aside.

14. I have already found material errors of law in the fact-finding process carried out by the First-tier in the decision promulgated on 8 August 2017. I therefore find that I cannot substitute my own decision because of the extent of the fact-finding exercise required to reach a just decision in this appeal.

Remittal to First-Tier Tribunal

15. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of September 2012 the case may be remitted to the First-tier Tribunal if the Upper Tribunal is satisfied that:

(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

16. In this case I have determined that the case should be remitted because a new fact-finding exercise is required. None of the findings of fact are to stand and a complete re hearing is necessary.

17. I remit the matter to the First-tier Tribunal sitting at Hatton Cross to be heard before any First-tier Judge other than Judge Cohen.

Decision

18. The decision of the First-tier Tribunal is tainted by material errors of law.

19. I set aside the Judge's decision promulgated on 8 August 2017. The appeal is remitted to the First-tier Tribunal to be determined of new.

Signed *Paul Doyle*

Date 18 June 2018

Deputy Upper Tribunal Judge Doyle