Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/02467/2013

THE IMMIGRATION ACTS

Heard at North Shields	**Determination Promulgated**
On 13 May 2014	**On 20 August 2014**

Before

UPPER TRIBUNAL JUDGE DEANS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR AMIN SHARIF HUSSEIN

Respondent

Representation:

For the Appellant: Mrs H Rackstraw, Senior Home Office Presenting Officer
For the Respondent: Mr C Boyle, Halliday Reeves Law Firm

DETERMINATION AND REASONS

1) This appeal is brought with permission by the Secretary of State against a determination by Judge of the First-tier Tribunal Fisher and Mr B D Yates allowing an appeal by Mr Amin Sharif Hussein (hereinafter referred to as "the Claimant").

2) The appeal to the First-tier Tribunal was brought against a decision by the Secretary of State under Section 32(5) of the UK Borders Act 2007 to the effect that the Claimant was subject to deportation as a foreign national convicted of an offence and sentenced to a period of imprisonment of at

least twelve months. The appeal was allowed by the First-tier Tribunal on the basis that as a national of Somalia the Claimant qualified for humanitarian protection in terms of Article 15(c) of the Refugee Qualification Directive 2004/83/EC.

3) The application for permission to appeal made on behalf of the Secretary of State submitted that the situation in Mogadishu had improved since the country guideline case of AMM and others (conflict; humanitarian crisis; returnees; FGM) Somalia CG [2011] UKUT 00445, on which the First-tier Tribunal based its decision. It was further submitted on behalf of the Secretary of State in the application that the test under Article 15(c) was different from the test to be applied under Articles 2 and 3 of the Human Rights Convention. The Tribunal did not apply the correct test to show that the Appellant would face a real risk of Article 3 harm.

4) Permission to appeal was granted on the basis that the First-tier Tribunal arguably erred in law by allowing the appeal on the basis that the Claimant was in need of humanitarian protection. The need for humanitarian protection was not one of the exceptions to automatic deportation in terms of section 3 of the UK Borders Act 2007.

Application made out of time

5) At the start of the hearing the point was raised on behalf of the Claimant as to whether the application for permission to appeal was made in time and, if not, whether time was extended. The application was date stamped by the Tribunal as having been received on 27 February 2014. The determination of the First-tier Tribunal was promulgated on 12 February 2014. Mr Boyle submitted that the last date for receipt of the application was 21 February 2014.

6) In terms of Rule 24(2) of the Procedure Rules the application must be received no later than five days after the date on which the party making the application is deemed to have been served with written reasons for the decision. The provision for deemed service in Rule 55(5) states that, unless the contrary is proved, service is deemed to take place on the second day after a document is sent by post from and to a place within the UK. In terms of these provisions the determination issued on 12 February 2014 would be deemed to have been served on Friday 14 February 2014. The period of five days for submission of an application for permission to appeal would have expired on Friday 21 February 2014.

7) For the Secretary of State Mrs Rackstraw submitted that an attempt had been made to submit the application by fax on Monday, 25 February but this transmission was unsuccessful. Successful transmission by fax was made on 27 February 2014.

8) For the Claimant Mr Boyle submitted that no grounds were given as to why the application was late. Even the attempt to submit the application on 25 February 2014 was out of time. He submitted that the Claimant had

been significantly prejudiced by this delay. The applicant had been released on bail at the hearing before the First-tier Tribunal but re-detained five days later.

9) It is apparent that when permission to appeal was granted by the First-tier Tribunal it went unnoticed that the application was made late. As a Judge of the Upper Tribunal is *ex officio* also a Judge of the First-tier Tribunal, I was satisfied that I had jurisdiction as a Judge of the First-tier Tribunal to consider whether time should be extended. Rule 24(4) allows the Tribunal to extend the time for appealing if satisfied that by reason of special circumstances it would be unjust not to do so.

