



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/13222/2015

THE IMMIGRATION ACTS

Heard at Columbus House, Newport
On 18th August 2017

Decision & Reasons Promulgated
On 26th October 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

MHH
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. G Hodgetts of Counsel, instructed by South West Law

For the Respondent: Mr I Richards, Home Office Presenting Officer

DECISION AND REASONS

1. The First-tier Tribunal (“FtT”) has made an anonymity order and for the avoidance of any doubt, that order continues. MHH is granted anonymity throughout these proceedings. No report of these proceedings shall directly or indirectly identify him. This direction applies both to the appellant and to the

respondent. Failure to comply with this direction could lead to proceedings being brought for contempt of court.

2. The appellant is a Somali national. He has claimed asylum in the UK. The date upon which he entered the UK is unclear. In a screening interview completed on 2nd September 2014, he claimed to have arrived in the UK on 20th August 2014, having left Somalia on 7th August 2014. In a subsequent interview completed on 6th October 2015, the appellant claimed that he had arrived in the UK on 28th December 2013. In any event, on 16th October 2015, the appellant's claim for asylum was refused by the respondent. The appellant appealed to the First-tier Tribunal ("FtT") and his appeal was heard on 8th September 2016 by FtT Judge Thomas. The appeal was dismissed for the reasons set out in a decision promulgated on 23rd September 2016. It is that decision that is the subject of the appeal before me.
3. It was common ground between the parties that the appellant is a Somali national and that he is from the Ashraf minority clan.
4. The appellant was represented at the hearing of his appeal before the FtT. The Judge heard evidence from the appellant and his sister. The appellant's claim is summarised at paragraphs [20] to [26] of the decision of the FtT. The Judge notes at paragraph [27] of her decision that the issue in the appeal is essentially one of credibility. The Judge noted that the appellant fears persecution because he originates from a minority clan and/or he is at risk from recruitment by the Al-Shabaab. The Judge states:

"...There is an overlap in the refugee Convention claim and the humanitarian protection claim in that the Appellant asserts he is specifically targeted by the Al Shabaab for also being of a minority clan. Therefore, in assessing the Appellant's asylum and humanitarian protection claim I have considered both of these at this part of my decision together..."

5. The Judge did not find the appellant's account of events in relation to his exit from Somalia to be credible for the reasons set out at paragraphs [29] to [34]. At paragraph [35], the Judge states:

"In summary I do not accept the Appellant's evidence in relation to either his attempted recruitment to the Al Shabaab or in relation to his asserted fear of them. The Appellant's version of events is flawed with inconsistencies and contradictions."

6. The Judge accepted, at paragraph [39], that the appellant's father and sister were killed in 1991. At paragraph [40], the Judge states:

"Nevertheless despite the claimed past persecution of the Appellant's family as a result of being from a minority clan, an event which happened nearly 25 years ago, I do not accept that it is sufficiently indicative of the claimed current or future risk to the Appellant upon return to Somalia. There is no factual evidence from the Appellant's account to support this assertion. The Appellant returned to Somalia from Kenya in 2005. He states that since that time he has lived in Bu'aale. Nowhere within his evidence does he suggest that he has at any time between 2005 until 2012 suffered what would amount to persecution for being a member of the Ashraf clan. My understanding is, is that the death of his sister Shukri was because she was caught in cross fire not because she was from a minority clan."

7. At paragraph [42], the Judge states;

"I do not find the Appellant's evidence credible. I have found in general his evidence contradictory, inconsistent and implausible. In summary I do not accept the truth of the Appellant's version of events relating to his reasons for leaving Somalia. I do not accept his claimed fear of persecution by the Al Shabaab either in relation to his evasion from recruitment or his claimed fear of forcible recruitment. Further, I do not accept the claimed fear of persecution on grounds of race/ethnicity. Albeit I accept that the background evidence which I have been directed to by Mr Paxton ('UK Home Office Country Information and Guidance') supports that there is discrimination of members of minority clans the factual evidence in this case is not consistent with the Appellant having ever been subjected to what would amount to persecution for the purposes of

Regulation 5. On that basis I cannot identify any future risk to the Appellant upon return nevertheless I deal with this point more substantively later within this decision.”.

