Upper Tribunal
(Immigration and Asylum Chamber)

Tirabi (Deportation: "lawfully resident": s.5(1)) [2018] UKUT 199 (IAC)

THE IMMIGRATION ACTS

Heard at Glasgow
15 February 2018

Decision & Reasons Promulgated

……

Before

MR C M G OCKELTON, VICE PRESIDENT
DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

ABDIRASHID ABDIRAHMAN TIRABI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr B Melville, instructed by Drummond Miller.
For the Respondent: Mrs M O'Brien, Senior Home Office Presenting Officer.

For the purposes of applying to para 399A of the Rules and s. 117C of the 2002 Act a definition of "lawfully resident" analogous to that in para 276A (as mandated by SC (Jamaica)), the invalidation provisions of s. 5(1) of the 1971 Act are to be ignored.

DETERMINATION AND REASONS

1. The appellant, a national of Somalia, appealed to the First-tier Tribunal against a deportation order made against him under the provisions of the UK Borders Act 2007

on 16 March 2016. Judge J C Grant-Hutchinson dismissed his appeal. The appellant now appeals, with permission, to this Tribunal.

2. The appellant appears to have arrived in the United Kingdom on or before 24 October 2001, when he was nine years old. He was with his mother. Her application for asylum was refused and her appeal was dismissed. She was in due course granted indefinite leave to remain, and the appellant was granted leave in line with her. When he reached the age of eighteen on 22 July 2010 he accordingly already had leave.

3. On 30 September 2015 the appellant appeared before Glasgow Sherriff Court and was convicted of being concerned with the supply of a controlled drug. He was sentenced to 12 months imprisonment. It was that event which prompted the making of the deportation order.

4. The appeal was on a number of grounds. The First-tier Tribunal Judge rejected it for the following reasons. In reference to his claim based on article 3 of the European Convention on Human Rights, the judge found that he would not be at risk of ill treatment, despite his belief that Somalia is a war zone, his claim that he had no family there and that he did not speak the Somali language, his worry that he would be targeted for kidnapping or murder, and his concern that he would not survive either if his family were to support him from the United Kingdom. Noting that in 2003, in her asylum claim, the appellant's mother said that she came from Mogadishu, the judge considered the Country Guidance case MOJ and others (Return to Mogadishu) [2014] UKUT 00442 (IAC). She analysed the evidence before her, and did not accept that the appellant was telling the truth on a number of issues, including his command of the Somali language, and the whereabouts of various relatives. She did not accept the appellant's claim that he had no useful skills. She decided, based on MOJ, that he would not be at risk on return.

5. She then turned to the Human Rights argument, based on the length of time he has been in this country. She noted, correctly, that paragraph 399A of the Statement of Changes in Immigration Rules, HC 395 (as amended), and Section 117B-C of the Nationality, Immigration and Asylum Act 2002 apply to this case. To a large extent, those provisions overlap. She considered the exceptions to deportation set out in paragraph 399A and Section 117C(4). She found as follows. (a) The appellant had not been lawfully resident in the United Kingdom for most of his life, because he had been granted leave only in 2010. (b) The appellant had not socially and culturally integrated into the United Kingdom, as demonstrated by his offence. (c) There would not be very significant obstacles to the appellant's integration into Somalia, based on the findings of fact that she had made in relation to the claim under article 3.

6. She accordingly dismissed the appeal. The grounds of appeal challenge each of the four findings we have set out above. We heard submissions on them from Mr Melville and from Mrs O'Brien.

7. Mr Melville made no oral submissions specifically directed to the judge's finding in relation to article 3. It seems to us that that finding is, in essence, unassailable. The

judge considered the case that the appellant was trying to make. She concluded that, in the factors he raised which might have shown that he would be at risk within the criteria set out in MOJ, he was not, or was not wholly, credible. In those circumstances she had no obligation to believe him on other similar matters. It is perfectly clear that she was entitled to reach the conclusion she did as to the appellant's credibility and as to his failure to establish the fact upon which he relied for his article 3 claim. So far as article 3 is concerned, therefore, we have no hesitation in saying that the judge's conclusion was correct.

