Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/02527/2016**

THE IMMIGRATION ACTS

Heard at Bradford
On 27 July 2018

Sent to parties on:
On 4 October 2018

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

A R O
(ANONYMITY DIRECTED)

Respondent

Representation:
For the Appellant: Mr M Diwnycz (Senior Home Office Presenting Officer)
For the Respondent: Mr R Toal (Counsel)

DECISION AND REASONS

1. This is the Secretary of State's appeal to the Upper Tribunal from a decision of the First-tier Tribunal (Judge Shimmin) made on 12 February 2018 and sent to the parties on 26 February 2018, whereupon the Judge allowed the appeal of the respondent (hereinafter "the claimant") against the Secretary of State's decision of 29 February 2016 to refuse his protection claim and to deport him.

2. The Judge made an anonymity direction with respect to the claimant. He did so because he thought any reporting of the case might expose him to risk if he were to be returned to his home country of Somalia. Nothing was said before me about that direction but, in the

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circumstances, I have decided to maintain the status quo and to continue it. Accordingly, I have not named the claimant in this decision.

3. The claimant has a somewhat convoluted immigration, offending (in the sense of criminal acts) and adjudication history which I shall now set out, though I do not intend to be utterly exhaustive.

4. The claimant, it is accepted, is a citizen of Somalia. He was born on 6 November 1986. It appears that he entered the United Kingdom ("UK") on 2 November 1993 as a dependent of his mother who was travelling on a Kenyan passport. The claimant's mother sought asylum but, on 27 June 1994, such was refused and an appeal was dismissed on 19 May 1995. Thereafter, the mother absconded with the claimant and two other of her children. She must have left the UK because she subsequently re-entered with the same three children including the claimant. Having done so she claimed asylum, this time, as a Somalian national. She used a different name to that which had been in the Kenyan passport with which she had initially entered the UK. Her asylum claim was refused but she was given leave to enter, I think outside the immigration rules but possibly under a then existing policy, which was at a later date extended until 28 November 2002. At that point she was granted indefinite leave to remain in the UK as was the claimant.

5. On 20 February 2003, the claimant was convicted at Sheffield Juvenile Court of assaulting a Police Constable and received a 40 hour community punishment order. On 23 October 2003 he was convicted at Sheffield Crown Court of murder and received, as I understand it, a mandatory life sentence but with a requirement that he serve a minimum term of imprisonment of 9 years and 4 months. There was no appeal against either sentence or conviction. On 8 December 2014, whilst he remained incarcerated, the claimant was served with a signed Deportation Order. He responded by claiming that he would face persecution or serious harm if he were to be deported to Somalia but, on 12 March 2015, the Secretary of State confirmed the decision to deport him. However, that decision was subsequently withdrawn and further enquiries were made into the claimant's protection claim. But all of that led to the decision of 29 February 2016 referred to above. By that time a Parole Board had decided that it was no longer necessary for the claimant to be detained for reasons of public protection and he had been released from custody.

6. The claimant appealed and his appeal was heard by First-tier Tribunal Judge Chambers who, in a decision sent to the parties on 31 May 2016, dismissed it. But the Upper Tribunal, on 12 October 2016 and following a hearing of 11 October 2016, set aside that decision and remitted. On 2 February 2017 the appeal came before First-tier Tribunal Judge Birrell who, in a decision sent to the parties on 15 February 2017, also dismissed the claimant's appeal. But in a decision sent to the parties on 5 September 2017 I set aside the decision of Judge Birrell and again remitted for a rehearing. That rehearing was the one before Judge Shimmin.

7. The central issues before Judge Shimmin revolved around the claimant's claim to have converted to Christianity and whether there was, as he had asserted, any consequent risk. There was also an issue as to whether or not he was entitled to protection under the Refugee Convention in consequence of his conviction for murder and the content of section 72 of the Nationality, Immigration and Asylum Act 2002 when read in conjunction with Article 33(2) of the Convention. The central concern as to that aspect was whether or not he was able to rebut the presumption, which followed from his conviction and sentence, that he is a danger to the community.

8. The hearing before Judge Shimmin took place over two days. Both parties were represented and the claimant gave oral evidence. The Judge produced his written reasons on 12 February 2018. He concluded that the claimant had rebutted the above presumption (a matter not the subject of any further challenge) and that he would be at risk as a Christian if he were to be returned to Somalia. As to that he said (and this has been the subject of subsequent challenge) that the Secretary of State had accepted that if the claimant were found to be a genuine Christian convert he would be at risk on return to Somalia.