8. At paragraphs [46] to [61] of her decision, the Judge went on to address the humanitarian protection and Article 3 claims. At paragraph [47], the Judge notes the submission made on behalf of the appellant that there is a serious and individual risk by reason of indiscriminate violence which meets the threshold to engage Article 15(c) of the Qualification Directive and Article 3 of the ECHR. Having considered the evidence relied upon by the appellant, the Judge states at paragraphs [60] to [62]:

“60. In summary, whilst I accept the Appellant has mental health problems which according to Dr Briffa’s report have been triggered as a result of ‘lifelong dramatic events and losses as a member of a minority clan persecuted in Somalia’ and albeit this is a factor that I should take into account when considering the return of the Appellant to Somalia, I do not accept, relying upon KH, that those problems either alone or in conjunction with any other factor or factors are sufficient to engage Article 15(c) or as asserted in KH, Article 3.

61. In summary on the basis that I do not accept the Appellant’s version of events as to why he left Bu’aale, I can identify no reason as to why he cannot therefore return to there in accordance with the guidance in AMM. No evidence has been adduced by the Appellant to suggest that there is fighting in Bu’aale. Further there is no evidence to support his assertion that he was at any time persecuted for the purposes of Regulation 5 of the Qualification Regulations whilst he lived there because of being a member of a minority clan. The Appellant asserts that his mother was killed, again I did not find this credible. The Appellant contends that they returned to Bu’aale having lived in Kenya yet gives no explanation as to why they chose to live in Bu’aale. It can only be inferred it was because they had support there and that was an area in which their clan was settled. The Appellant in his substantive asylum interview portrayed himself as a well-known person within Bu’aale. I therefore do not accept that he would have no connections if returned to Bu’aale.

62. *In conclusion having considered all the evidence in relation to the risk of indiscriminate violence upon return to Somalia I find that neither Article 15(c) nor Article 3 of the ECHR is engaged.*

9. The appellant advances three grounds of appeal. First, the Judge of the FfT failed to reach a decision on a material matter. It is said that the appellant's claim was based on four separate grounds. Whilst three of these have been considered by the FfT Judge, the Judge gave no consideration to the appellant's claim that he would be at risk of Article 3 harm by virtue of destitution upon return to Somalia. Second, even if the Judge's conclusions relating to the Article 15(c) claim apply to the Article 3 claim, the Judge failed to give sufficient reasons for her decision. Finally, the Judge failed to apply the country guidance decision of **MOJ -v- SSHD [2014] UKUT 00442 (IAC)** when determining whether the appellant would upon return, face living conditions so poor as to engage Article 3.
10. Permission to appeal was granted by Upper Tribunal Judge Grubb on 15th December 2016. The matter comes before me to consider whether or not the decision of the FfT involved the making of a material error of law, and if so, to remake the decision.
11. Before me, Mr Hodgetts submits that the issue in this appeal was whether the appellant can return to Mogadishu as a member of a minority clan. He submits that the Judge of the FfT failed to have any proper regard to the guidance set out in **MOJ -v- SSHD** and in particular, whether the appellant would end up in an IDP camp, and if so, how he would fare in the IDP camp. Mr Hodgetts submits that applying the guidance in **MOJ**, it is clear that the appellant would have to stay in an IDP camp and the evidence demonstrates that he would suffer discrimination. Mr Hodgetts submits that the Judge was wrong to state at paragraph [27] of her decision that "*the sole issue in this case is credibility*". He submits that in addition to the issue of credibility, it was incumbent upon the Judge to consider the guidance set out in **MOJ** in deciding whether the claim is capable of succeeding on Article 3 grounds. Furthermore in concluding at

paragraph [61] of her decision that the appellant can return to Bu'aale, the Judge did not consider how the appellant could get from Mogadishu to Bu'aale.

12. Mr Hodgetts submits that the Court of Appeal in SSHD -v- Said [2016] EWCA Civ 442 was concerned with an appellant who was wholly disbelieved and the Court of Appeal did not consider evidence about minority clan members. The Court of Appeal did not consider how a minority clan member would be treated in an IDP camp. He submits that the decision of the Court of Appeal in Said does not undermine the guidance provided by the Upper Tribunal in MOJ, and that the impact upon return to someone who is vulnerable because they are a member of a minority group, must still be considered by the Tribunal.
13. Mr Richards submits that the appellant now seeks to widen the grounds of appeal to encompass issues such as the arrangements for the appellant's travel between Mogadishu and Bu'aale. He submits that the submissions of Mr Hodgetts stray beyond the grant of permission that was limited to the Judge's arguable failure to deal with the Article 3 claim advanced by the appellant. Mr Richards submits that it was open to the judge to find that the appellant could return to Bu'aale and that it did not form part of the appellants case that he would face difficulties on return to Mogadishu, before returning to Bu'aale.
14. Mr Richards submits that in any event, any error in the Judge's approach to the Article 3 claim is immaterial in light of what is said by the Court of Appeal at paragraph [31] in SSHD -v- Said. He submits that there is no material error of law capable of affecting the outcome of the appeal.

