



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00906/2012

THE IMMIGRATION ACTS

Heard at Field House
On 12th August 2013

Determination Promulgated
On 6th September 2013

Before

UPPER TRIBUNAL JUDGE PETER LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MUKTAR NOOR
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr T. Wilding, Senior Home Office Presenting Officer
For the Respondent: Mr T. Lay, Counsel, instructed by Wilson Solicitors LLP

DETERMINATION AND REASONS

1. The claimant, a citizen of Somalia born on 27th April 1980, was around 11 years old when in 1991 his mother took him and his siblings to claim asylum, as a family, at the Secretary of State's public enquiry office in the United Kingdom. Although unsuccessful in their asylum claims, the appellant, his mother and siblings were

granted indefinite leave to remain in the United Kingdom in January 2000. In March 2006 the claimant was convicted of offering to supply Class A drugs, for which he was sentenced to 20 months imprisonment.

2. That sentence led to the Secretary of State making a decision to deport the claimant. The claimant did not appeal against that decision and a deportation order was, accordingly, signed on 17th October 2006. The order stated that the claimant was to be removed to Somaliland. The claimant lodged an out-of-time appeal against the deportation decision; but the ensuing appeal was unsuccessful, as was the claimant's attempt to obtain a High Court review of the Asylum and Immigration Tribunal's decision. Removal decisions were then set for May 2008 but were cancelled when the claimant obtained a rule 39 stay from the European Court of Human Rights, effectively preventing his removal from the United Kingdom.
3. While serving his custodial sentence, the claimant assaulted a prison officer and, following conviction in May 2009 for that offence, was sentenced to six months imprisonment, together with a recommendation for deportation.
4. On 19th April 2012 the European Court of Human Rights lifted the rule 39 stay and on 10th October 2012 the Secretary of State made a decision to refuse to revoke the claimant's deportation order.
5. The claimant appealed against that decision to the First-tier Tribunal (Tribunal Judge Shepherd and Mrs E Morton), which by a determination dismissed the claimant's appeal on asylum grounds and Article 8 of the ECHR. The appeal was, however, allowed on Article 3 grounds and under Article 15(c) of Council Directive 2004/83/EC (the Qualification Directive).
6. Permission to appeal against the First-tier Tribunal's determination was sought by the Secretary of State and granted by a Designated Judge of the First-tier Tribunal on 5th July 2013. The Secretary of State complains of the First-tier Tribunal's approach to the evidence concerning the way in which the claimant would be returned from the United Kingdom to Somaliland. The manner and route by which the Secretary of State intends to remove a particular individual from the United Kingdom to his or her home country is capable of playing a significant (indeed, crucial) role in deciding whether the removal of that individual would violate the United Kingdom's international protection obligations. So much is plain from the judgments of the Court of Appeal in HH and Others [2010] EWCA Civ 426 and the determination of this chamber of the Upper Tribunal in AMM and Others (conflict; humanitarian crisis; returnees; FGM) Somalia CG [2011] UKUT 00445 (IAC). This important fact was fully appreciated by the First-tier Tribunal in the present case. That is why there were no fewer than three Case Management Hearings involving judges of that Tribunal, before the matter reached Judge Shepherd and Mrs Morton on 18th April 2013. It appears to have only been with some difficulty that the First-tier Tribunal was able to ascertain from the Secretary of State that she intended to return the claimant to Mogadishu by air and then overland across southern and central

Somalia, to Somaliland. A proposed land journey from Mogadishu to the border of Somaliland would involve travelling across areas of Somalia, which the Tribunal in AMM had found posed real risks for returnees without recent experience of living in Somalia (see [4] to [8] and [12] of the country guidance in that case).

7. On the day of the substantive hearing, however, the Secretary of State revealed that her proposed means of returning the claimant to Somaliland had radically changed. Whilst an email exchange in February 2012 had recorded that “all returns are currently to Mogadishu and then overland”, the Presenting Officer, Ms Fleming, presented the Tribunal with an email from Anne Scruton of 17th April 2013, which indicated that there would, in fact, be no overland travel. Ms Scruton stated:-

“Removals are either via Nairobi or Dubai. There are difficulties with the present route due to insufficient transit times in Nairobi. CROS Ops are looking at alternative routes and one suggestion is via Royal Brunei, but this is subject to their agreement. A meeting is planned.

