Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00148/2018

THE IMMIGRATION ACTS

Heard at: Field House
On 4th April 2019

Decision & Reasons Promulgated
On 20th May 2019

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

And

Mr Mohamed [Y]
(no anonymity direction made)

Respondent

For the Appellant: Mr Bramble, Senior Home Office Presenting Officer
For the Respondent: Mr Fripp, Counsel instructed by Duncan Lewis & Co Solicitors

DECISION AND REASONS

1. The Respondent Mr [Y] is a national of Somalia date of birth 1th September 1996. On the 23rd January 2019 the First-tier Tribunal (Judge Hodgkinson) allowed, on protection grounds, his appeal against a decision to deport him. The Secretary of State now has permission to appeal against that decision.

2. The following matters are not in dispute. Mr [Y] arrived in this country in 2002 when he was five years old. The following year he, his mother

and brother were all granted indefinite leave to remain as refugees. On the 13th January 2017 Mr [Y] was convicted, upon a guilty plea, of possession of Class A drugs (heroin and cocaine) with intent to supply: he was sentenced to 30 months' imprisonment. This followed an earlier conviction for possession of cannabis and theft. As a result of these convictions the Respondent took action to deport Mr [Y].

3. Section 32(1)-(5) of the United Kingdom Borders Act 2007 provides, that subject to the exceptions in section 33 of the Act, the Secretary of State must take action to deport a foreign criminal who was been convicted of a crime in the United Kingdom for which he has received a sentence of 12 months or more. 'Exception 1' in section 33 is that the automatic deportation provisions shall not apply where a person's removal would place the United Kingdom in breach of its obligations under either a) the Refugee Convention or b) the European Convention on Human Rights.

4. The first question for the First-tier Tribunal was therefore whether Mr [Y] was subject to 'automatic deportation'. Having regard to the length of his sentence of imprisonment it found that he was, and neither party has any complaint about that.

5. The second question was whether the Secretary of State was prevented from actually deporting him because of the United Kingdom's obligations under the Refugee Convention.

6. In his refusal letter dated 19th September 2018 the Secretary of State had imposed a 'section 72 certificate', that is a finding that Mr [Y], having received a criminal sentence of more than 2 years, was presumed to be a 'particularly serious criminal' by virtue of s72 Nationality, Immigration and Asylum Act 2002 and that as such he constitutes a danger to the community. By Article 33(2) of the Refugee Convention signatory states are entitled to refuse international protection to those they regard as 'particularly serious criminals'; by paragraph 339D of the Immigration Rules this exclusion extends to Humanitarian Protection. The Judge had regard to the very serious nature of dealing Class A drugs, and set out the sentencing remarks of the trial judge in full. He read the evidence provided by the probation service, Mr [Y] himself and an additional witness, a key worker with a charity who had worked closely with Mr [Y] whilst he was incarcerated in HMP Brixton. Having done so the Judge was satisfied that the presumption in s72 was rebutted. Although Mr [Y] had been sentenced to 30 months' in prison, the First-tier Tribunal was satisfied that he does not currently constitutes a danger to the community and quashed the s72 certificate.

7. There is no challenge to that finding. That is not, however, the end of the matter. As well as attempting to exclude Mr [Y] from the benefit

of the Convention the Secretary of State further sought to argue that his refugee status had ceased. In his letter he argued that the situation had markedly changed in Somalia since Mr [Y] and his mother were granted refugee status, to the extent that it could no longer be said that he faced a real risk of harm if returned there. The First-tier Tribunal did not agree. It referred itself to the country guidance in MOJ & Ors (Return to Mogadishu) Somalia CG [2014] UKUT 00442, to more recent country background information, to the views expressed by UNHCR and the expert witness Dr Hoehne. It had regard to the fact that Mr [Y] left Mogadishu when he was 2 years old, that he is effectively a stranger there with no connections to the city, that he is unable to speak fluent Somali, is unskilled and without any discernible employment prospects, and importantly, to the substance of his mother's original claim for asylum – that they are members of the Ashraf minority clan. Having directed itself to the appropriate legal test when considering cessation of status, the First-tier Tribunal concluded that the circumstances in connection with which Mr [Y] has been recognised as a refugee have not ceased to exist. The Tribunal therefore allowed Mr [Y]'s appeal on both refugee and human rights grounds, finding in respect of the latter that its conclusions on risk led to a positive disposal on Article 8 (paragraph 399A Immigration Rules).

8. It is that decision that is at the centre of this appeal.

The Grounds of Appeal

9. The Secretary of State submits that the First-tier Tribunal erred in the following material respects:

   i) It should have followed the guidance in MA (Somalia) [2018] EWCA Civ 944;

   ii) It should have rejected the claim that the family are Ashraf;

   iii) Even if that were accepted, the Tribunal erred in placing any weight on their claimed ethnicity in its risk assessment, contrary to MOJ;

   iv) The finding that Mr [Y] would find it difficult to find work is contrary to the conclusions in MOJ.

The Response

10. In respect of the country guidance Mr Fripp submitted that the First-tier Tribunal did not depart from the findings of the Upper Tribunal in MOJ, and insofar as the grounds suggest that it did, they are mistaken. Although the Tribunal there found that the significance

of clan membership has changed, it did not find that it was wholly irrelevant. In this case it was plainly relevant, since it was at the heart of Mr [Y]'s inability to access social, economic and physical support in Mogadishu. *But for* his minority clan membership he would have connections in the city to help him financially, gain access to employment and housing, and to whom he could turn for basic human interaction. Absent those connections and support he is in an extremely vulnerable position. That finding was neither inconsistent with the findings in MOJ nor with the evidence before the First-tier Tribunal.

