



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/02174/2018

THE IMMIGRATION ACTS

**Heard at Cardiff Civil Justice Centre
On 7 February 2019**

Decision & Reasons Promulgated

On 28 March 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE L J MURRAY

Between

**O D S
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Gardner

For the Respondent: Mr Howells, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Somalia. On 13 September 2017 he claimed asylum and humanitarian protection. His claim was rejected by the respondent in a decision dated 26 January 2018. The appellant appealed against that decision under Section 82 of the Nationality, Immigration and Asylum Act 2002. His appeal came before the First-tier Tribunal and was dismissed by First-tier Tribunal Judge Mathews in a decision promulgated on 29 October 2018 on all grounds.

2. The appellant sought permission to appeal against that decision and permission was granted by First-tier Tribunal Judge O’Keeffe in a decision dated 29 November 2018. Judge O’Keeffe found that it was arguable that the Judge’s finding that the appellant previously had a Somali passport was based in part on a mistake in finding of fact, namely that the appellant had disclosed a passport number on a previous Visa Application Form. It is stated in the grant that it is certainly arguable that this has influenced the Judge’s application of existing country guidance to the facts as found. It was also found to be arguable that the judge had failed to give proper consideration to the modification of the **N v United Kingdom [2005] UKHL 31** test as set out in **AM (Zimbabwe) v Secretary of State [2018] EWCA Civ 64**.
3. The appeal therefore comes before the Upper Tribunal in order to determine whether or not there was a material error or errors of law in the decision of the First-tier Tribunal.
4. At the hearing Mr Howells confirmed that notwithstanding the fact there was no Rule 24 response the respondent was contesting the appeal. I heard submissions from both representatives.
5. Ms Gardner submitted that the grounds were thorough and detailed. The first ground related to the First-tier Tribunal’s alleged failure to apply the proper test in relation to the appellant’s medical condition, namely Type 1 diabetes. It is submitted that the judge failed to reference the lead cases of **AM (Zimbabwe)** and **Paposhvili**. In paragraph 34 of the decision where the Judge’s reasoning was set out, there was no explicit reference to the relevant case law. The appellant needed access to four insulin injections a day and the expert evidence of Dr Goldwyn was that his health would decline. Even if it was not the case that the Judge had erred in failing to refer to relevant case law, the matters in grounds 2 and 3 had to be considered. There was a failure to take into account material factors. There was no acknowledgment in the decision of the additional complications affecting the appellant’s condition when the judge concluded that the appellant could work. It was accepted by the expert that there were significant complications which affected his ability to work but these were not considered in the determination. The appellant’s diabetes was not well controlled in the UK and according to the expert’s evidence, namely that of Dr Hoehne, he needed to be working four to five hours a day in order to be able to afford treatment. Further, he had never worked in a school and therefore was not a qualified maths teacher and that had not been addressed in terms of accessing treatment. Further, the Judge did not take into account that the rate of unemployment in Somalia was 66% in Mogadishu. The appellant had never lived in Mogadishu and had no family support there. Further, the Judge concluded that the appellant was not without significant financial support from abroad and that was irrational on the basis that it was accepted that he was in the UK and his diabetes was not under control and he had a chaotic lifestyle. The fact that he had friends who would provide him with a sofa was different from providing funds for the insulin he required. His family in the UAE

were migrant workers and low paid and unlikely to be able to provide financial support on return.

6. Further, in relation to the Judge's comments on his previous immigration applications, he had applied to join as a spouse and that relationship had broken up and there was no support from his former spouse.
7. In relation to ground 4 the appellant's evidence was that he did not have a passport and that had been his evidence throughout. He did not enter the UK on a passport and it added to the complications that he would have to fund a passport and insulin injections.
8. Mr Howells submitted that the judge clearly addressed himself at paragraph 34 of the decision in relation to the requisite test to be applied with regard to the medical evidence. The test was a point clearly and strongly made by Counsel on the day in his skeleton argument and the Judge noted listening with care. The Judge was not persuaded that the appellant would not have access to appropriate treatment and medical support and in the circumstances there would be any short term or medium term deterioration in his health. The form of words used by the Judge was similar to that at paragraph 40 of **AM (Zimbabwe)**.
9. Mr Howells then submitted that grounds 2 and 3 were interlinked and asserted that material factors were not taken into account. The evidence before the Judge was that he was educated in the United Arab Emirates and had unofficial work as a maths teacher and it was open to the Judge at paragraph 27 to find that he could generate a limited income as a maths teacher. It was also open to him to find that he had family and friends he could rely on when required. Paragraph 29 showed that the Judge was alive to the evidence of Dr Hoehne's report about the cost of his treatment in Mogadishu and Somaliland. The Judge's findings were reached on the basis that he would go to Somaliland where his clan was dominant where he lived and worked. The Judge was not contemplating him settling in Mogadishu but being there temporarily to make onward arrangements.
10. With regard to ground 4 it was accepted that there was an error in relation to the finding that he must have had a passport, however this was not a material error as the Judge noted at paragraph 31 that it might take several weeks in Mogadishu before he could find the support of clan and he referred to the presence in Mogadishu of Isaaq clan elders with the possibility that they would be able to help make arrangements for onward travel and this was dealt with at paragraph 31.