...

2. Whether the appellant will need to disembark in Mogadishu en route to Somaliland.

If via Nairobi then the flight goes via Mogadishu but the subject would not need to disembark.”

8. For the purposes of the substantive hearing, the claimant’s advisors had obtained an expert report from Markus Hoehne, a Somali expert with the Max Planck Institute in Germany. Dr Hoehne’s credentials to be an expert are amply set in Annex 1 to his report. His anthropological studies in the area have, amongst other things, required him to undertake frequent field work in Somaliland. Crucially for this case, Dr Hoehne’s report contained the following evidence concerning the possibility of the appellant being able to travel for Mogadishu Airport (found in AMM to be sufficiently safe) by air to Hargeysa in Somaliland:-

“14. It is proposed that Mr Noor is returned to Somaliland via Mogadishu. This means that he would have to fly into Mogadishu international airport, and then would have to get a connection flight, e.g. with Jubba Airlines, to Hargeysa. While such flights to Hargeysa exist and Jubba flies at least two times per week from Mogadishu to Hargeysa, it is not probable that Mr Noor would be able to directly connect from Mogadishu to Hargeysa. Most probably he would have to stay a few days or even longer in Mogadishu for organising his connection flight. Thus, while Mr Noor would in general be able to fly to Hargeysa and cross into Somaliland, the specific details must be assessed in order to understand the potential risks this involved for Mr Noor. This is done below (paragraph 17 and 18).

15. As mentioned in the introduction above, the situation in Mogadishu and its surroundings, as well as in other parts of south-central Somalia is still volatile. Several regions, particularly Hiiraan and Galguduud, Geedo, Bay, Bakool and

Lower Jubba, are still affected by ongoing fighting between remaining Al Shabaab forces and Somali government forces and their allies. Insecurity prevails in many areas of south-central Somalia, and particularly in Mogadishu, where a number of assassinations and attacks against officials and civilians happened until early April 2013, most of which were ascribed to A Shabaab, some of which, however, were also conducted by ordinary gangsters and undisciplined government forces (see particularly paragraphs 5, 6 and 8).

16. Flights from Mogadishu to Hargeysa are operated, e.g. by Jubba Airlines. The machines usually come from Nairobi, stopover in Mogadishu International Airport, and continue to Hargeysa. This route was flown at least twice a week as recently as mid-March 2013, when I investigated into these connections for planning my own travels in the region. I confirm that I recently, in December 2012, had a stop-over in Mogadishu myself and that the security at the airport is fine. This is also where AMISOM has many barracks and its headquarter. Also the UN and several international NGOs have offices and houses at Mogadishu International Airport. The airport is a highly securitized area and it is in general not easy for ordinary Somalis to enter it. Staying overnight at the airport is extremely expensive. One night costs several hundred US\$ (up to 300\$), as far as I heard recently from a French colleague. Ordinary Somalis do not stay over night there.
17. Upon arrival in Mogadishu International Airport Mr Muktar Noor would most probably have to enter Mogadishu city to organise his connection flight to Hargeysa. Usually these flights are quite busy and often booked. Moreover, since the main airline (Jubba) flies only twice a week, Mr Noor most probably would have to wait a few days before he could continue. This means that he would have to 'find his ways around' in Mogadishu and spend time in town. Against the background of his a) long absence from Somalia as a whole, b) lack of knowledge about the current situation in Somalia in general and Mogadishu in particular, c) limited ability to speak Somali language, d) distance to Islamic faith and religious practices such as regular praying, and e) generally westernized lifestyle and behaviour Mr Noor would most probably run a very high risk to get into serious trouble while in Mogadishu trying to organise his connection flight. As outlined in the introduction of this report, the security situation in Mogadishu is not stable and Al Shabaab, criminal groups and undisciplined government forces operate there. The government under President Mahamoud Sheikh Hassan has not yet the ability to guarantee the safety of the local population. Officials and other prominent persons need guards. Those who cannot afford any would minimise their movements in town and avoid certain areas. Mr Noor does not have the relevant local knowledge to find his ways around quickly and effectively and to be able to avoid risky areas and situations. Given his inability to speak proper Somali and his difference in style and appearance, Mr Noor would be quickly identified as a 'newcomer' by local actors including criminals or extremists. This would make him highly vulnerable to attacks, including robbery by criminals or undisciplined soldiers or policemen, beatings by fundamentalist Muslims or attempts to recruitment by clandestinely operating Al Shabaab networks."

