



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: RP/00159/2016

THE IMMIGRATION ACTS

Heard at Birmingham Employment Tribunal
on 26 September 2018

Decision Reasons Promulgated
on 22 October 2018

Before

UPPER TRIBUNAL JUDGE HANSON

Between

DIREY [M]
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Khurram Solicitor with Hanif & Co Solicitors.
For the Respondent: Mr Mills – Senior Home Office Presenting Officer.

DECISION AND REASONS

1. The appellant, a citizen of Somalia born on 2 June 1984, claims to have arrived in the United Kingdom on 22 November 2002 shortly after which he claimed asylum. The respondent refused the application against which the appellant appealed. The appellant succeeded on appeal when it was accepted he was a member of the Ashraf minority clan and therefore at risk on return to Somalia.

- On 17 March 2004 the appellant was recognised as a refugee and granted indefinite leave to remain.
2. On 4 April 2014 the appellant was convicted of possession with intent to supply controlled Class A drugs - heroin, for which he was sentenced to 5½ years imprisonment.
 3. On 11 February 2015 a decision was made to deport him in accordance with section 32(5) of the UK Borders Act 2007.
 4. On 26 January 2016 the appellant was notified of the respondent's intention to cease his refugee status pursuant to Article 1C(5) of the Refugee Convention and paragraph 339A of the Immigration Rules on the basis that the circumstances in connection with which he had been recognised as a refugee had ceased to exist. In a decision dated 12 October 2016 the respondent refused the appellant's protection and human rights claim and maintained the decision to deport him. A deportation order was issued the same day.
 5. The appellant appealed. This appeal was heard before the First-Tier Tribunal on 17 February 2017 in which the Judge, amongst other issues, made the following findings: (a) that the appellant posed a danger to the community and that the respondent had properly found that he had failed to rebut the presumption in section 72(2) Nationality, Immigration and Asylum Act 2002, (b) that there had been a significant and non-temporary change in circumstances in Somalia so that the appellant was no longer at risk of persecution for a Refugee Convention reason on his return to Mogadishu, (c) that the appellant would not have access to financial resources and would have no family or clan support and that he would end up in an IDP camp where there was a real possibility of having to live in conditions that fell below acceptable humanitarian standards in breach of Article 3, (d) with regard to article 8, the Judge accepted the appellant a genuine and subsisting relationship with his wife and children and that the effect upon them of his deportation would be unduly harsh. The Judge accepted the appellant was socially and culturally integrated into the United Kingdom and that there would be very significant obstacles to his integration to Somalia. The Judge found there were compelling circumstances outweigh the public interest in the appellants deportation and that the appellant met the requirements of the immigration rules and on article 8 grounds, leading to the appeal being allowed pursuant to both article 3 and 8 ECHR.
 6. The Secretary of State sought permission to appeal which was granted. At an Error of Law hearing on 4 July 2017 Upper Tribunal Judge Kebede found the First-Tier Tribunal had erred in law in a manner material to the decision to dismiss the appeal. The Judge Kebede's reasoning is set out at [12 - 14] in the following terms:

12. I find myself in agreement with the assertion made in the respondent's grounds, that the Judge failed adequately to engage with all the paragraphs of the head note to the country guidance in MOI. Although the Judge clearly had regard to the country guidance and set out the head-note in full at [23], there is nothing in her findings to show that she gave consideration to (x) and to the question of access to economic opportunities in Mogadishu. At [24] she referred to the appellant's limited qualifications and skills but did not elaborate or provide any reasons why he could nevertheless not find employment. The

Judge also, rather curiously, found that the appellant would have no form of ongoing support, but she did not provide any details nor give reasons as to why he could not access support from his family in the UK or his brother in Norway. Accordingly the Judge's conclusion, that the appellant would find himself destitute and subjected to harsh conditions in an IDP camp that amounted to a breach of Article 3, was inadequately reasoned.