DISCUSSION

15. At paragraphs [13] to [15] of the appellant's skeleton argument that was before the FtT Judge, the appellant submitted that the circumstances of the appellant upon return to Somalia would be so poor so as to engage Article 3 ECHR. The appellant pointed to a number of factors including his absence from Mogadishu

for around 21 years, the fact that the appellant is from a minority clan and the widespread discrimination against members of a minority clan, and his claim that he would not have any family in Somalia to assist him financially. The appellant also submitted that he does not have any family members who are in a position to assist financially, and that his journey to the west was funded by a third party, with whom the appellant has had no further contact. It was submitted that if the appellant were returned to Somalia, he would face destitution and be forced to live in an IDP camp. Applying the approach in MOJ, it was submitted that the appellant's Article 3 ECHR rights would be breached.

16. It is now well established that it is generally unnecessary and unhelpful for FfT decisions to rehearse every detail or issue raised in a case but it is necessary for Judges to identify and resolve key conflicts in the evidence, and explain in clear and brief terms their reasons, so that the parties can understand why they have won or lost.
17. In MOJ the Tribunal concluded that an ordinary civilian would face no real risk of persecution on return and that any ordinary citizen of Mogadishu would be able to reduce personal exposure to risk. At (i) of the headnote, the Tribunal states:

(i) The country guidance issues addressed in this determination are not identical to those engaged with by the Tribunal in AMM and others (conflict; humanitarian crisis; returnees; FGM) Somalia CG [2011] UKUT 445 (IAC). Therefore, where country guidance has been given by the Tribunal in AMM in respect of issues not addressed in this determination then the guidance provided by AMM shall continue to have effect.

18. The scope of the country guidance in MOJ is identified in paragraph [1] of the decision in the following way:

“... the Upper Tribunal addresses the current situation in Mogadishu in order to determine the individual appeals and to give guidance limited to the following issues:

Whether the current situation in Mogadishu is such as to entitle nationals of Somalia whose home area is Mogadishu or whose proposed area of relocation is

Mogadishu to succeed in their claims for refugee status, humanitarian protection status under Article 15(c) or protection against refoulment under Articles 3 or 2 of the ECHR solely on the basis that they are civilians and do not have powerful actors in a position to afford them adequate protection.

19. Importantly in my judgement, in **MOJ**, the Upper Tribunal was concerned with whether the current situation in Mogadishu is such as to entitle nationals of Somalia whose home area is Mogadishu or whose proposed area of relocation is Mogadishu, to succeed in their claims. The Tribunal made it clear that the country guidance issues addressed in that determination are not identical to those engaged with by the Tribunal in **AMM and others (conflict; humanitarian crisis; returnees; FGM) Somalia CG [2011] UKUT 445 (IAC)**. Therefore, where country guidance has been given by the Tribunal in **AMM** in respect of issues not addressed in the **MOJ** determination, the guidance provided by **AMM** shall continue to have effect.
20. In **AMM**, the Tribunal provided the following guidance in respect of those from Southern and central Somalia, outside Mogadishu:

“597. Outside Mogadishu, the fighting in southern and central Somalia is both sporadic and localised and is not such as to place every civilian in that part of the country at real risk of Article 15(c) harm. In individual cases, it will be necessary to establish where a person comes from and what the background information says is the present position in that place. If fighting is going on, that will have to be taken into account in deciding whether Article 15(c) is applicable. There is, likewise, no generalised current risk of Article 3 harm as a result of armed conflict.