9. At [77] and [78] of its determination, the Tribunal said this:-

“77. It is fair to say that the respondent’s position of the proposed manner of return of a failed asylum seeker to Somaliland does not appear to be settled. We do note that, as Mr Eaton pointed out, the respondent herself in her letter of rejection specifically accepted that it is not currently safe or practicable to transport overland from Mogadishu to Somaliland (page 5). This nullified the later statement made in response to a court direction made in the appeal that (Paul Whitehead email 6th February 2013) that all returns are currently to Mogadishu and then overland. Despite Ms Fleming’s efforts to obtain a more plausible return strategy from the Africa desk, what emerged was the statement by Anne Scruton that the subject would not need to disembark from a flight to Mogadishu, before onward travel to Hargeisa by air.

78. There was no evidence before us to demonstrate the accuracy of that final statement, and as the information was submitted during the hearing itself, with no time for the appellant or anyone else to verify the claim, we are inclined to give it less weight than might otherwise be the case.”

10. At [80] the Tribunal noted that the evidence of Dr Hoehne:-

“80. ... is in direct contradiction of Anne Scruton’s statement that he would not need to disembark”. Hoehne goes on to describe the difficulties inherent in trying to organise the connecting flight, and that the likelihood is that this would involve a wait of perhaps a few days and the need to organise a ticket. Once again, as with the need to obtain a travel document identified in AMM, the real risk is a significant amount of time in Mogadishu itself, outside the safety of the airport, and of falling into the hands of the Al Shabaab insurgents currently gaining ground around and in the fringes of Mogadishu (Hoehne paragraphs 3 to 10).

81. In summary, the respondent’s position is not settled, and as to the manner of return it appears highly unlikely that the appellant could be returned by air without having to disembark, and that he would have to enter Mogadishu itself and spend some time there. Any suggestion of a return overland must on current evidence be rejected, as this would be ‘fraught with dangers’ AMM paragraph 643.”

11. This led to the following conclusions:-

“84. We do conclude however, following AMM, that the appellant, being in the position of someone having to return to Mogadishu, albeit briefly, after spending 22 years in the UK, and with no clan connection, or indeed any connection to rely upon, would be at real risk of Article 15(c) harm.

85. We conclude that a journey overland from Mogadishu to Hargeisa could not be accomplished without a real risk of serious harm in either the obtaining of the unofficial travel document or the journey itself, or both.”

12. The Secretary of State’s grounds of application for permission to appeal to the Upper Tribunal assert that:-

“It is unclear from the evidence of Mr Hoehne what expertise he has on the processes of the Secretary of State when making enforced returns, and how he could conclude that the Secretary of State would leave an appellant in a country which was not his country of Nationality, and not the country to which he is being forcibly (sic) returned, to obtain his own flight ticket.”

13. I do not consider there to be any merit in this ground of the Secretary of State. The First-tier Tribunal was faced with a divergence in the evidence of, respectively, Dr Hoehne and Ms Scruton. The Tribunal’s decision to prefer the evidence of Dr Hoehne on this issue is sufficiently reasoned. It cannot in any sense be categorised as irrational. Dr Hoehne had recent direct experience of arrangements for connecting flights at Mogadishu international airport. By contrast, the evidence in the email of Ms Scruton is exiguous and fails to inform the reader how she knows there would be no need to disembark.
14. The somewhat rhetorical question in the Secretary of State’s grounds, asking how Dr Hoehne could conclude that the Secretary of State would leave a person in the claimant’s position with the task of obtaining his own flight ticket, sits badly with what was the Secretary of State’s practice, concerning returns to Somaliland, as set out in AMM: [530], [532], and [544]