13. For the same reasons the Judge erred, in her Article 8 assessment, in her finding that there would be very significant obstacles to the appellant's integration in Somalia. That, in turn, fed into her findings on "compelling circumstances". Furthermore, I find merit in the respondent's submission that the Judge's decision failed to identify any proper reasons why the appellant's circumstances were considered to be compelling or what was exceptional about the best interests of the appellant's children in the terms considered in The Secretary of State the Home Department v CT (Vietnam) [2016] EWCA Civ 488.

14. For all these reasons I consider the Judge's conclusions on Article 3 risk on return, and on Article 8, to be unsustainable and accordingly her decision must be set aside. The decision on Articles 3 and 8 is therefore set aside.

7. At [15] of the Error of Law decision the Upper Tribunal confirmed the scope of the next hearing which is for the decision to be remade on Articles 3 and 8 ECHR grounds only, with the Judge's findings on exclusion and cessation being preserved.

Background

8. The matter was listed for a Resumed Hearing before another judge of the Upper Tribunal at Birmingham on 13 July 2018. The appellant's previous representatives had written to the Upper Tribunal on 12th July indicating that the barrister instructed to represent the appellant had on that day withdrawn due to professional embarrassment and seeking an adjournment to allow alternative counsel to be instructed in the matter. The Upper Tribunal granted the appellant's request. The matter was relisted for hearing on 26 September 2018 with notices being sent to the parties by post on 23 August 2018.
9. On 21 September 2018 another firm of solicitors, Hanif & Co, wrote to the Upper Tribunal confirming they had been instructed by the appellant and providing a form of authority dated 21 September 2018.
10. The Upper Tribunal then received a request for the hearing listed on 26 September to be adjourned as the new representatives required time to compile and serve any relevant documents and bundles. That application was refused by a Duty Lawyer exercising delegated powers on the basis the decision on error of law was sent on 12 July 2018 and notice of hearing on 23 August 2018 and that late instruction of new representatives by the appellant did not justify the hearing being vacated at this late stage. Time and resources had already been allocated for the case to be heard and it would not be possible to list an alternative matter at this stage. Further, the respondent did not appear to have been given notice of the application. The appellant was given liberty to renew the request at the hearing.

11. At the hearing on the 26 September 2018 the appellant's representative was present but not, initially, the appellant. Mr Khurram advised that the delay in instructing solicitors was as a result of financial problems and that Hanif & Co had been instructed once the appellant was in funds. He stated he needed to see the appellant who, it appeared, had gone to the Priory Courts in Birmingham where the First-Tier Tribunal sit, despite the notice of hearing clearly stating the Upper Tribunal will be sitting in the Employment Tribunal Building. When the appellant finally arrived at the Upper Tribunal he was able to hear his advocate's submissions.
12. It is accepted that at the last hearing the appellant was in funds which Mr Khurram stated was because a friend had paid his previous representatives, Khan Solicitors.
13. When asked the scope of their instructions it was confirmed Hanif & Co had accepted instructions to represent the appellant for all proceedings and not only for the renewed adjournment application. Mr Khurram was asked why his client could not update his case in examination in chief, from the developments since the earlier statements which he confirmed he could. It was stated however that Social Services had become involved with the family since March 2018 and that it was believed there is a risk assessment being undertaken by Social Services with a view to the appellant returning to live with his children; as the appellant was not with the family at that time.
14. Mr Mills, on behalf of the Secretary of State confirmed the respondent was ready to proceed in July but that the appellant had not attended that hearing and that the matter has been put off as a result of the fairness principle. There had been delay in this matter being relisted and being brought back and early evidence has been provided. It was submitted the current representatives have been instructed late and that the appellant was "playing the system". Mr Mills opposed the adjournment on the basis the principles of fairness did not require the same to be granted.
15. Mr Khurram stated in March 2018 the appellant had been released from detention and that his circumstances had now changed and that he will be ready to proceed if given time. It was claimed that one month will be sufficient.
16. There has been considerable delay in this matter including as a result of the appellant failing to attend the hearing before Upper Tribunal Judge Kebede. Lack of funds is not a reason to an adjourn as it is not made out the appellant could not have provided evidence to update his circumstances or to have prepared for the hearing as a self-representing litigant if required. Sufficient time to prepare had already been given and it was not made out that the appellant or any witnesses could not provide oral evidence to confirm their current situation. It was not established the principle of fairness required a further adjournment of the proceedings; although it was considered if an issue arose during the course of the hearing that required the same further consideration would be given to it.
17. The appellant was thereafter called to give oral evidence in which he confirmed, inter alia, the statement he provided on 26 September 2018 was true. He was released from immigration detention in March 2018 and has contact with his