Discussion and Reasons

11. Ground 1 relates to the alleged failure to apply the proper test in relation to medical treatment and Article 3. The appellant argued that he was an insulin dependent diabetic and would be unable to access the required insulin if returned to Mogadishu and there was either a real risk of a significant reduction in life expectancy or that he would be subject to a

rapid and irreversible decline in his health resulting in intense suffering. The appellant's skeleton argument outlined the test and referred to the case of **AM (Zimbabwe)** in which it was held at paragraph 37 and 38 that the protection of Article 3 against removal in medical cases is now not confined to deathbed cases where death is already imminent when the applicant is in the removing country. It extends to cases where substantial grounds have been shown for believing that the applicant although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or a lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy. Therefore, the boundary of Article 3 protection has been shifted from being defined by imminence of death in the removing state to being defined by the imminence of intense suffering or death in the receiving state, which may only occur because of the non-availability in that state of the treatment which had previously been available in the removing state.

12. The First-tier Tribunal Judge noted at paragraph 24 that he had read the medical references and reports before him and accepted that the appellant was either a Type 1 diabetic or had a rare MODY type diabetes. He also found that he had further neurological symptoms and visual problems which are consistent with the condition. He accepted at paragraph 25 that he required four insulin injections a day to control his condition. He noted at paragraph 28 that Dr Hoehne confirmed that all major cities in Somaliland had drugs including insulin available to treat diabetes and that the particular issue was financial capability rather than availability of medication. He also noted that many households have fridges required to store drugs. At paragraph 29 he found on the evidence that the appellant had the ability to fund the medication he required from his employable skills in mathematics, together with the support of family and friends that in his judgment supported him in the UK. He also noted that at paragraph 35 of the report Dr Hoehne assessed the cost of treatment in Somalia at about US\$200 and a man's potential earning to be between US\$200 to US\$400 in Hargeisa, and US\$150 to US\$350 in Mogadishu. He found that with the support of well-wishers that the appellant had had since 2013 he could fund the medication he required which was available in Somalia either in Hargeisa or Mogadishu. He then found at paragraph 34 that he would have access to appropriate treatment and medical support and said:

"It follows that I am not persuaded that his return from the United Kingdom will cause any short term deterioration in his health or medium term deterioration in his health. I have considered all the authorities advanced before me but simply do not find that he is at risk of health deterioration as claimed. I find that he will be able to access the medication that will allow many years of stable health".

13. The Judge therefore specifically noted that he was taking into account the authorities he had before him but found on the basis of the evidence that the appellant would have access to employment and funds from well-

wishers which would mean that he could afford the insulin he required. I find that if the Judge was correct in the sense that it was open to him to find as a fact that the appellant would be able to afford the requisite medication and that that would mean there would not be either a short term or a medium term deterioration in his condition, it could not be material that he did not specifically refer to the test in **AM (Zimbabwe)** because any reference or the failure to make any reference would have not made any difference to the outcome as on the basis of his findings there was no risk of either death or intense suffering in the receiving state. In the circumstances therefore, in the light of his findings there was no need for him to expressly refer to the test in **AM**.

14. In order for the appellant to succeed in this appeal he must demonstrate that material factors were not taken into account and/or the findings in regard to the appellant's ability to access insulin and findings in relation to family support were irrational.
15. It is asserted in relation to ground 2 that material evidence was not taken into account in concluding that the appellant was able to work and that such employment would be sufficient to pay for his insulin. It is said that the Judge failed to take into account that his diabetes was not controlled in the UK and that he had generalised upper limb large fibre neuropathy and damaged sight which ultimately would lead to blindness. Further, it is said that the respondent's own evidence was not taken into account which establishes that Type 1 diabetics either die or leave the country, and that the Judge's analysis of the likelihood of being able to obtain four doses of chilled insulin a day ought to have been based on the practical reality of what the statistical evidence established rather than on the hypothetical possibility of obtaining sufficient work. It is also said that the judge failed to take into account Dr Hoehne's evidence at paragraph 42 and 44 that he would need to work consistently for the necessary three to four hours each day, five days a week to be able to afford the necessary insulin to keep him alive and the increased hospital costs that he would be likely to encounter due to his medical complications arising from diabetes which would increase by US\$200 to US\$300 for every stay in hospital. It is also submitted that the judge failed to take into account that unemployment in Mogadishu was at 66% and that the appellant was a relatively old man in Somali terms at the age of 36 who had never lived in Mogadishu or southern Somalia and had no friends or family there, and that he also failed to take into account country guidance in **AM and others [2011] UKUT 00445** that he would be unlikely to get the assistance from the Isaaq clan in the city.
16. I have already set out the Judge's findings in relation to his ability to work on return and the ability to access treatment.
17. The appellant relied on two key reports, namely the medicolegal report of Charmian Goldwyn dated 4 October 2018 and the report of Markus Hoehne PhD, Somali expert from the University of Leipzig, undated. It is not in dispute that either expert had the expertise to comment on this

