



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: DA/01164/2013

THE IMMIGRATION ACTS

Heard at Field House

On 9th October 2013

Determination

Promulgated

On 22nd October 2013

**Before
MISS E E ARFON-JONES DL, VICE PRESIDENT
UPPER TRIBUNAL JUDGE MARTIN**

Between

MR LIBAN OSMAN WARSAME

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss V Hutton (instructed by Wilson Solicitors LLP)

For the Respondent: Mr G Saunders (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. This is an appeal to the Upper Tribunal by the Respondent against a Determination of the First-tier Tribunal (Judge Whiting and Mrs L R Schmitt) promulgated on 24th July 2013 by which it allowed, on Humanitarian Protection grounds and under the EEA Regulations, the Appellant's appeal against the Secretary of State's decision to deport him.

2. Although the proceedings before the Upper Tribunal are brought by the Secretary of State, for the sake of clarity and continuity we shall continue to refer to Mr Warsame as the Appellant and the Secretary of State as the Respondent.
3. The brief facts of this case are that the Appellant, born in December 1990, is a citizen of Somalia. He entered the UK in 2004 as a family member of an EEA national, his mother. On 21st November 2011 (when aged 21) he was convicted, on his Guilty Plea, at Wood Green Crown Court of three counts of burglary and one of violent disorder. The offences were committed during the "London riots" in August 2011 and the Appellant was sentenced to 30 months imprisonment.
4. As a result of that conviction the Secretary of State served him with a Notice of Decision to make a Deportation Order on 3rd April 2012 and a Deportation Order was signed on 16th May 2012. The Appellant's attempt to appeal against that decision was rejected as being out of time.
5. The Appellant then claimed asylum in December 2012 and on 31st May 2013 the Secretary of State refused his claim for asylum and issued a fresh decision to deport him. The previous decision to deport was revoked.
6. It is that decision of 31st May 2013 that was the decision appealed against in the proceedings before the First-tier Tribunal.
7. The Appellant's claim for asylum was based on a fear of persecution upon return to Mogadishu on account of his absence from Somalia for a period in excess of 13 years and being westernised and also a fear of persecution by al-Shabaab. He also claimed to be a member of a minority clan.
8. The First-tier Tribunal heard evidence from the Appellant and various family members and concluded at paragraph 34 of the Determination that the Appellant had not demonstrated a real risk that he would face persecution or severe ill treatment upon return to Somalia for any of the reasons under the 1951 refugee Convention nor would he face treatment which breached Article 3 of the ECHR. The First-tier Tribunal did not accept that al-Shabaab would be interested in or able to specifically target him. It did not accept the Appellant was a member of a minority clan. Those findings are not challenged by the Appellant.
9. The First-tier Tribunal then went on to consider the Appellant's position as a family member of an EEA national, his mother being a Dutch national. It noted that he could only be deported in accordance with the EEA Regulations. It concluded the Appellant had not acquired permanent residence in the UK under the EEA Regulations. That finding is not challenged.
10. The First-tier Tribunal considered in detail the nature of the offences, the risk of the Appellant's offending in future and the contents of the NOMS report. The Tribunal concluded at paragraph 61 that the Appellant's

proposed deportation would be fully justified on serious grounds of public policy and public security, the Appellant presenting a genuine, present and sufficiently serious threat affecting one of the interests of society. That finding, the Tribunal said, meant that his deportation, considered as a discrete issue, would be justified on both the basic and the intermediate level of protection from deportation afforded to an EEA family member. Again, that finding is not challenged by the Appellant.

