IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005260
First-tier Tribunal No:
PA/12075/2018

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 29 March 2023

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR
DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

A D
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms A Radford, Counsel, instructed by Malik and Malik Solicitors
For the Respondent: Mr S Whitwell, Senior Presenting Officer

Heard at Field House on 3 March 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant, and any member of his family, is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant and other person. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. The appellant, a citizen Somalia born in 1990, appeals against the decision of First-tier Tribunal Judge Hoffman ("the judge"), dated on 16 June 2022 following a hearing on 27 May 2022. By that decision, the judge dismissed the appellant's appeal on all grounds.

2. As we announced to the parties at the conclusion of the hearing, the judge erred in law when making the decision, which is set aside and the appeal remitted to the First-tier Tribunal.

Decision of the First-tier Tribunal

3. In essence, the appellant's case before the judge was as follows. He had been born in Hiraan, a town situated approximately 300km north of Mogadishu. At the age of four or five years old, he left Somalia and came to the United Kingdom where he lived with his half-siblings. He was eventually granted limited leave to remain, with indefinite leave to remain following in 2002. Between 2012 and 2015, the appellant had been convicted of a number of offences. In 2018 he began a relationship with an Eritrean national with indefinite leave to remain. The couple's son was born in the summer of 2019, and their daughter approximately a year later. The appellant asserted that (a) he would be at risk, specifically, or in general terms, if returned to Somalia and/or (b) his removal would breach Article 8.

4. In refusing the appellant's protection and human rights claims, the respondent had asserted that the appellant originated from Mogadishu, not Hiraan, that he was not at risk in Somalia for any reason, and that deportation would not be disproportionate with reference to Article 8. A certificate under section 72 of the Nationality, immigration and Asylum Act 2002, as amended, was made.

5. The judge was satisfied that the appellant was not a danger to society and therefore the section 72 certificate was discharged: [47]. The judge found that the appellant in fact came from Mogadishu and not Hiraan: [60] and [66]. The judge did not accept that the appellant would be at risk, either on a specific basis relating to Al-Shabab, or for any other reason: [52] and [60]-[72]. The judge went on to consider Article 8 and concluded that neither of the two exceptions under section 117C had been satisfied, nor were there very compelling circumstances: [78]-[93].

The grounds of appeal

6. Six grounds of appeal were put forward. It is the first of these which constitutes the main focus of the appeal before us. It was asserted that during the course of the hearing, the Presenting Officer had effectively conceded the fact that the appellant did not originate from Mogadishu, but rather from Hiraan, as claimed. The judge had therefore acted with procedural unfairness when reaching the contrary finding.

7. In brief summary, the remaining grounds asserted that: (a) the judge had failed to adequately the address documentary evidence; (b) inadequate reasons had been given in respect of the security situation in Somalia (in particular, Mogadishu); (c) there was a failure to take relevant evidence into account; and (d) the judge's conclusions on the unduly harsh assessment were irrational.

8. The grounds were apparently accompanied by a witness statement from Counsel who appeared before the judge (Ms S Akinbolu), together with her notes of the hearing. Although we were unable to locate them on the Upper Tribunal's database, we have no reason to believe that they were not in fact provided at the appropriate point in time.

9. Following the grant of permission, the respondent provided a rule 24 response, opposing the appellant's challenges. A minute note from the Presenting Officer who appeared before the judge accompanied that response.

The hearing

10. At the outset of the hearing we ensured that we had read Ms Akinbolu's witness statement and notes of hearing (we record our gratitude to her for attending the hearing), together with the Presenting Officer's very brief minute note (ICD. 2742). Prior to the hearing, we had also obtained the CVP recording of the hearing before the judge. With the assistance of Ms Radford and Mr Whitwell, we were able to identify the particular part of the recording which bore on the question of whether the Presenting Officer had indeed conceded the place of the appellant's birth. Having done so, we then played that part of the recording in the hearing room (for the record, the passage in question started at 33 minutes 50 seconds and ran until 35 minutes 36 seconds).

11. We then heard concise submissions from both representatives. Ms Radford confirmed that the judge had not raised any issue relating to the appellant's place of birth during the course of submissions.

Conclusions

12. We have applied appropriate restraint before interfering with the judge's decision. He read and heard a good deal of evidence and his decision was clearly conscientiously drafted. We have read that decision holistically and sensibly.

13. We are satisfied that the Presenting Officer did indeed make what was, to all intents and purposes, a concession of fact as to the place of the appellant's birth and that the judge did not raise any concerns relating to that concession with Ms Akinbolu at the hearing.

14. With reference to the passage within the timeframe of the recording referred to earlier, it is clear that the judge quite properly pointed out to the Presenting Officer that she had not asked any questions in cross-examination on the location of birth. The judge queried whether this entailed a concession on the respondent's part. It was apparent that the Presenting Officer did not initially provide a clear response. She observed that the evidence was what it was and that she would "take it at that is what he said". She "had no other evidence to support that". Perhaps unsurprisingly, the judge asked for further clarification on the respondent's position. He specifically asked whether the respondent was conceding the point as to the place of birth. In response, the Presenting Officer stated that she was "not conceding the point", but failed to provide the clarity sought. The judge (again, quite properly) pressed the point. The Presenting Officer then expressly confirmed that she was "not challenging" the appellant's evidence. Given that the appellant's clear evidence had been that he was born in Hiraan and not Mogadishu, the Presenting Officer's clear statement that she was not challenging that evidence amounted, in effect, to a concession that the appellant's account was, to that extent, accepted.