case. According to Dr Goldwyn the appellant has the worst HbA1c test results that he has ever seen and his results have been very serious. He describes a chaotic lifestyle and sofa-surfing which makes it difficult for him to maintain good control. There is reference to a report from consultant clinical neurophysiologists which states that there is neurophysiological evidence of generalised upper limb large fibre motor peripheral neuropathy due to diabetes. In his clinical opinion the appellant has diabetes which is under poor control and if returned to Somalia and if he does not get the treatment he requires he states at paragraph 58 that he cannot say whether he will die first from diabetic coma or whether he will get an overwhelming infection for which there may not be treatment in Somalia. In his opinion there will be a serious and rapid decline in his health, he would be likely to die from a hypoglycaemic coma and problems relating to eyesight and peripheral neuropathy would also become more evident. His cardiovascular system could also become compromised and it would be impossible to quantify how soon he would die. Without that and the absence of injectable insulin his health would deteriorate quickly, leading to death. He said there is a real risk of death. It is therefore clear that in the absence of being able to obtain the insulin he requires he will undoubtedly satisfy the test in **AM**.

18. Dr Hoehne reports on the situation in Somalia, specifically with regard to this ground as to healthcare in general in Somalia, and specifically treatment for diabetes and the appellant's ability to obtain it. He states that in all major cities in Somaliland although there can be shortages many drugs are available. Drugs for diabetes Type 1 medications are widely available and accessible for all people and the issue is financial capability. Many households have fridges. Many drugs can be found most of the time, at least in urban centres. The cost in all places is the issue. At paragraph 35 he states that for the medication he would face costs of UD\$200 and the appellant would need US\$250 in Hargeisa in order to secure a stable supply and in Mogadishu the cost would be \$20 to \$30 less monthly. In relation to the issue of whether the appellant would be able to gain a stable income, he states that unemployment amongst people aged 50 to 64 is 54% in Somalia and in Mogadishu there is 66% unemployment and it is the world's most fragile city. He states that those who find jobs usually have substantial family support and additionally they would ideally have a university degree or a certificate in a profession that is hardly regarded. He estimates that as a private teacher he could earn between US\$200 and US\$400 a month, possibly a bit less, in Hargeisa, and \$150 to \$350 in Mogadishu depending on the number of classes he was teaching. A problem he foresees is that if he is unable to regularly teach for several hours a week, three to four hours a day, five days a week, due to his health issues and of his health deteriorating there was no unemployment money or Social Services money. He would need at least \$350 to \$400 a month. He concludes at paragraph 44 that the appellant would face severe challenges to establishing himself economically. He assumes that health problems would prevent him from working stably full-time which

would lead to economic destitution having a negative impact on his health and a downward spiral.

19. I conclude, having had regard to the expert evidence that I have summarised and the relevant passages in the decision of the First-tier Tribunal, that adequate consideration was not given to material factors in the medical evidence as highlighted in the grounds, namely the complications arising out of the appellant's diabetes, the fact that the appellant would need to work consistently and the fact that even in the UK his diabetes is poorly managed, the high unemployment rate and the increased costs as a result of medical complications. In the absence of any reference to these difficulties highlighted by the experts, I find that the Judge's conclusion that the appellant would be able to access insulin due to his ability to work is flawed.
20. It is also said in ground 3 that the findings in relation to finance are irrational and I find that the Judge did take immaterial factors into account at paragraph 23 in that it does not follow from the fact that the appellant made previous applications that he would have financial support in view of the fact that his marriage has ended.
21. The respondent concedes that the judge made an error of fact in relation to ground 4 but argued that it was not material. The evidence before the court from the appellant was that he did not have a passport but there was reference at A1 of the appellant's bundle to a passport number otherwise all other references throughout the material were to the absence of a passport. I accept the appellant's submission that the reference at A1 was in fact simply the assertion of his date of birth and it cannot safely be concluded from this that the appellant had a passport. The appellant argued in his skeleton argument that the assessment that the appellant as a member of the Isaaq clan would be able to secure a passport in order to travel to Somaliland and be assisted by officials in Mogadishu was contrary to the extant country guidance in **AMM** that was clearly referenced in the appellant's skeleton argument.
22. It is clear that returns are to Mogadishu and that from the country guidance in **AMM** a person from Somaliland will not be able to travel overland without a risk of Article 3 ill-treatment. The Tribunal held that Isaaq clan members were unlikely to be favourably disposed to the Somaliland authorities and to have much to offer by way of assistance to a person arriving in Mogadishu who wished to go to Somaliland. Further, that in most cases it would be impractical for returnees to obtain old green passports in southern and central Somalia in order to be able to make the return journey to Somaliland because of the dangers in getting such documentation. I therefore find the Judge's conclusion that the appellant would be able to obtain a passport or had a passport in the past are also material errors.

23. For those reasons I conclude that the appeal should be remitted to the First-tier Tribunal for rehearing with no findings preserved before a judge other than Judge Mathews.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 26 March 2019

A handwritten signature in black ink, appearing to be 'L J Murray', enclosed in a thin black rectangular box.

Deputy Upper Tribunal Judge L J Murray