family and with his wife and children. The appellant claims to take the children to school and to spend time with them. The appellant is not working as he is not permitted to work and claimed that if deported he could not rely on funds from abroad and that the family could not go to Somalia. The appellant was cross-examined. There was no re-examination. The appellant's wife also gave oral evidence confirming her statement was accurate and in response to questions from the advocates confirmed the appellant was released sometime in March 2018 and that although they had lived together briefly since release the appellant was not permitted by Social Services to live with her or the children at that time. The appellant's wife considered she is in a subsisting relationship with her husband and that contact and indirect contact occurs.

18. In cross examination the appellants wife was asked how the children had coped as they had not lived with the appellant for a number of years to which she claimed it was quite hard for them. When asked to explain the impact of the appellant's removal the witness stated he had been around since being released from prison and that the children get emotional when they speak to him and upset if they cannot see their father. The witness confirmed that they see the appellant whenever they have money or social services range of contact which is supervised by social services at their house or another place. A social worker has been appointed. The witness confirmed there have been meetings with social workers and that the appellant can come to the house but must return and cannot stay overnight. This was agreed approximately 2 months ago. The evidence indicates ongoing assessment by social services, but the witness stated that work had been completed resulting in more supervised contact taking place after which there will be a further review. No decision has yet been made on the future arrangements at this time. The witness confirmed the children had been on the "at risk" register but came off last year and that the children are in her full-time care.
19. The witness confirmed the extended family in Birmingham the appellant has and that she does not speak to her family. She has lived in Rotherham all her life. It was said in Birmingham there is the appellants sister and nephews with whom there is contact.
20. In reply to questions from the bench the witness confirmed social service had become involved with her first child a long time ago, a child not related to the appellant, who now lives with her own parents, which is a long-term arrangement. The three boys mentioned in her statement are the appellant's children and that social services have been involved since the birth of the children. When asked the reason for their involvement the witness confirmed it was as a result of concerns regarding physical abuse and emotional neglect which was initially attributed to the witness herself, but then as her parents did not like the appellant social services became involved with both the witness and appellant.
21. A childcare conference occurred approximately a week before the hearing. The children were on the child protection register when the appellant went into prison. Although concerns have been raised there was no suggestion of the commencement of care or supervision proceedings arising from the childcare

meetings and that although social services were more involved at the point the appellant went into prison their involvement was reduced a year or two thereafter. The witness stated she had got on with life and that although she did not like social services intervening she has “put up with them”.

22. As stated, social services have not expressed concerns that the children are at risk of physical harm or neglect in her care and that the Guardian appointed to represent the children supported the view that the children should remain with their mother, the witness, and that they should work around this scenario. The witness stated social services were assessing the impact on the children if the appellant is returned to the family.
23. There was no re-examination or questions arising.
24. A third witness, the appellant’s niece, confirmed the content of her statement, that there was no family in Mogadishu, and that she could not financially support the appellant.