10) The judge who granted permission to appeal clearly intended that the appeal should proceed to the Upper Tribunal. Failure to extend time when granting permission was an inadvertent error, which I have the power to remedy. I agree with the judge who granted permission to appeal that the application identifies an arguable error of law. It is both in the interests of the parties and in the public interest for this to be considered. The first attempt to submit the application by fax, although unsuccessful, was only one working day after the time limit had expired. The application was successfully transmitted by fax two days later and was therefore late by only three days. The re-detention of the Claimant took place, according to Mr Boyle, some five days after the hearing, which would have been not only before the application for permission to appeal was granted but before the determination of the First-tier Tribunal was even promulgated. The appeal proceedings were continuing. It does not therefore seem to have been the position that the re-detention of the Claimant was linked in some way to the grant of permission to appeal. In considering whether to extend time I may look not only at the reasons, if any, why the application was late but also at the wider interests of justice and on this basis I am satisfied that by reason of special circumstances it would be unjust not to extend time.

11) Although in terms of rule 24(4)(b) the application should not have been admitted without time having been extended, I do not consider this is fatal to the application as this can be remedied in terms of rule 59(1).

Submissions

12) An issue arose at the start of the hearing as to the scope of the appeal. Permission to appeal was granted on the basis that it was arguably an error of law to allow an appeal against automatic deportation on the basis that the Claimant was entitled to humanitarian protection. There was possibly a further issue in relation to the circumstances in which the Secretary of State had revoked the grant of humanitarian protection already made by way of the decision letter of 19 November 2013. Mrs Rackstraw submitted that the revocation was justified by the commission of a serious crime and she referred to the Claimant's convictions in December 2011 for sexual assault on a female under the age of 13 years and for sexual assault on a female. It was pointed out, however, that it

was not on the basis of these offences that the deportation decision was made. The deportation decision was made on the basis of a sentence of imprisonment for twelve months for burglary imposed in December 2012. A decision was made by the Secretary of State not to pursue deportation proceedings in respect of the earlier offences because it was apprehended at that time that there would be a potential breach of Article 3 were the Claimant be removed.

13) Mrs Rackstraw further submitted that since humanitarian protection was granted the situation in Mogadishu, in particular, and Somalia more generally had changed. The main point in the appeal was that protection under Article 15(c) of the Directive was not a lawful exception under Section 33 of the 2007 Act. The revocation of humanitarian protection was justified under paragraph 339G(iv) of the Immigration Rules, which allows for revocation of humanitarian protection where there are serious reasons for considering that a person constitutes a danger to the community or to the security of the United Kingdom.

14) Turning to section 33 of the 2007 Act, Mrs Rackstraw pointed out that although this included an exemption for rights protected under the European Treaties, the Refugee Qualification Directive was not a provision of the Treaties.

15) For the Claimant, Mr Boyle submitted that the Tribunal had considered the situation in Somalia in detail and found a risk to the Claimant. This was set out at Paragraph 21 of the determination, where the Tribunal followed the decision in AMM. The Tribunal took into account that the Claimant had been absent from Somalia for a substantial period of time. There were further risk factors, namely that the Claimant had no links to Somalia, that he was not familiar with the governance, and that he was alcohol dependent. The Tribunal did not accept all these points but was satisfied that the Claimant came within Article 3. Although paragraph 26 of the determination referred to humanitarian protection, the Tribunal found effectively that the Claimant was at risk in terms of Article 3. It had previously been accepted in 2012 that the Claimant was entitled to humanitarian protection. Any error made by the Tribunal was not material.

16) It was pointed out that at paragraphs 19 and 24 of the determination the First-tier Tribunal specifically distinguished between Article 3 protection and Article 15(c) protection. Mr Boyle questioned this view of the determination. He referred to the skeleton argument he had prepared on the basis that the Claimant was at risk under Article 3. He had not sought in his skeleton to address the question of whether the Claimant was excluded from humanitarian protection because of his convictions.

17) In response on behalf of the Secretary of State Mrs Rackstraw submitted that there had been no cross-appeal on behalf of the Claimant relying upon Article 3.

Error of law

18) The first question for me was whether the First-tier Tribunal was entitled to allow the appeal on the basis on which they purported to do so, namely that the Claimant was entitled to succeed because he fulfilled the conditions for humanitarian protection. I note that in terms of section 32 of the UK Borders Act 2007, for the purpose of section 3(5)(a) of the Immigration Act 1971 the deportation of a foreign criminal is conducive to the public good and the Secretary of State must make a deportation order in respect of a foreign criminal. It is not disputed that the Claimant is a foreign criminal. He is not a British citizen and he has been convicted of an offence and sentenced to a period of imprisonment of at least twelve months.