8. We turn therefore to the three factors set out in paragraph 399A of the Immigration Rules and, in the same terms, in Section 117C(4) of the 2002 Act. The first question is whether the appellant has been "lawfully resident in the UK for most of his life". This phrase was the subject of interpretation by the Court of Appeal in SC (Jamaica) [2017] EWCA Civ 2112, in which the leading judgment, with which the other members of the Court agreed, was given by the Senior President of Tribunals. At [53], the Senior President concluded that "most of his life" means "more than half". At [54]-[57], the Senior President considered the definition of "lawful residence" for these purposes. There is no definition made specifically applicable to either paragraph 399A or Section 117C; but there is an unrelated definition of lawful residence in paragraph 276A(b) of the Rules, in relation to an application for indefinite leave to remain:

> ""Lawful Residence" means residence which is continuous residence pursuant to:
>
> (i) existing leave to enter or remain; or
>
> (ii) temporary admission within section 11 of the 1971 Act where leave to enter of remain is subsequently granted."

The reference to temporary admission has been the subject of amendment following the coming into force of the Immigration Act 2016, but that has no impact on the present discussion.

9. Faced with the alternative arguments that the requirement in relation to article 8 should be interpreted by analogy with that in paragraph 276A on the one hand, and that (as submitted by the Secretary of State) lawful residence could begin only when there was a grant of leave, the Senior President preferred the former argument. It thus follows that the definition in paragraph 276A is to apply, by analogy, to the calculation in the present case.

10. The records are not complete, and Mrs O'Brien was not able to supply exact details, but it is in the highest degree likely that the appellant was granted temporary admission when he arrived, and that that temporary admission continued until his grant of indefinite leave to remain. He committed his offence in 2015, aged about 23, of which all but 9 years had been spent in the United Kingdom. It would appear to follow that he is to be treated as having been lawfully resident in the United Kingdom for most of his life.

11. There is, however, a tension which was not explored in SC (Jamaica). That case was, of course, a deportation case; otherwise paragraph 399A would not have been in

issue. The facts are set out in paragraphs [2] – [8] of the Senior President's judgment. There is no reference there to the deportation order actually being made. That is potentially of some importance, because Section 5(1) of the Immigration Act 1971 provides in part as follows:-

> "A deportation order against a person shall invalidate any leave to enter or remain in the United Kingdom given him before the order is made or while it is in force".

12. The latter half of that provision, equating the effect on a previous grant of leave to a grant made (presumably accidentally) when a deportation order is actually in force, shows that "invalidates" must mean what it says: that the leave is to be regarded as a nullity. But, if that is right, it would follow that in a case where a deportation order had been made, a definition such as that in paragraph 276A could not assist an appellant, because the grant of leave, which would retrospectively have validated (so to speak) the period of temporary admission, was itself retrospectively invalid.

13. However, it appears to us that the decision in SC (Jamaica) which is certainly binding in England and Wales, and of the highest authority in Scotland in relation to cases where the appeal is against a deportation decision, must be taken equally to apply when a deportation order has been made. At the time of the enactment of the 1971 Act, and for many years afterwards, an appeal against a deportation decision was normally determined in advance of the deportation order being made. But under the 2007 Act, the order is often (though not always) made at the time of the decision. The Senior President, no doubt, had these points in mind (he cites the 1971 Act) and we regard it as inconceivable that he thought that the determination of this issue, which is essentially one of the nature of the appellant's integration into the United Kingdom, should depend on the apparently random fact of whether a deportation order happens to have been signed before the appeal is brought.