Discussion

25. The effect of the section 72 certificate is that the appellant is excluded from the protection of the Refugee Convention. Such status previously granted to the appellant was revoked by the Secretary of State. No arguable legal error is made out in these aspects of the respondent’s decision. Indeed, if the appellant were to claim asylum now on the basis of his membership of the Ashraf clan in Somalia, absent any new matters arising that may give rise to grant of international protection, any claim for asylum or international protection will be more likely than not to be refused on the basis of the current country conditions and relevant country guidance set out in MOJ& Ors (Return to Mogadishu) Somalia CG [2014] UKUT 00442 (IAC), and availability of a viable internal flight alternative which would preclude the appellant from a grant of international protection. MC (Art 1 (c) (5) Mogadishu) Somalia [2018] UKUT 2018 considered in making such finding.
26. In any event, the rejection of protection claim is preserved findings are not a matter before this Tribunal.
27. It is, however, relevant to consider the current country guidance case relating to Somalia. In MOJ& Ors (Return to Mogadishu) Somalia CG [2014] UKUT 00442 (IAC) it was held that(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; (ii) Generally, a person who is “an ordinary civilian” (i.e. not associated with the security forces; any aspect of government or official administration or any NGO or international organisation) on returning to Mogadishu after a period of absence will face no real risk of persecution or risk of harm such as to require protection under Article 3 of the ECHR or Article 15(c) of the Qualification Directive. In particular, he will not be at real risk simply on account of having lived in a

European location for a period of time of being viewed with suspicion either by the authorities as a possible supporter of Al Shabaab or by Al Shabaab as an apostate or someone whose Islamic integrity has been compromised by living in a Western country; (iii) There has been durable change in the sense that the Al Shabaab withdrawal from Mogadishu is complete and there is no real prospect of a re-established presence within the city. That was not the case at the time of the country guidance given by the Tribunal in AMM; (iv) The level of civilian casualties, excluding non-military casualties that clearly fall within Al Shabaab target groups such as politicians, police officers, government officials and those associated with NGOs and international organisations, cannot be precisely established by the statistical evidence which is incomplete and unreliable. However, it is established by the evidence considered as a whole that there has been a reduction in the level of civilian casualties since 2011, largely due to the cessation of confrontational warfare within the city and Al Shabaab's resort to asymmetrical warfare on carefully selected targets. The present level of casualties does not amount to a sufficient risk to ordinary civilians such as to represent an Article 15(c) risk; (v) It is open to an ordinary citizen of Mogadishu to reduce further still his personal exposure to the risk of "collateral damage" in being caught up in an Al Shabaab attack that was not targeted at him by avoiding areas and establishments that are clearly identifiable as likely Al Shabaab targets, and it is not unreasonable for him to do so; (vi) There is no real risk of forced recruitment to Al Shabaab for civilian citizens of Mogadishu, including for recent returnees from the West; (vii) A person returning to Mogadishu after a period of absence will look to his nuclear family, if he has one living in the city, for assistance in re-establishing himself and securing a livelihood. Although a returnee may also seek assistance from his clan members who are not close relatives, such help is only likely to be forthcoming for majority clan members, as minority clans may have little to offer; (viii) The significance of clan membership in Mogadishu has changed. Clans now provide, potentially, social support mechanisms and assist with access to livelihoods, performing less of a protection function than previously. There are no clan militias in Mogadishu, no clan violence, and no clan based discriminatory treatment, even for minority clan members; (ix) If it is accepted that a person facing a return to Mogadishu after a period of absence has no nuclear family or close relatives in the city to assist him in re-establishing himself on return, there will need to be a careful assessment of all of the circumstances. These considerations will include, but are not limited to: (a) circumstances in Mogadishu before departure; (b) length of absence from Mogadishu; (c) family or clan associations to call upon in Mogadishu; (d) access to financial resources; (e) prospects of securing a livelihood, whether that be employment or self employment; (f) availability of remittances from abroad; (g) means of support during the time spent in the United Kingdom; (h) why his ability to fund the journey to the West no longer enables an appellant to secure financial support on return; (x) Put another way, it will be for the person facing return to explain why he would not be able to access the economic opportunities that have been produced by the economic boom, especially as there is evidence to the effect that