11. The Tribunal then turned their attention to Humanitarian Protection and Article 15(c) of the Qualification Directive. The Tribunal referred itself to the authority of AMM and Others (Conflict; Humanitarian Crisis; Returnees; FGM) Somalia CG [2011] UKUT 00445 (IAC). It found no reason to depart from the findings of AMM and at paragraph 65 found substantial grounds had been shown for believing that the Appellant would face a real risk of suffering serious harm if returned to Somalia in the present circumstances obtaining in Mogadishu and that the Appellant's removal would cause the United Kingdom to be in breach of its obligations under the Qualification Directive. That finding, the First-tier Tribunal found, meant that the Appellant's proposed deportation to Somalia additionally became disproportionate under Regulation 21 (5) of the Immigration (EEA) regulations 2006.
12. It is that finding that the Secretary of State challenges in the grounds. In short the First-tier Tribunal is said to have made a material error of law in failing to give adequate reasons for its finding that the Appellant would be at risk of harm falling within Article 15(c) on deportation to Mogadishu. The Secretary of State had argued before the First-tier Tribunal that the country conditions in Somalia had changed to such an extent that there will be no breach of article 15(c) of the Qualification Directive, and thus the First-tier Tribunal was entitled to depart from the guidance given in AMM. AMM was reported in November 2011 and took into account evidence to relation to the country situation as at October 2011.
13. The grounds refer to background evidence submitted by the Secretary of State to the First-tier Tribunal which included a Danish/Norwegian Fact-Finding Report dated May 2013. The grounds submit that report supports a finding that the situation in Mogadishu has been durable and that the risk in relation to Article 15(c) harm no longer exists.
14. The grounds then set out sections of that report and in particular:-

"These days there are no armed struggle and no front line [in Mogadishu], people can move freely around in the city and people have moved back from the Afgoye corridor and from elsewhere". Page 6 of the report.

"Al-Shabaab mainly targets: Government officials; African Union Mission in Somalia (AMISOM); People working for international organisations; People they suspect to be spying on them for the government". Page 6/7 of the report

“The international NGO (B), Mogadishu stated that al-Shabaab does not kill civilians indiscriminately”. Page 7 of the report

“UNDSS, Mogadishu, explained that there are no recent reports of al-Shabaab having attacked or killed civilians deliberately through armed attacks. Actually this has not taken place for some years because al-Shabaab no longer has fixed combat positions inside Mogadishu”. Page 9 of the report

“UNDSS, Nairobi, stated that security for ordinary people in Mogadishu had improved since October 2012. Freedom of movement for ordinary people living in Mogadishu has improved, as most checkpoints have now been removed. All illegal checkpoints had been completely removed”. Page 20 of the Report

“According to UNHCR-Somalia, Mogadishu, many people from the Diaspora have returned to Mogadishu, also, because they see business opportunities”. Page 51.

15. Before us Mr Saunders indicated that that report was a substantial document and was one upon which the Secretary of State relied. He referred to the various passages which we have cited above that were cited in the grounds. He argued that the First-tier Tribunal should have done more than it actually did in the determination. He did not suggest that the First-tier Tribunal had ignored that evidence but submitted that it should have done more to demonstrate that it had given it proper consideration.
16. Miss Hutton sought to defend the determination referring us to the Danish report itself, AMM and the other documents that the Appellant had produced at the hearing.
17. Turning to the Determination itself, the First-tier Tribunal listed the pieces of evidence before it at paragraph 21 and at paragraph 32 referred to the Appellant’s acknowledgement that al-Shabaab had either been driven out or withdrawn from Mogadishu although al-Shabaab inspired attacks on security forces and government agencies spasmodically continued to occur. The First-tier Tribunal accepted that al-Shabaab would not be in a position to target the Appellant specifically
18. At paragraph 64 the First-tier Tribunal referred to evidence submitted by the Respondent seeking to demonstrate that conditions in Mogadishu had improved to such an extent that it should be able to depart from the Country Guidance case of AMM. The Tribunal stated that it had examined that evidence in detail but was not persuaded that conditions in Mogadishu had improved to such an extent to mitigate the risks found to exist for vulnerable returnees in AMM such as to enable it to depart from the relevant conclusions of that Country Guidance case.

19. It is true that the First-tier Tribunal did not set out in detail the contents of the Danish Report relied on by the Secretary of State. However, even if that was an error it would only be relevant if doing so could have led the First-tier Tribunal to reach a different conclusion.
20. Turning to Danish Report itself it is our view that the passages cited by the Secretary of State in the grounds "cherry pick" those parts which favour the Secretary of State's argument whilst ignoring those parts that do not.