19) There are five exceptions set out in section 33 of the 2007 Act as to when the requirements of section 32 will not apply. The first exception is where the deportation would breach a person's rights either under the Human Rights Convention or under the Refugee Convention. This is the only exception which is in issue in this appeal. The main argument on behalf of the Secretary of State is that "humanitarian protection", as it is termed under the Immigration Rules, or "subsidiary protection", as it is termed under the Refugee Qualification Directive, is not a status afforded either under the Human Rights Convention or under the Refugee Convention. More specifically, Article 15 of the Directive sets out a definition of "serious harm" in terms of three alternatives. The first, death penalty or execution, corresponds to Article 2 of the Human Rights Convention. The second, torture or inhuman or degrading treatment or punishment, corresponds to Article 3. The third is defined as "Serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict". It is this which gives rise to the Article 15(c) protection to which the Claimant was considered entitled because of the violent situation in Somalia. The subsidiary protection set out in Article 15(c), however, is not equivalent to protection under Article 2 or 3 of the Human Rights Convention. This was pointed out in HH (Somalia) & Others [2010] EWCA Civ 426. The specific finding made by the First-tier Tribunal in this appeal was that there was in general a real risk of Article 15(c) for those returning to Mogadishu after a significant period of time abroad, as set out in AMM, and this was the basis on which the appeal was allowed.

20) The First-tier Tribunal erred in law by allowing the appeal against deportation as a foreign criminal under section 32(5) of the 2007 Act on the basis that the Claimant qualified for humanitarian protection. I accept the argument of the Secretary of State that entitlement to humanitarian protection does not give rise to an exception from deportation in terms of section 33 of the 2007 Act.

21) The First-tier Tribunal having erred in law, its decision is set aside in order to be re-made.

22) Before proceeding to re-make the decision, however, I will briefly address the incidental issue which arose during the course of the proceedings before me as to the revocation of humanitarian protection by the Secretary of State. In the decision of 19 November 2013 against which the appeal to the First-tier Tribunal was brought, it was stated on behalf of the Secretary of State that humanitarian protection was revoked due to the serious nature of the Claimant's crimes. It was recorded that the Claimant had received ten convictions for twenty offences, including three sexual offences, one of which was against a female under 13 years. He had also been convicted of battery and of possession of an offensive weapon in a public place. He had been given consecutive sentences of twelve months and sixteen weeks for the offences of burglary and breach of a suspended sentence. He had been assessed as constituting a high risk of harm in the community.

23) On behalf of the Secretary of State, Mrs Rackstraw submitted that the revocation of humanitarian protection had been properly made under Paragraph 339G(iv) of the Immigration Rules, which allows for revocation where there are serious reasons for considering that a person constitutes a danger to the community or to the security of the United Kingdom. Clearly security considerations do not arise in relation to this particular Claimant.

24) In addition I note that in terms of section 72 of the Nationality, Immigration and Asylum Act 2002 provision is made for the circumstances in which a person is to be excluded from the protection of the Refugee Convention because of conviction for a particularly serious crime and because the person constitutes a danger to the community of the United Kingdom. In terms of this provision, a crime will only be regarded as particularly serious if a sentence of at least two years has been imposed. Although this Claimant has committed a number of offences he has not been sentenced to a period of at least two years. The use of the phrase "particularly serious crime" is taken from Article 33(2) of the Refugee Convention and this is arguably a more stringent test than the test of exclusion from humanitarian protection under Paragraph 339G, which is based on Article 17 of the Refugee Qualification Directive. Having regard to the terms of Paragraph 339G(iv), I am satisfied that given the Claimant's convictions the Secretary of State was entitled to regard him as a danger to the community. I do not think that this conclusion is affected by the Secretary of State's decision not to seek deportation following the Claimant's convictions in 2011 for sexual offences. Although a decision was made at that time in relation to specific offences, the Claimant has since committed a further serious offence, for which he was sentenced to imprisonment for twelve months. I consider that following this the Secretary of State was entitled to look at the Claimant's offences cumulatively in deciding whether he is a danger to the community.

25) Even if I am wrong about the grounds for revoking humanitarian protection, as already observed, entitlement to humanitarian protection

under Article 15(c) will not entitle the Claimant to rely upon an exception from deportation under section 33 of the 2007 Act. This was the error made by the First-tier Tribunal. If his appeal is to succeed the Claimant must show that his risk of serious harm arises under Articles 2 or 3 of the Human Rights Convention.