- returnees are taking jobs at the expense of those who have never been away; (xi) It will, therefore, only be those with no clan or family support who will not be in receipt of remittances from abroad and who have no real prospect of securing access to a livelihood on return who will face the prospect of living in circumstances falling below that which is acceptable in humanitarian protection terms; (xii) The evidence indicates clearly that it is not simply those who originate from Mogadishu that may now generally return to live in the city without being subjected to an Article 15(c) risk or facing a real risk of destitution. On the other hand, relocation in Mogadishu for a person of a minority clan with no former links to the city, no access to funds and no other form of clan, family or social support is unlikely to be realistic as, in the absence of means to establish a home and some form of ongoing financial support there will be a real risk of having no alternative but to live in makeshift accommodation within an IDP camp where there is a real possibility of having to live in conditions that will fall below acceptable humanitarian standards.
28. Mr Mills submissions referred to the provisions of the headnote set out at (viii) and (ix).
 29. The country guidance case law reaffirms the need to consider all relevant circumstances of an individual before making findings in relation to their ability to satisfy the relevant criteria, or not. The criteria present a considerable hurdle for the Secretary of State, but the burden is not upon him to initially establish a person can return but upon an appellant alleging an entitlement to international protection or right to remain that they should be awarded the same. In this case that is the article 3 ECHR aspect.
 30. The appellant is a healthy individual in his mid-30s with considerable experience of working and living in Somalia. Mr Mills argued the appellant has not discharged the burden upon him to the required standard to establish that his circumstances are such that he would face destitution or be unable to support himself if returned to Somalia. The appellant has no disability, there are no psychiatric issues, and no established credible impediment to the appellant being able to work.
 31. The issue of remittances from family members was raised in the error of law finding and it is not made out that the appellant would not have access to resources from the family members either in the United Kingdom or elsewhere. The bare assertion by one witness that she would not be able to provide support appears contrary to both the family and cultural values of the Somali community who will help each other as much as possible. Insufficient evidence was provided to establish that any claimed refusal to assist is genuine or that the economic circumstances of the individuals concerned is such that they would not, realistically, be able to provide some form of assistance.
 32. The appellant fails to make out that any assistance that may be available, even if less than he will prefer, would not be sufficient to enable him to secure accommodation and meet basic needs if returned to Somalia with other income arguably available to him through work.

33. The appellant fails to establish that he would be subject to unacceptable living standards if returned to Somalia sufficient to amount to a breach of his rights pursuant to Article 3 ECHR.
34. Mr Mills referred the tribunal to the decision of the Court of Appeal in MA (Somalia) [2018] EWCA Civ 994 and specifically at [63 – 64] where it was found:

63. The analysis in *Said*, by which this Court is bound, is that there is no violation of Article 3 by reason only of the person being returned to a country which for economic reasons cannot provide him with basic living standards. Mr Sills however contends that the situation is brought about by conflict, which is recognised by the European Court of Human Rights as an exception to this analysis. It is true that there has historically been severe conflict in Somalia, but, on the basis of *MOJ*, that would not necessarily be the cause of deprivation if the respondent were returned to Somalia now. The evidence is that there is no present reason why a person, with support from his family and/or prospects of employment, should face unacceptable living standards.

64. Mr Waite submits that the decision of this Court in *FY (Somalia) v Sec State for the Home Department* EWCA Civ 1853 could be read as departing from *Said* and is accepting that it was sufficient for Article 3 purposes that a person returning to his country of origin might end up living in and the IDP camp. Although the holding of the FTT in that case (paragraph 22), which this Court held had not erred in law (paragraph 23), could be read as so holding, *Said* was not cited and therefore in my judgement to the extent that there is any conflict between the decision of this Court in *Said* and that in *FY (Somalia)*, the decision of this Court in *Said* should be followed.

35. The appellant has not discharged the burden of proof upon him, even to the lower standard applicable in appeals of this nature, to establish credible argument that he does not have realistic prospects of employment or that he would face unacceptable living standards or destitution on return to Somalia sufficient to engage article 3 ECHR or an entitlement to any aspect of international protection remaining available to him, if any.
36. In relation to article 8 ECHR, I find there is family life that exists between the appellant his wife and their children. Such family life existed before the appellant was imprisoned and has continued since his release from criminal and immigration detention albeit that the frequency of contact and nature of the way such family life is enjoyed is affected by the intervention of social services as a result of concerns they have for the well-being of the children.
37. The contact the appellant enjoys with the children is supervised at the insistence of social services who are carrying out a review to ascertain whether it is safe for the appellant to return to the family environment. Social services involvement is as a result of concerns centred around physical and emotional neglect and/or harm, real concerns illustrated by the convening of a childcare conference, appointment of a guardian for the children, and work being undertaken to ensure the children's needs are properly met.
38. The tribunal is very grateful to the children's mother, the appellant's wife, for her assistance and the honest way in which she answered questions relating to the children.
39. The effect of the enforced separation is that the appellant and the children live approximately one hundred miles apart making more frequent contact difficult

