Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04308/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 September 2019	**On 18 September 2019**

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR J K
(ANONYMITY DIRECTION MADE)

Claimant

Representation:
For the Appellant: Mr C Avery, Senior Home Office Presenting Officer
For the Claimant: Ms M Sardar of Counsel, instructed by Turpin & Miller LLP

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an anonymity direction. Unless the Upper Tribunal or a court directs otherwise no report of these proceedings or any form of publication shall directly or indirectly identify either claimant or their family members.

1. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge Seelhoff promulgated 27 June 2019, allowing the claimant's appeal on Articles 3 and 8 ECHR against the decision of the respondent of 19 February 2019. The claimant

had appealed against the decision of the Secretary of State dated 19 February 2019 to refuse his human rights claim and to maintain the decision to deport.

2. First-tier Tribunal Judge Bristow refused permission on 19 July 2019. However, when the application was renewed to the Upper Tribunal Upper Tribunal Judge Rimington granted permission on 6 August 2019, pointing out that the claimant had been sentenced in 2009 to four years in prison for a sexual offence and again in 2017 for eighteen months for supplying drugs. Mr Avery also pointed out that there had been another sentence, a suspended sentence for failing to comply with the sex offender requirements. Judge Rimington found it arguable that the judge had not applied the test of very compelling circumstances properly in respect of Article 8 and did not appear to be aware of the case of Said v SSHD [2016] EWCA Civ 442, which put a gloss on the case of MOJ.

3. There are essentially two grounds of appeal: in relation to the judge's treatment of Article 3, and in relation to Article 8. In respect of Article 3 I am satisfied that the judge's approach was entirely flawed from the outset. It is clear from paragraph 33 of the decision that the judge regarded the burden as being on the respondent to demonstrate that the conditions were such in Somalia that Article 3 was not engaged. The judge considered there had been previous decisions, or that the respondent had accepted on a number of previous occasions, that the claimant was at risk on return and in the judge's view the respondent had provided no explanation as to why the circumstances would have changed since the last grant of leave. At paragraph 34 the judge stated:

> "There is a fundamental issue of fairness here in that the respondent failed to address this issue in the original decision despite it having been raised by the appellant's representatives. The respondent further failed to address it in response to specific directions from the Tribunal on the issue. In those circumstances I consider the Tribunal is bound by the earlier assessment of risk and there is likely ongoing risk on return such as would engage Article 3."

4. The judge's approach was completely wrong. The claimant's refugee status had been removed but he had been granted discretionary leave to remain. The judge should have made an assessment of the circumstances rather than starting with the conclusion and then considering his circumstances. Effectively, the outcome of the decision was predetermined by what was said in paragraph 34. The burden was on the claimant to demonstrate that Article 3 was engaged and the judge does not seem to have approached the matter in that way. For example, at the end of paragraph 36 the judge said, "I am not satisfied that there have been any changes to those circumstances that existed in 2016 and the respondent was not able to point me to any specific changes. This reinforces the conclusion I have reached on the Article 3 issue."

5. In the circumstances, the decision in relation to Article 3 cannot stand and is flawed by error of law.

6. I turn to consider the second ground in relation to Article 8. Because the claimant had previously been sentenced to a period of four years' imprisonment it follows that Section 117C of the 2002 Act applied and the public interest required his deportation

unless there were very compelling circumstances over and above those considered in Exceptions 1 and 2, which clearly in this case did not apply. The judge appears to have accepted this.

7. Ms Sardar has carefully taken me to sections of the decision where the judge has referred to the phrase 'very compelling' and that at paragraph 37 the judge states that he assessed the Article 8 issues in the context of Razgar but with regard to the provision and the Immigration Rules that it would take very compelling circumstances for removal to be disproportionate in the case of somebody who had received a sentence in excess of a year in prison but who did not fit within the exemptions. That was not an accurate statement of the law but it does support the suggestion that the judge had in mind the issue of very compelling circumstances.

8. However, reading the decision as a whole, I am not satisfied that the judge retained in mind the high threshold required of 'very compelling circumstances.' For example, at paragraph 39 the judge said it was considered that there are a number of respects in which the circumstances of the case are "exceptional and compelling." There was no reference there to 'very compelling.' Similarly, at the end of the decision at paragraph 55 the judge referred to the fact that the claimant's lack of connection to Somalia may present 'significant further obstacles to integration' on return. On the other hand, at paragraph 54, as Ms Sardar has pointed out, the judge said he found the circumstances of the case are "very compelling in the context of Article 8."

9. As stated, I am not satisfied that the judge has made a balanced assessment in relation to Article 8. I accept that there are paragraphs highlighted by Ms Sardar where the judge referenced the negative factors weighing against the claimant, the risk that he presents to wider society, and the public interest in ensuring that drugs and sexual offences are treated seriously. However, one of the difficulties with the decision is the judge's reliance on MOJ and his failure to take into account the decision in Said [2016] EWCA Civ 442. In Said it was pointed out that in its guidance in MOJ the Upper Tribunal had confused humanitarian protection with the issue of Article 3 even though at paragraph 422 of MOJ the Upper Tribunal had distinguished humanitarian protection from Article 3, it being stated that each case would fall to be decided on its own facts and there would need to be a careful assessment of all the circumstances of a particular individual. Whilst there has been some assessment of the claimant's circumstances, in relatively brief form, I find it is tainted and not properly balanced by the reliance on the MOJ guidance.

10. Putting all of that together, I find that the decision in respect of Article 8 is also flawed for error of law and cannot stand.

11. When a decision of the First-tier Tribunal has been set aside Section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions or it must be remade by the Upper Tribunal. It is not the role of the Upper Tribunal to be the primary factfinder. Where facts are left unclear as a result of the error of law decision on crucial issues at the heart of an appeal, effectively there has not been a valid determination of those issues.

12. In the circumstances, I relist this appeal for a fresh hearing in the First-tier Tribunal on the basis that it is a case which falls squarely within the Senior President's practice statement at paragraph 7.2.

13. Ms Sardar invited me to preserve some of the positive findings in respect of the claimant. However, to do so would put a constraint upon the First-tier Tribunal in what Mr Avery has pointed out are complex circumstances. There are extensive issues to be reconsidered and it would be unfair to the First-tier Tribunal to bind the Tribunal with positive findings. It will be for the First-tier Tribunal to make its own decision on all findings.

Decision

14. For the reasons set out above, the making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I remit the appeal to be decided afresh in the First-tier Tribunal in accordance with the Consequential Directions set out below.

Signed 

Upper Tribunal Judge Pickup

Dated 9 September 2019

Consequential Directions

1. The appeal is to be remitted to the First-tier Tribunal sitting at Hatton Cross;

2. The estimated length of hearing is three hours;

3. The appeal is to be decided afresh with no findings of fact preserved;

4. The appeal may be listed before any First-tier Tribunal Judge, with the exception of Judge Seelhoff and Judge Bristow.

Signed 

Upper Tribunal Judge Pickup

Dated 9 September 2019

To the Respondent
Fee Award

I make no fee award. The outcome of the appeal remains to be decided. In any event, no fee is payable in this case.

Signed 

Upper Tribunal Judge Pickup

Dated 9 September 2019