598. In general, a returnee with no recent experience of living in Somalia will be at real risk of being subjected to treatment proscribed by Article 3 in an Al-Shabab controlled area. “No recent experience” means that the person concerned left Somalia before the rise of Al-Shabab in 2008. Even if a person has such experience, however, he or she will still be returning from the United Kingdom, with all that is likely to entail, so far as Al-Shabab perceptions are concerned, but he or she will be less likely to be readily identifiable as a returnee. Even if he or she were to be so identified, the evidence may point to the

person having struck up some form of accommodation with Al-Shabab, whilst living under their rule. On the other hand, although having family in the Al-Shabab area of return may alleviate the risk, the rotating nature of Al-Shabab leadership and the fact that punishments are meted out in apparent disregard of local sensibilities mean that, in general, it cannot be said that the presence of family is likely to mean the risk ceases to be a real one.

21. In SSHD -v- Said [2016] EWCA Civ 442, the Court of Appeal considered whether the Upper Tribunal was right to conclude that the deportation of Mr Said, to Somalia would violate his rights guaranteed by Article 3. All of Mr Said's family live in the UK. His appeal against deportation was dismissed by the FtT. On appeal, the Upper Tribunal Judge concluded that the FtT had made an error of law in connection with its conclusion on Article 3. Following the decision in MOJ, the Upper Tribunal Judge found that Mr Said's deportation would violate Article 3 because he would be at risk of finding himself destitute, and thus likely to end up in an IDP camp, where the conditions would be very poor. The Court of Appeal considered the law relating to the reach of Article 3 in preventing removal of foreign nationals from the UK and concluded that Mr Said's circumstances fell far short of being able to satisfy the Article 3 threshold. As to the country guidance in MOJ, at paragraphs [28] and [31] of his judgment Lord Justice Burnett (*with whom Lady Justice Sharp and Lord Justice Christopher Clarke agreed*) stated

"28 In view of the reference in the paragraph immediately preceding para 407 to the UNHCR evidence, the factors in paras 407(h) and 408 are likely to have been introduced in connection with internal flight or internal relocation arguments, which was a factor identified in para 1 setting out the scope of the issues before UTIAC. Whilst they may have some relevance in a search for whether a removal to Somalia would give rise to a violation of article 3 of the Convention, they cannot be understood as a surrogate for an examination of the circumstances to determine whether such a breach would occur. I am unable to accept that if a Somali national were able to bring himself within the rubric of para 408, he would have established that his removal to Somalia would breach article 3 of the Convention. Such an approach would be inconsistent with the domestic and

Convention jurisprudence which at para 34 UTIAC expressly understood itself to be following.

...

*31. I entirely accept that some of the observations made in the course of the discussion of IDP camps may be taken to suggest that if a returning Somali national can show that he is likely to end up having to establish himself in an IDP camp, that would be sufficient to engage the protection of article 3. Yet such a stark proposition of cause and effect would be inconsistent with the article 3 jurisprudence of the Strasbourg Court and binding authority of the domestic courts. In my judgment the position is accurately stated in para 422. That draws a proper distinction between humanitarian protection and article 3 and recognises that the individual circumstances of the person concerned must be considered. An appeal to article 3 which suggests that the person concerned would face impoverished conditions of living on removal to Somalia should, as the Strasbourg Court indicated in *Sufi and Elmi* at para 292, be viewed by reference to the test in the *N* case. Impoverished conditions which were the direct result of violent activities may be viewed differently as would cases where the risk suggested is of direct violence itself.*

22. Plainly, each case is fact specific and the various and particular circumstances of the appellant need to be taken into account. Here, the Judge notes at paragraph [21] of her decision that the appellant was born in Mogadishu. In 1995, the appellant and his remaining family fled from Somalia to Kenya. In 2005, the appellant and his family were deported from Kenya back to Somalia. They lived in Bu'aale "*which the appellant describes as a small town in the countryside some distance from Kismayo*". The appellant's account was that he fled Bu'aale in March 2012. On the appellant's own account, he had lived in Bu'aale during the seven years between 2005 and 2012 with his mother. The Judge rejected the appellant's version of events in relation to his exit from Somalia. The Judge also rejected the appellant's account that following his departure from Bu'aale, his mother was killed by Al Shabaab.
23. The Judge proceeds upon the basis that the appellant's home is in Bu'aale. Although the appellant was born in Mogadishu, that does not mean that that area

falls to be treated as the ‘home area’ for the purposes of determining entitlement to international protection. At paragraph [61] of her decision, the Judge states:

“In summary on the basis that I do not accept the Appellant’s version of events as to why he left Bu’aale, I can identify no reason as to why he cannot therefore return to there in accordance with the guidance in AMM. No evidence has been adduced by the Appellant to suggest that there is fighting in Bu’aale. Further there is no evidence to support his assertion that he was at any time persecuted for the purposes of Regulation 5 of the Qualification Regulations whilst he lived there because of being a member of a minority clan. The Appellant asserts that his mother was killed, again I did not find this credible. The Appellant contends that they returned to Bu’aale having lived in Kenya yet gives no explanation as to why they chose to live in Bu’aale. It can only be inferred it was because they had support there and that was an area in which their clan was settled. The Appellant in his substantive asylum interview portrayed himself as a well-known person within Bu’aale. I therefore do not accept that he would have no connections if returned to Bu’aale.”

24. In MOJ, the Upper Tribunal was concerned with the situation of those whose home area is Mogadishu, or whose proposed area of relocation is Mogadishu. Here, the Judge of the FtT was not concerned with return or internal relocation to Mogadishu. The Judge was concerned with whether there would be a breach of Article 3 if the appellant returns to Bu’aale. In my judgement, it was open to the Judge to find, as she did at paragraph [61], that there is no reason as to why the appellant cannot return to Bu’aale in accordance with the guidance in AMM. The Tribunal confirmed in AMM that there is no generalised current risk of Article 3 harm as a result of armed conflict. On the facts as found, the FtT Judge noted that there is no evidence to suggest that there is fighting in Bu’aale or that the appellant was targeted whilst he had lived there because he was a member of a minority clan. At paragraph [75] of her decision, the FtT Judge also states as follows:

“I do not accept that the Appellant would be without support on return to Bu’aale. I do not find the Appellant credible about what would be his lack of

support if returned and I make this finding on the basis of the findings I have made concerning the Appellant's credibility in relation to the other issues. Further, I do not accept that the Appellant is in the dire financial circumstances which he suggests. The Appellant has repeatedly referred to the uncle which assisted him in financing his exit from Nairobi to Norway and then from Norway to the UK. This uncle he asserts he has had no contact with since 2013. Nevertheless, on the 2 occasions the Appellant needed money he was able to contact him to obtain financial assistance sufficient to instruct an agent and to arrange entry to both Norway and the UK by plane. Further the Appellant when he arrived in the UK had the financial resources to remain in the UK for 8 months without financial support from his sister."

25. I accept the submission of Mr Hodgetts that the Judge did not consider how the appellant could get from Mogadishu to Bu'aale. In **AMM** the Tribunal states, at paragraph [605], that travel by land across southern and central Somalia to a home area or proposed place of relocation is an issue that falls to be addressed in the course of determining claims to international protection. Such travel may well, in general, pose real risks of serious harm, not only from Al-Shabab checkpoints but also as a result of the present famine conditions. The Tribunal noted that women travelling without male friends or relatives are in general likely to face a real risk of sexual violence.
26. I have carefully read the witness statements that were relied upon by the appellant. As Mr Richards submits, it did not form any part of the appellant's case that he would face difficulties on return to Mogadishu before returning to Bu'aale. On the evidence before the FfT and the facts found by the Judge, it cannot be said that the Judge's decision is infected by a material error of law capable of affecting the outcome of the appeal in not considering how the appellant could get from Mogadishu to Bu'aale. The appellant did not advance a case on the basis that he would face difficulties on return to Mogadishu before returning to Bu'aale. The Judge cannot be criticised for failing to find that the appellant would face difficulties travelling from Mogadishu to Bu'aale where that

was simply not part of his case, and neither was there any evidence before the Judge to support such a claim.

27. In my judgement, it follows that upon a careful reading of the decision of the FfT Judge, who considered the whole of the evidence in the round, it was open to the Judge to dismiss the appeal on Article 3 grounds for the reasons given. The decision of the FfT does not contain a material error of law capable of affecting the outcome of the appeal and the appeal is therefore dismissed.

NOTICE OF DECISION

28. The appeal is dismissed.

Signed _____ Date 20th October 2017

Deputy Upper Tribunal Judge Mandalia

FEE AWARD

I have dismissed the appeal and there can in any event be no fee award

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Signed _____ Date 20th October 2017

Deputy Upper Tribunal Judge Mandalia