14. We note the provisions of Sections 78 and 79 of the 2002 Act. Those provisions attempt to work through the question whether a deportation order can be made during the currency of an appeal, and, if so, with what effect. If an appellant has an in-country right of appeal, a deportation order cannot be made against him while an appeal could be brought or is pending. That rule does not apply to deportation orders made under the 2007 Act, but Section 79(4) specifically provides that in those circumstances, the invalidation provisions of Section 5 of the 1971 Act do not have effect until any appeal has ceased to be pending. These provisions show that the draftsman had in mind, for the purposes of the calculation of leave, the difficulties posed by the date of a deportation order. They do not, however, in our judgment have any real impact on the rationale of the Senior President's decision in SC (Jamaica), which was that a person who has had a period of temporary admission which is followed by a grant of leave is to be regarded, and specifically, is to be regarded in the context of the assessment of the legality of a deportation decision under paragraph 399A, as a person who during the period of temporary admission and during the period of leave has been lawfully resident in the United Kingdom. We thus hold that, for the purposes of applying to paragraph 399A and Section 117C a definition of "lawful residence" analogous to that in paragraph 276A, in accordance with SC (Jamaica), the invalidation provisions of Section 5(1) of the 1971 Act are to be ignored. It follows that the appellant succeeds on this ground: he should have been

regarded as a person who had been lawfully in the United Kingdom for most of his life.

15. The second issue is whether he is "socially and culturally integrated into the United Kingdom". As we have said, the judge decided this point against the appellant because of his offence, which, when coupled with the assessment that he continued to pose a danger to the community, she decided demonstrated his lack of integration. Mrs O'Brien conceded that the judge was wrong about that, and we think she was right to do so. Bearing in mind again that these factors are being taken into account always in the context of the deportation of a person who has committed an offence, it is inconceivable that it could have been intended that, in any general sense, the commission of an offence would demonstrate a lack of integration. The appellant has been here since he was a child, he has been educated here, he has friends and relatives here, he has lived on his own in Glasgow after his relatives moved to London. We have little hesitation in concluding that he is socially and culturally integrated into the United Kingdom.

16. The third question is whether there would be very significant obstacles to his integration in Somalia. The grounds of appeal note, as we have noted above, that in reaching her conclusion on that issue, the judge took account of the findings of fact that she had made in relation to article 3. As the grounds point out, the question of whether a person is at risk of ill treatment is different from the question whether he will be able to integrate into the community abroad. That is, of course, true: but it does not follow that facts and assessments which are relevant to one issue are not relevant to the other. As we have said, the judge did not accept the appellant's account of the difficulties he would face in relation to his claim under article 3: it was equally his task to establish that there were very significant obstacles to his integration in Somalia. As the judge found, he is educated to a considerable level, and he has work experience. There is no suggestion that he cannot easily make friends. There is no reason why, initially at least, he should not be supported by his relatives outside Somalia; and there are some, admittedly more distant, relatives in Somalia. Further, as the judge found, he was, in his evidence, trying to minimise his connections with Somalia.

17. In his submissions before us, Mr Melville suggested that the appellant's good United Kingdom education would not be an advantage to him in Somalia, simply because of the difference between Scottish and Somali educational standards. We are unable to accept that argument, which verges on the bizarre. The appellant's education will stand him in exceptionally good stead on his return. On his own account, he has no nuclear family in Somalia, and it is of course fair to say that he has no real life experience of being there, but in the context of this case, and with the appellant's own experience and personal characteristics, we are wholly unable to accept that the judge was not entitled to find, as she did, that the appellant had not established that there would be serious obstacles to his integrating himself in Somalia.

18. In order for the exception in paragraph 399A or Section 117C to apply, the appellant would need to establish all three elements. In our judgement he fulfilled the requirements of the first two, but not of the third. The exception therefore does not apply to him. Further, as the judge noted, the public interest continues to demand

the appellant's deportation, not merely because he is a convicted foreign criminal, but also because, in the only assessment which is being made of him, he continues to pose a risk to the public in the United Kingdom.

19. For the foregoing reasons, we conclude that despite the judge's errors, her decision dismissing the appeal was not merely the appropriate one, but which flows from those parts of her determination which were without error. We therefore decline to set her determination aside. The appellant's appeal stands as dismissed.

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 30 April 2018.