as a result of the geography and possible economic reality of the cost of travelling between Yorkshire where the children live and the appellant's address in Birmingham.

40. It is not disputed that the best interests of children are to remain in an environment with both parents, provided such an environment is a loving, caring, and supportive one, to enable the children to attain their maximum potential; but the best interests are not the determinative aspect, albeit one of considerable importance.
41. The appellant is the subject of a deportation order as a result of his conviction for serious drug-related offences for which he was imprisoned for 5 ½ years by the Nottingham Crown Court.
42. This is not the first such offence as the appellant was convicted of possession of a controlled drug Class B drug - cannabis and possession of a controlled Class A drug - heroin together with other matters recorded in the appeal papers prior to this conviction.
43. To resist deportation the appellant is therefore required to show very compelling circumstances sufficient to outweigh the public interest in his removal from the United Kingdom. Both the Court of Appeal in Supreme Court have reminded us that a very strong case needs to be made out to resist such deportation which, on the facts of this matter, is not made out.
44. It is accepted that if the appellant is deported he will be separated from the children and they from him physically, but that is normal consequence of deportation. No adverse impact upon the children or indeed the appellant's wife has been established sufficient to outweigh the public interest in deportation. The appellant's wife has, to her credit, had to bring the children up during the time the appellant has been in prison and immigration detention and on a practical day-to-day level during the period since the appellant's release, when he has been prohibited from living within her family home. The fact the appellant's wife and children may be upset as a result of the separation that may occur is not sufficient to outweigh the very strong public interest in the appellant's removal.
45. There is no evidence any of a negative impact on the children's education or psychological health and the involvement and presence of social services in the family unit indicates ongoing support will be available, if required. It is also to the credit of the children's mother that social services are happy for the children to remain with her as she is able to adequately care for them, notwithstanding the difficulties she has faced. It is also the case that there was no evidence provided to show that when the appellant was in prison social services needed to be involved any further than they were and did not need to issue proceedings to protect the welfare of the children. There was no need to take the children into care or seek any statutory orders. As Mr Mills submitted this was a trial run of how the family would cope if the appellant is deported.
46. Mr Khurram relied upon the skeleton argument that had been prepared prior to the hearing and the oral evidence and submitted that social services had indicated that they would allow the appellant to return to live in the family home. It was argued that there will be a deterioration in the children's welfare if

the appellant is deported and that in all the circumstances the appellant had discharged the burden of proof to establish that his removal from the United Kingdom is disproportionate.

- 47. Any case involving the loss to a child of a parent brings its own issues that require careful consideration. In this case, however, the appellant is the author of his own misfortune as a result of his serious criminal offending resulting in an order for his deportation from the United Kingdom. The children are fortunate in that they have their mother and statutory services to assist if necessary. It is also the case that insufficient evidence was provided to substantiate the appellant’s claim that if removed from the United Kingdom sufficiently compelling circumstances had been made out to outweigh the public interest in his removal. Members of the family may consider that the appellant’s removal is harsh, but it has not been established, when weighing the competing interests, that it will be unduly harsh. Any interference in the appellant’s family and private life established in the United Kingdom is proportionate to the legitimate aim relied upon.
- 48. I find the Secretary of State has discharged the burden of proof upon him to the required standard to show that the appellant’s deportation from the United Kingdom is a proportionate response in light of his criminal conduct and when considering the competing arguments, in light of existing provisions and case law.

Decision

49. **I remake the decision as follows. This appeal is dismissed.**

Anonymity.

50. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 16 October 2018