“530. We have to say that we are at something of a loss to understand the respondent’s position regarding a person such as appellant ZF or Elmi in *Sufi & Elmi*. Although the evidence points firmly towards them having the requisite degree of connection with Somaliland and facing no real risk of serious harm, if returned to that region, the respondent has chosen to put her case on the basis that return will be to Mogadishu International Airport. The ECtHR in *Sufi & Elmi* thought that this decision might, in fact, point towards Elmi not being able to get into Somaliland. That certainly does not appear to be the case with appellant ZF, where the respondent has argued forcefully that appellant ZF could travel to Somaliland by land or air. In either case, she would have to do so on her own, in the sense that the respondent presumably considers that her obligations regarding return cease when appellant ZF has left Mogadishu International Airport. Given, however, that there are flights from Nairobi to Hargeisa, Somaliland (albeit stopping at Mogadishu), it is at first sight hard to see why the respondent could not propose to return appellant ZF to Hargeisa. Mr Burns appeared to accept that the Somaliland authorities would be prepared to accept a person travelling on an EU travel document; but, because of the respondent’s stance, we did not hear sufficient evidence or submissions on the matter to make any proper findings on this issue. In any event, once a case reaches this point, it is likely that Article 8(3) of the Qualification Directive becomes relevant. This provides that the power of Member States in Article 8(1), to determine that a person is not in need of international protection “if in a part of the country of origin there is no well-founded fear of being persecuted or no real risk of suffering serious harm and the applicant can reasonably have been expected to stay in that part of the country”, may apply “notwithstanding technical obstacles to return to the country of origin”. In *HH & Others* the Court of Appeal found at [83] that the ambit of Article 8(3) was “probably confined to administrative

difficulties such as documentation”, as opposed to risks to life and limb, in getting to the place in question. Thus, it would seem that difficulties regarding the documentation required to satisfy the Somaliland authorities would not, in such a scenario, entitle a claimant to succeed.

...

532. It may be that the respondent’s stance, both as regards Elmi and appellant ZF, is driven by the difficulty of getting the Somaliland authorities to accept the return of anyone from the United Kingdom to their area. An insight into the somewhat fraught relationship between those authorities and the respondent is provided by reading the judgments in R (on the application of) MH v SSHD [2010] EWCA Civ 1112, concerning a claim of unlawful detention brought by a person from Somaliland, whom the respondent had not been able to return there. But, as we have indicated, from the point of view of an entitlement to international protection under the Refugee Convention or the Qualification Directive, such problems could well be said to be “technical obstacles” within Article 8.

...

544. But, once we turn from the law to the facts, it is frankly surreal of the respondent to expect appellant ZF, a 67 year old woman with no recent experience of living in the Horn of Africa, to disembark at Mogadishu International Airport, travel into the city of Mogadishu to Bakara Market (assuming it is open), look for an old green passport there, or travel to a market in the Al-Shabab-controlled Afgoye Corridor, if, as might be the case, the vendors of such passports have relocated there, and then either return to Mogadishu International Airport in order to fly to Hargeisa, or else undertake a journey by land to Somaliland. The respondent did not, in fact, energetically advance the option of going back to the airport, preferring instead to look in detail at the evidence regarding land journeys, including those undertaken by refugees, moving in groups to Somaliland, and to the evidence of minibuses, which Mr Burns contradicted. We shall have more to say on this when we look in detail at appellant ZF’s appeal in Part L of this determination. As a general matter, however, we conclude that, at the present time, it will in most cases be impracticable for returnees to obtain old green passports in southern and central Somalia, in order to make the journey to Somaliland, because of the dangers involved in acquiring such documentation.”