21. At page 5 the Report states:-

"Regarding armed conflict UNDSS, Mogadishu, explained that al-Shabaab's partial combat withdrawal from Mogadishu in August 2011 this withdrawal was only completed by the end of May 2012. Since then there have been no more al-Shabaab troops holding fixed combat positions in Mogadishu, but there continue to be underground al-Shabaab cells and terrorism. The district of Daynile was the last district of Mogadishu to be liberated from al-Shabaab. Since then, i.e. end of May 2012, there were approximately 6 weeks of calmness and no fighting in Mogadishu. However, following this period there have been armed attacks again, against targets in the city's outlying districts such as security forces' patrols and police stations. Al-Shabaab undertake these hit-and-run attacks with small arms and occasionally slightly heavier weapons like rocket propelled grenades. Al-Shabaab is not trying to retake Mogadishu, not even the outlying districts of the city, but it instead uses the attacks as a form of harassment and is a reminder of its presence."

22. Further on at page 5 of the report it states:-

"Elman Peace and Human Rights Centre, Mogadishu, is hopeful about the SNG, but it was emphasised that there are still a lot to be done before the SNG will function as a genuine government. People are talking freely about what the SNG should do, but the main issue at the moment is peace and security."

23. On page 6 it is stated:-

"These days there are no armed struggle and no front line [Mogadishu], people can move freely around in the city and people have moved back from the Afgoye corridor and elsewhere."

This is one of the passages relied upon by the Secretary of State in her grounds. The report then however goes on to say:-

"However, according to the international NGO (B), Mogadishu, there are still threats in the city. Different kinds of improvised explosives, hand grenade attacks and assassinations create fear among people, and al-Shabaab still has influence that affects people's lives. Checkpoints have been removed, but when people are moving around, they must constantly be careful. For

example, since people started to go to Lido beach there have been two attacks there, one car bomb and one suicide bomber. On the other hand, there are clear improvements."

24. The following paragraph indicates that al-Shabaab members can be found everywhere and it is not possible to identify an al-Shabaab by the way he looks.
25. Further on page 6 it is stated that the influence of al-Shabaab in Mogadishu is not visible, but it is able to undertake attacks all over the city.
26. On page 7 the Report indicates that al-Shabaab has infiltrated the police, the intelligence and the military where they have their informants.
27. It then states that in Mogadishu al-Shabaab also exerts its influence by calling people and threatening them and that this is still going on. It then states that assassinations have increased from the previous year and that the numbers went up and down periodically.
28. On page 8 the Report indicates that the present security situation in Mogadishu will most likely continue if the international community does not seize the time.
29. At page 9 of the Report there is a section headed –“Al-Shabaab’s capacity to undertake attacks” referring to them usually being hit-and-run attacks as well as hand grenade attacks and targeted killings. It refers to a number of attacks that have taken place during the year examined (2012/2013). It indicates that during the first quarter of 2013 IED attacks had been going up compared with the last quarter of 2012 and that whilst such attacks tended to target AMISOM, SNAF and convoys they sometimes resulted in the killing of civilians.
30. The overall tenor of the Report is that while there are clearly significant improvements from the previous situation, matters are far from secure. The most telling section is on page 20 of the Report where it states:-

"Although the security situation in Mogadishu steadily improved there is still a lot of uncertainty. The situation is not stable and it is not just serenity and peace in Mogadishu. The overall context in Somalia is still fragile, in spite of the security improvements and progress that have been made since August 2011".

31. All of this, in our view means that the First-tier Tribunal was entirely justified in finding that there was no evidence before it to justify a departure from the findings of AMM and we therefore reject the Secretary of State's suggestion that the First-tier Tribunal made an error of law. The First-tier Tribunal’s determination is upheld and the appeal to the Upper Tribunal is dismissed.

Signed

Date 18th October 2013

Upper Tribunal Judge Martin