15. We are satisfied that the judge had not subsequently raised with Counsel any point relating to the place of birth issue, notwithstanding what the Presenting Officer had said. In turn, we are satisfied that Ms Akinbolu adopted the reasonable position that particular aspect of the appellant's case had not been challenged and was no longer a live issue. Consequently, she had not made any submissions on the point.

16. We note that the Presenting Officer's minute note of the hearing provides no detail whatsoever of either the evidence or any other matter which bears on the issue before us.

17. In all the circumstances, we conclude that the Presenting Officer had effectively conceded a particular factual issue, namely the place of the appellant's birth. Subsequent to that, the judge had failed to seek submissions from Counsel, or in any other way indicate that in his view this remained a live issue. It follows that the judge's conclusion that the appellant had not been born in Hiraan, but rather Mogadishu, was infected by procedural unfairness. That was, in the circumstances of this case, an error of law.

18. It was of course important to establish whether that error had had a material bearing on the outcome. We conclude that it did. If, as claimed, the appellant had never lived in Mogadishu and did not have any links there, the assessment of potential risk on return would have had to proceed on the basis that he was internally relocating from his home area

of Hiraan to the capital. That would, in our judgment, place the appellant in a materially different position from someone who originated from Mogadishu. There would have had to have been a finding on risk in the home area of Hiraan and then a reasonable assessment in respect of the place of relocation, namely Mogadishu. That is not of course what the judge did, given his finding on the place of birth issue.

19. Given the above, we are satisfied that when the procedural unfairness is placed in the context of the country guidance decision of OA (Somalia) CG [2022] UKUT 00033 (IAC), the outcome of the appellant's appeal could (not would) have been different.

20. The material error of law on the procedural unfairness ground does in our judgment have a knock-on effect on the other challenges brought against the judge's decision. In particular, it is capable of having a bearing on the assessment of the current security situation in Mogadishu as it might apply to a returnee not originating from that city.

21. Thus, we conclude that the protection-based aspect of the judge's decision is flawed and must be set aside.

22. Turning to the Article 8 assessment, the error on the place of birth issue potentially undermines the assessment of very significant obstacles and the broad evaluative judgment required under Kamara v SSHD [2016] EWCA Civ 813 and an assessment of very compelling circumstances, pursuant to section 117C(6) of the 2002 Act.

23. We appreciate that the conclusions on the unduly harsh test might not appear as connected to the errors we have identified as other matters. However, it would in our judgment be artificial to hive off this issue from everything else, particularly as we have decided that the appropriate course of action by way of disposal is to remit this appeal to the First-tier Tribunal.

24. In light of the above, we set aside that aspect of the judge's decision relating to Article 8.

Disposal

25. As stated above, it is appropriate to remit this appeal to the First-tier Tribunal. We bear in mind recent decisions relating to remittal: AEB v SSHD [2022] EWCA Civ 1512 and Begum (Remaking or remittal) Bangladesh [2023] 00046 (IAC). The fact that the principal error we have identified relates to procedural unfairness, together with the need for further fact-finding, satisfies us that the appeal needs to be re-heard in the First-tier Tribunal. We acknowledge that not every finding made by the judge is in itself flawed. Having said that, it is appropriate not to preserve any findings for the purposes of the remitted hearing except for that relating to the section 72 certificate. There has been no cross-appeal by the respondent in respect of the judge's assessment and conclusions at [42]-[47]. This means that both the protection and Article 8 issues can

be re-argued. It also has the effect that what we have deemed to be an effective concession made by the Presenting Officer before the judge will not necessarily bind the respondent's hands at the remitted hearing. What is important, however, is for the respondent to clearly state her position prior to the next hearing.

Anonymity

26. We make an anonymity direction. This is because the case continues to involve protection issues.

Notice of Decision

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

We exercise our discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 and set aside the decision of the First-tier Tribunal.

We remit the case to the First-tier Tribunal.

Directions to the First-tier Tribunal

1. **This appeal is remitted to the First-tier Tribunal (Taylor House hearing centre);**

2. **The remitted hearing is to be conducted by a judge other than First-tier Tribunal Judge Hoffman;**

3. **There shall be no preserved findings of fact except for the finding that the appellant does not represent a danger to the community for the purposes of section 72 of the Nationality, Immigration and Asylum Act 2002, as amended.**

Directions to the parties

1. **The respondent must confirm in writing prior to the remitted appeal whether or not she accepts that the appellant was born in Hiraan.**

H Norton-Taylor

Case No: UI-2022-005260
First-tier Tribunal No: PA/12075/2018

Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 6 March 2023