Re-making the decision

26) The re-making of the decision proceeds on the basis of the facts found by the First-tier Tribunal, in terms of which the Claimant will succeed only if he can show that his removal to Somalia would breach Article 2 or 3 of the Human Rights Convention. In assessing the risk to the Claimant of return to Somalia, the First-tier Tribunal was able to rely on an asylum appeal by the Claimant heard before the Asylum and Immigration Tribunal in May 2009. In the determination in respect of that appeal the judge rejected the Claimant's claim that he was from a minority clan. The judge accepted that the Claimant fled Somalia because he had a dispute with a "warlord" who was extracting protection money from the Claimant and other persons in the area. The Claimant had refused to pay and had been assaulted. The judge accepted that the Claimant might have problems in returning to his home area but considered that the Claimant could relocate to another part of Somalia. Although the appeal was unsuccessful, it was after this that the Claimant was given humanitarian protection.

27) In the current proceedings the First-tier Tribunal found that the Claimant would not be at risk of treatment contrary to Article 3 if he were to return to Mogadishu and he had failed to show that fighting was ongoing in his home area such as to place him at risk there in terms of Article 15(c). The Tribunal acknowledged that in AMM the Tribunal found that there was in general a real risk of Article 15(c) harm for the majority of those returning to Mogadishu after a significant period of time abroad. The decision of the First-tier Tribunal makes it clear that it was no more than Article 15(c) protection to which the Claimant was entitled on the facts of his case.

28) In his skeleton argument Mr Boyle accepted that in terms of KAB v Sweden [2013] ECHR 814 there was no general Article 3 risk to returnees to Mogadishu but there were specific risk factors for the Claimant. These were that the Claimant had been out of Somalia for seven years, he was unfamiliar with the current ruling parties, he had no family support system, and he had a serious alcohol abuse problem. Although Mr Boyle identified these risk factors, he did not state how these factors would give rise to a serious risk of treatment contrary to Article 2 or Article 3. It has already been established in this appeal that the generalised risk of indiscriminate violence, from which Article 15(c) is intended to provide protection, would not in law prevent the deportation of the Claimant. The Claimant may face conditions in Mogadishu which are harsh and difficult but this will not be sufficient to bring him within the protection of Article 3.

29) Mr Boyle referred specifically to the Claimant's history of alcohol abuse. This was noted in the Judge's sentencing remarks from December 2012. A pre-sentence report from January 2012 pointed out that the Claimant at that time had succeeded in avoiding alcohol. Clearly he was unable to maintain this course as the subsequent offence of burglary was committed after the Claimant had been drinking. Although alcohol abuse was clearly a significant factor in the Claimant's offending, the Tribunal did not appear to have any medical evidence before it as to the extent of the Claimant's dependency and the possibility of overcoming it. I am not persuaded that this is a material factor in assessing the risk of treatment in Somalia contrary to Article 2 or 3.

30) Mr Boyle drew to my attention that there is a pending Country Guideline case before the Upper Tribunal on Article 15(c) protection in Mogadishu. Even were this decision to show, however, that there is still a need for Article 15(c) protection, as was found in AMM, this would not without more constitute an exception from deportation, for the reasons set out above.

31) The circumstances of this Claimant are not wholly dissimilar from the circumstances of the Claimant in KAB v Sweden. In that case threats had been made against the applicant but it was not shown that these had occurred at a time when the applicant was living in Mogadishu. The applicant did not belong to any group that was at risk of being targeted by Al-Shabaab at a time when they were in control of the city. In the present case the Claimant has not been shown to be at risk of serious harm in Mogadishu and he does not belong to a persecuted minority clan. On the basis of the evidence he has not made out his claim that he faces a real risk of treatment contrary to Article 2 or 3 were he to be removed to Somalia or, in particular, Mogadishu. For this reason his appeal will not succeed.

Conclusions

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

I set aside the decision.

I re-make the decision in the appeal by dismissing it.

Anonymity

The First-tier Tribunal did not make an order for anonymity and I see no requirement for such an order.

Fee award Note: this is not part of the determination

The First-tier Tribunal recorded that the appeal was exempt from the requirement to pay a fee and so no issue of a fee award arises.

Signed Date

Judge of the Upper Tribunal