9. Although what Judge Shimmin had to say about section 72 of the Nationality, Immigration and Asylum Act 2002 and exclusion from refugee protection has not, as I say, been the subject of challenge, it is perhaps helpful for me to briefly summarise his conclusions as to that and which appear in full at paragraphs 34 to 51 of the written reasons. Essentially, he noted the view which had been taken by the Parole Board which was, as he put it, "the statutory body tasked with determining whether convicted prisoners represent a danger to the community". He noted that although the claimant had had some mental health difficulties those issues appeared to have resolved themselves (paragraphs 38 and 39 of the written reasons). He noted that the claimant had eventually been frank about all the details of his offending and that he had done well on a victim awareness course (see paragraphs 41 and 42). Being satisfied, in particular, that the Parole Board had "fully addressed the seriousness of the index offence" (see paragraph 50 of the written reasons) he concluded that the claimant was not excluded from refugee protection. He then went on to analyse the claim for protection and said this:

> "52. If I find the appellant is a genuine Christian convert then the respondent accepts he would be at risk on return to Somalia.
>
> 53. The evidence supporting the appellant's claim to be a Christian are as follows.
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> 54. First, there is the appellant's own evidence on the issue. His first statement contains, I find, an entirely plausible and detailed account of his journey from being an atheist, motivated by 'looking for ways forward', from the harm he had caused and the consequent guilt he experienced.
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> 55. The claimant was partly influenced by his friend, [P] and partly by the appeal of the prospect of forgiveness offered by Christianity.
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> 56. I have heard statements and oral evidence from [P] saying, inter alia, that he first met the appellant in 2001. The appellant and his sisters attended the after-school club that, as a 'Homeless Children's Development Worker', he organized. He developed a good relationship with the appellant and kept in touch with him 'as he had no other male role models'. [P] regularly visited the appellant after his arrest in 2003. He described to me the appellant's interest in religion, his questioning of his Muslim faith and their conversations about religion over several years. Importantly, he described the appellant's questioning of him about religion. He described the impact on the appellant of working at the Pentecostal Church in [a town] whilst at [a prison].
>
> 57. He described the appellant's anxiety about the possible effect on his mother of her learning of the appellant's Christian faith. He says, 'I have no doubt that [the claimant's] faith as a Christian is real…I am in no doubt that he is sincere…he has given this a lot of thought over years and taken a long time to come to a considered position, which could cost him a lot emotionally and in family relationships'.
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> 58. The Parole Board refers to [P] as providing the appellant with 'strong support' as a person 'who knew you when he was a child support worker and you were in your early teens and has kept in touch with you and provided you with substantial support ever since. He…has clearly been a reliable and positive influence upon you.'

59. The appellant worked from March 2014 for almost 6 months at a Christian church in [a town] and during that period 'became fully committed to Christ'.

60. From April 2015 at [a prison] he was actively involved with the church, but also received threats from Muslim prisoners on account of his Christianity.

61. In particular there is the statement of [C], chaplain at [a prison], including reference to the 'remarkable' speech given by the appellant to his congregation which 'impacted greatly on the eighty strong congregation and underlined the authenticity of his new found life'.

63. There is a statement of [A], Senior Minister of [a Church] where the appellant worked form 21 March 2014 to 12 August 2014.

64. There are the statements of [P], who I have referred to above, and who visited the appellant approximately once per month during his 13 years imprisonment. He was aware of the appellant, 'searching for faith to help him come to terms with the enormity of his crime' and observed the appellant during that search. [P] described the appellant's life post-release and expressed his belief that the appellant has sincerely converted to Christianity.

65. There are the statements of [F]. Her evidence that the appellant holds Christian beliefs and puts them into practice is, I find, particularly significant given the nature of her relationship with the appellant. She was a probation hostel worker in the hostel where appellant was accommodated. She had experience of dealing throughout her career, with potentially manipulative individuals. She described the appellant's life in the hostel as being 'under a microscope' and on the basis of that degree of scrutiny, describes his Christianity as genuine.

66. There is a letter from Rev [B] who has known the appellant for 10 months. He has met him regularly over that period and participated in discussions with the appellant from which he believes the appellant is 'practicing his Christian faith in daily life'.

67. The Parole Board reports and some of the witness statements document the difficulty for the appellant in coming to terms with and addressing his offence and the sustained hard work that he has undertaken to deal with his offence.