15. If it is the Secretary of State’s case that she would now forcibly return a person to Somaliland by taking them under suitable escort to Mogadishu Airport, having previously arranged an onward air ticket to Hargeysa, so that the returnee would not be reasonably likely to have to enter Mogadishu city in order to await an onward flight to Hargeysa, then she could and should have produced satisfactory evidence to that effect before the First-tier Tribunal; or at least given the Tribunal a formal assurance that she would not remove the claimant if there was a real risk that this would happen. The Secretary of State conspicuously failed to do so. All the Presenting Officer, Ms Fleming, could do in this regard was to suggest to the First-tier Tribunal that they “could make a direction that [the claimant] is not to be returned to Mogadishu” [56]. One might sympathise with the position in which Ms

Pleming found herself; but her suggestion is far from constituting evidence or such an assurance. Indeed, it has not been explained how the First-tier Tribunal could lawfully make such a direction.

16. The Secretary of State has not sought to challenge the First-tier Tribunal's finding that, if the claimant were to have to enter Mogadishu city, he would be at real risk of harm contrary to Article 15(c) of the Qualification Directive; namely a "serious and individual threat to a civilian's life or person by reason of indiscriminate violence and situations of international or internal armed conflict". That was the country guidance conclusion in AMM and both Dr Hoehne's report and other material put before the First-tier Tribunal was more than capable of rebutting any submission that the position in Mogadishu had materially changed, so as to require a departure from the AMM country guidance.
17. It seems the First-tier Tribunal decided to allow the claimant's appeal under Article 3 of the ECHR, not because of any risk that might be encountered in Mogadishu (which AMM found did not reach Article 3 levels) but because the Secretary of State's stance regarding proposed manner of return was not sufficiently settled, so as to permit the Tribunal to ignore the risk that the claimant would be returned from Mogadishu to Somaliland by an overland route. Given the unsatisfactory way in which the Secretary of State chose to approach the important issue of manner of return, I have some sympathy with the First-tier Tribunal's view, if that it was. However, I find that, albeit only during the hearing on 18th April, the Secretary of State's position on this issue had sufficiently crystallised, so as to exclude the necessity of considering overland travel. On this narrow point, I set aside the First-tier Tribunal's determination and substitute a decision dismissing the claimant's appeal on Article 3 grounds.
18. The Secretary of State's other ground of challenge is that the First-tier Tribunal was wrong to assume that a second reason why the claimant would be reasonably likely to have to enter the city of Mogadishu was to obtain there a travel document acceptable to the Somaliland authorities. Even if this ground had merit, it would be immaterial to the outcome of the appeal. The claimant would be entitled to succeed on the basis of Article 15(c), for the simple reason that, as I have said, the First-tier Tribunal was entitled to prefer the evidence of Dr Hoehne regarding the likelihood of the claimant having to disembark and stay in Mogadishu city before making the connecting flight to Hargeysa.
19. In any event, I do not find that the Secretary of State has made good this second ground of appeal. There was simply no evidence in the email from Ms Scruton that compelled the conclusion that all necessary documentation, acceptable to the Somaliland authorities, would be in place, as a result of arrangements made between the Secretary of State and those authorities, before the claimant's removal from the United Kingdom was initiated. Again, if that was the proposition that was being advanced, it represented a significant change from the position analysed by the Upper Tribunal in AMM and needed to be properly supported.

20. Apart, therefore, from the narrow issue regarding Article 3, I find that the First-tier Tribunal did not err in law. The result is that an individual with a history of serious criminal offending who, despite his length of time in the United Kingdom and ties to those in this country, was found by the First-tier Tribunal to be deportable, remains here as a result of the Secretary of State's unsatisfactory handling of the issue of method of return to Somaliland. If the Secretary of State now finds that she can satisfactorily address that issue, it would appear to be open to her to make a new decision to deport the claimant.

Decision

21. The determination of the First-tier Tribunal does not contain an error of law, other than as regards Article 3 (as to which I have set aside a part of the decision and re-made it by dismissing the claimant's appeal). However, the First-tier Tribunal's decision stands, insofar as the applicant's appeal was allowed by reference to Article 15(c) of the Qualification Directive.

Signed

Date

Upper Tribunal Judge Peter Lane