68. I accept the submission on behalf of the appellant that the whole context provides part of an entirely plausible explanation, consistent with the appellant's own evidence, of his turning to Christianity. Furthermore, the appellant becoming a Christian is of a piece with his preoccupation with the offence and working over a long period of time on becoming a different person to the person who committed the offence.

69. The respondent submits the appellant is not credible in his claimed conversion as he has lied in the past.

70. There is evidence of the appellant having told lies in relation to the knife used to murder [the victim]. At his trial the appellant denied having brought the knife to the scene and claimed the knife was his victim's. That claim was 'the central lie' in his defence and it was rejected by the jury. He maintained the lie for 10 years until he admitted to the Parole Board that he had brought the knife to the scene. It was described by the Parole Board as 'a dramatic demonstration of how you had found real insight into your offending behaviour'. The appellant submits that this is relevant to the present issue as showing that whilst the appellant has lied about a very significant issue in the past, he was not an accomplished liar. His lie failed before the jury. That evidence does not support a conclusion that the appellant is capable of successfully deceiving his witnesses, over substantial periods of time, into believing that he is a genuine convert to Christianity when he is not. The Tribunal would need to find that the appellant is an extremely skilled and accomplished liar to have accomplished a successful deception of this kind. A major feature of the appellant's rehabilitation is resiling from a major lie in favour of the truth.

That fact is of at least as much significance as the fact that the appellant maintained a major lie in the past.

71. It has also been said by the respondent that the appellant is not credible because he has maintained a lie about having seen his father murdered in Somalia. It is submitted on behalf of the appellant that the evidence does not support that conclusion.

72. Reliance is placed on the appellant's mother's evidence that the appellant had already left Mogadishu when his father was killed there to show that he could not have witnessed the killing. However, the appellant's mother has not been consistent in her statements in saying that the appellant was absent when his father was killed.

73. It is clear from the appellant's mother's medical records that she has suffered from prolonged mental disorder as a result of what happened to her family in Somalia and that her disorder, including disordered and intrusive memory of those events shaped the environment in which the appellant was said by the psychiatrist, Dr [C], not to be a reliable historian in relation to some events in Somalia and that he had been involved in recounting his mother's narrative rather than narrating his own clear and distinct early childhood.

74. In the light of that, I accept the appellant's submission that the Tribunal cannot properly conclude that it has no real doubt: (a) that appellant did not witness the killing of his father and (b) that if he did not see the killing of his father, his claim to have done so was a deliberate ie rather than a false memory, honestly recalled.

75. The fact that in his screening interview the appellant did not mention his Christianity or fear of being persecuted in Somalia on that account is held against him by the Secretary of State. The screening interview took place on 5 February 2015. The appellant says he was not asked about his religion and the interviewing officer must have made an assumption. It is important that there is independent evidence that by that time, the appellant had become (or was acting as if he had become) a Christian. There is the statement of [A], Senior Minister of [a Church] where the appellant worked from 21 March 2014 to 12 August 2014, describing how, during that period, the appellant 'told us how he made a commitment to follow Jesus' and expressed his desire to be baptized. There is the statement of [P] tracing the appellant's conversion to the period when he was working at the church in [a town].

76. If the appellant was merely contriving an appearance of being a Christian in order to advance a false asylum claim, his failure to mention his conversation at his screening interview makes no sense at all. The conversion, whether genuine or contrived, had taken place before the screening interview. If the conversion was a contrivance for the purpose of a false asylum claim, the appellant would have mentioned it at the screening interview. His failure to mention it means that there must be some reason other than advancing a false asylum claim for the appellant appearing to have converted. None is suggested by the Secretary of State. I find that the only plausible explanation is that the conversion is genuine.

77. I find in the light of the above evidence and my above findings that I have no real doubt that the appellant is a Christian. I find that he has not falsely claimed to be a Christian in order to contrive an asylum claim.

78. Taking the above conclusions and the respondent's concession into account I find it is reasonably likely that on return to Somalia he would face torture, inhuman or degrading treatment and I find that rights under the Human Rights Convention with respect to Article 3 would be infringed by his removal".

10. So, the claimant's appeal was allowed. But that was not the end of the matter because the Secretary of State applied for and obtained permission to appeal to the Upper Tribunal. Whilst I paraphrase, the first ground of appeal (ground 1) was to the effect that either no concession

(see above) had been made or, if it had been, it had been wrongly given by the presenting officer who had represented the Secretary of State before Judge Shimmin. The second ground amounted to a contention that Judge Shimmin had erred through speculating on offering his own hypothesis as it was put in the grounds, as to why the claimant had not mentioned his Christianity during an asylum screening interview (see paragraph 76 of the written reasons). It was not, it was argued, for Judge Shimmin to advance such theories. Thirdly, it was argued that Judge Shimmin had erred through relying upon the evidence of "two Reverends" regarding the acceptance of the claimed conversion rather than conducting a holistic assessment as to all of the evidence prior to reaching such a conclusion.

11. Permission to appeal was, in fact, granted on all grounds. The matter was then listed for a hearing before the Upper Tribunal (before me) so that it could be decided whether Judge Shimmin had erred in law and if so what should flow from that. Representation at that hearing was as indicated above and I am grateful to each representative.

12. At the hearing I reminded the parties of my previous involvement in setting aside the decision of Judge Birrell. I inquired of the parties whether they thought I should, in the circumstances, recuse myself. Mr Toal argued that I should not do so and suggested that I should only consider doing so if my previous decision had been impugned. Mr Diwnycz said he would not urge me to recuse myself and would not object to my hearing the case but he would understand if I felt I should.

13. When I set aside Judge Birrell's decision I did so for quite narrow reasons based upon my view that that Judge had erred in his consideration of an adjournment request which had been made on behalf of the claimant. My decision had not involved me in making any findings or reaching any view as to the merits of the actual claim for international protection. In any event, as a Judge, I considered myself able to deal objectively, rationally and fairly with whatever arguments might be presented and neither party offered any view to the contrary. In the circumstances I decided to proceed to hear the appeal. I stress, neither representative urged me not to do so.

14. Mr Toal had filed a skeleton argument which contained his response to the grounds of appeal. Mr Diwnycz had not had the opportunity to read that skeleton argument and I permitted time for him to do so. He subsequently confirmed that he was happy to proceed. But I shall briefly summarise what is said in the skeleton at this stage. As to ground 1, it was asserted that, in fact, there had been a series of similar concessions which had been made throughout the appellate process. Additionally, and in any event, no basis had been given to justify any conclusion that the making of the concession (or I suppose the acceptance) might have involved any legal error. As to the second ground it was argued that Judge Shimmin had not provided a hypothesis as to why the claimant had failed to mention his conversion in his screening interview. Rather he had simply considered whether or not he should draw an adverse inference from the failure to mention it and had concluded, as had been open to him, that he should not. As to the third ground, Judge Shimmin had given detailed reasons for his conclusion as to the claimed conversion. His analysis had been holistic.

15. Mr Diwnycz, as to the concession point, suggested that the Presenting Officer before Judge Shimmin had not made any such concession though he said that that presenting officers notes of the hearing were brief. But I pointed out that in Judge Shimmin's typed Record of Proceedings he had noted this:

> "Christianity element is the only issue as far as protection and R accepts that A would be at risk on return if he is a genuine Christian".

16. When I read that to Mr Diwnycz he, very fairly and properly in my view, said that he would not seek to impugn Judge Shimmin's Record of Proceedings and that ground 1 could not now be pursued. As to the other grounds Mr Diwnycz observed that the question of the credibility of the claimed conversion was all that was left to him to argue about. He said that he could not really attack what Judge Shimmin had said at paragraph 76 and 77 of his written reasons (reproduced above) and he observed that credibility had been a matter for the Judge. He said he would say no more. In those circumstances it was not necessary for me to hear further from Mr Toal, whose skeleton argument, of course, I had already read and considered.

17. I have concluded that the decision of Judge Shimmin did not involve the making of an error of law.

18. As to the first ground of appeal, in my judgment what was said by Mr Diwnycz at the hearing amounted to an abandonment of that ground. Strictly speaking, therefore, it is not necessary for me to say any more about it but, at the risk of unnecessarily prolonging this decision of the Upper Tribunal, I will do so.

19. There have, as will be apparent from what I have already said, been a number of appeal hearings and a number of decisions concerning the claimant's protection claim. At paragraph 26 of the decision of Judge Chambers this is said:

> "Counsel submitted that there is a real risk of Christians being persecuted in Somalia. Mr Dillon agreed but if the appeal is determined upon the basis that the appellant is a Christian the appellant will be persecuted in Somalia. I agree."

20. Mr Dillon was the Presenting Officer representing the Secretary of State before Judge Chambers at the hearing of 16 May 2016. At paragraph 8 of the written reasons of Judge Birrell which relates to the hearing of 2 February 2017 this is said:

> "As a result of preliminary discussions between Mr Toal and Mr Saunders it was conceded by Mr Saunders that if I accepted that the appellant was a genuine Christian then he would be at risk on return to Somalia".

21. Mr Saunders was the Presenting Officer representing the Secretary of State at the hearing before Judge Birrell. There was then, of course, the hearing before Judge Shimmin who also recorded a concession at paragraph 52 of his written reasons as set out above. There is then, of course, what was said in the typed Record of Proceedings. So, even if the first ground had not been withdrawn, I would have concluded that, as a matter of fact, there had been a concession made before Judge Shimmin and that that was entirely in line with the previous stance which had been taken on behalf of the Secretary of State at previous hearings concerning the same claimant and the same issues. So, I would have rejected the contention in that ground to the effect that no such concession had been made. As to the alternative suggestion that if such a concession had been made it had been wrongly made, my first position as to that, had the ground not been effectively withdrawn in any event, would have been that it was up to the Secretary of State to choose how to present her case and if her position was (as it was) that the claimant would be at risk solely on the basis of conversion to Christianity upon return, Judge Shimmin was not required to look behind that. He could have done so had he wished but he did not have to. So, I would have detected no error of law. But anyway, nothing is said in the grounds as to why it is thought, as a matter of law, that the concession was, in fact, wrongly

given. All that is really said in support is a summary of what the Home Office position as to Christians in Somalia is said to be. But it does not appear that that position, as summarised, was actually advanced at any stage either in the reasons for refusal letter (or decision letter as perhaps it is now more commonly called) or at the hearing before Judge Shimmin. Against that background it seems to me that had the ground been maintained I would have had to conclude that it was simply untenable.

22. As to the second ground Mr Diwnycz said he could not "really attack" what had been said by Judge Shimmin concerning the screening interview. But in any event, I agree with Mr Toal that the Judge was not seeking to advance a hypothesis of his own. He was asking himself, as he was required to do, whether he should or should not draw adverse inferences from the failure to mention the conversion to Christianity in the screening interview. At paragraph 76 he simply provides an explanation as to why he had decided not to draw any such adverse inferences. Really, the ground is no more than an attempt to reargue matters concerning the view taken by the Judge as to that discrete matter.

23. As to the third ground, nothing was said in support of it before me. It is right to say that Judge Shimmin attached weight to the views of a number of persons who have followed a religious calling and who have had contact and involvement with the claimant in recent years. He was entitled to do that. He took into account the claimant's previous conduct in lying regarding his criminality (see paragraph 70 of the written reasons). He considered, as already noted, the point made about his not raising the matter at his screening interview. What the Judge said in the extensive portion of his written reasons which I have seen fit to set out above demonstrates that, in fact, his consideration of the truthfulness or otherwise of the claimed conversion was holistic. He reached a conclusion very clearly open to him on the evidence and which he has more than adequately explained. The ground, again in my view, does not go beyond mere re-argument as Mr Diwnycz tacitly accepted when observing that credibility was "an issue for the Judge".

24. I appreciate that this was a most serious case involving the most serious type of criminal offence. But Judge Shimmin reached a decision which was open to him for the detailed reasons he gave. The grounds of appeal advanced on behalf of the Secretary of State do not withstand close analysis and Mr Diwnycz, it is fair to say, did not offer a spirited argument based upon them. There is nothing to suggest that Judge Shimmin misunderstood or misapplied the law and nothing to suggest that he was not entitled, on the evidence, to reach the factual findings he did reach and to draw the conclusions he did draw from those findings. In the circumstances the tribunal did not err in law and its decision must, therefore, stand.

Decision

The decision of the First-tier Tribunal did not involve the making of an error of law. That decision shall stand. Accordingly, the Secretary of State's appeal to the Upper Tribunal is dismissed.

Signed

M R Hemingway
Judge of the Upper Tribunal

Dated: 18 September 2018

Anonymity

The First-tier Tribunal granted the claimant anonymity. I continue to do so pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Unless and until a Tribunal or Court directs otherwise the claimant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies to both parties to these proceedings. Failure to comply could lead to contempt of court proceedings.

Signed
M R Hemingway
Judge of the Upper Tribunal

Dated: 18 September 2018