Discussion and Findings

11. I deal first with the factual issue in dispute. When she arrived in this country in 2002 Mr [Y]'s mother told the authorities that she and her sons were members of the Hassan sub-clan of the Ashraf minority. She also gave a narrative of recent persecution in Somalia. They were all granted asylum. In the course of these proceedings Mr [Y] explained that immediately prior to the family's arrival in the United Kingdom they had in fact spent approximately three years in the Netherlands. This necessarily meant that some of what his mother had told the authorities upon her arrival was untrue: the recent persecution events described by her could not have taken place because she was in Holland at the time. The First-tier Tribunal gave what I find to be careful consideration to this matter. At paragraphs 59-63 it notes the inconsistencies in the evidence, and expressly considers the HOPOs submission that if Mr [Y]'s mother was lying about those matters, it could be assumed she was lying about everything. The Tribunal notes Mr [Y]'s evidence that he has been brought up to believe that he is Ashraf, and that this is what he has been consistently told by both his mother and father, who is also now a refugee in the United Kingdom. It notes that the Secretary of State's refusal letter expressly accepts the claimed identity. Considering the evidence in the round the Tribunal finds that it would be too great a speculative 'leap' to conclude that this claimed ethnic identity was false. Asylum seekers may tell untruths about some matters and be telling the truth about others. One lie does not necessarily mean everything the liar says in untrue.

12. I find no error of law or logic in that reasoning. The Tribunal had heard live evidence from Mr [Y] which it was entitled to believe; it was logically permissible to place weight on the fact that he had grown up to believe that he was Ashraf; it was entitled to assume that when the Immigration Adjudicator allowed the mother's appeal back in 2003 he or she did so having conducted a careful evaluation of the evidence. The Tribunal's approach is here entirely consonant with that taken by Sir John Dyson in MA (Somalia) v Secretary of State for the Home Department [2010] UKSC 49:

> "21. For appellants who appeal to the AIT in Refugee Convention or Article 3 cases, the stakes are often extremely high. The consequences of failure for those whose cases are genuine are usually grave. It is not, therefore, surprising that appellants frequently give fabricated evidence in order to bolster their cases".

13. I am therefore unable to find any reason to interfere with the First-tier Tribunal's finding that Mr [Y] is from a minority clan.

14. The Secretary of State submits that even if that finding is upheld, the Tribunal's risk assessment is flawed.

15. I do not understand what the relevance of MA (Somalia) [2018] might be. That case addressed the issue of internal flight in the context of cessation, with the Court of Appeal concluding that since the assessment of cessation must be a mirror image of the assessment of risk, that must include an examination of internal flight alternatives. That issue did not arise in this appeal, since Mr [Y]'s family hail from Reer Hamar, a district of Mogadishu. The Secretary of State was not proposing any alternative: see paragraph 80 of the determination. The proposed place of return was the capital, and on the facts, if he at risk there, he is at risk anywhere.

16. The real issue is whether the First-tier Tribunal was entitled to find Mr [Y] to still be at risk in Somalia, applying the extant country guidance in MOJ. The Secretary of State submits that the Tribunal impermissibly departed from that guidance in three ways. First, the First-tier Tribunal failed to recognise the central conclusion in MOJ that there is in general no risk to ordinary civilians. Second, the weight it places on his Ashraf identity is at odds with the guidance that "clan membership is not a risk factor". Third, it fails to explain in what way Mr [Y] would be unable to take advantage of the "economic boom" in the city.

17. I deal first with clan membership. This had long been a factor of great significance in Somali asylum appeals, with the general view that minority clans faced a real risk of persecution prevailing since at least 1994. MOJ was the first departure from this orthodoxy. Heard in 2014 after the routing of Al-Shabaab and more than twenty years of civil war the Tribunal concluded:

> (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.

18. The First-tier Tribunal in this case clearly directed itself to that conclusion; indeed the determination sets out verbatim the detailed and lengthy 'reasons for refusal' letter which adopts the reasoning in MOJ and expands upon it. The Tribunal then sets out the evidence relied upon by Mr Fripp. At paragraph 68 it replicates extracts from the June 2017 Country Policy Information Note (CPIN) *Somalia: Majority Clans and Minority Groups in South and Central Somalia* to the effect that "clan affiliation is the main identity-providing factor within the Somali nation". The same document explains that clan protection remains an important factor in the day to day lives of Somalis: "in case of a crime, Somalis would rather go to their clan than the police". The CPIN further cites the US State Department Report published in March 2017:

> "Minority groups, often lacking armed militias, continue to be disproportionately subjected to killings, torture, rape, kidnapping for ransom, and looting of land and property with impunity by faction militias and majority clan members, often with the acquiescence of federal and local authorities. Many minority communities continued to live in deep poverty and to suffer from numerous forms of discrimination and exclusion".

It further cites the UNHCR position paper of May 2016 to similar effect.

19. The Tribunal then sets out the extent of Mr Fripp's submissions on that evidence at paragraph 70. The point was that MOJ may well have been correct in identifying a sea-change in the nature of the civil war, which for many years had been clan based, but the reality was that Somali society itself had not changed. The clan remains the most important factor in determining an individual's relationship with the outside world:

> "there was no sufficiency of protection from the authorities in Mogadishu or Somalia for somebody such as the appellant, who would be vulnerable in any event, bearing in mind that he was essentially a stranger to Mogadishu, who had not lived in Somalia since he was 2 years old, he now being 22 years old".

20. That is the reasoning accepted by the Tribunal. The relevance of Mr [Y]'s clan membership was not that would be caught up in inter-clan warfare; it was that it left him without protection, protection that he would likely need, given his other vulnerabilities. Mr [Y] would be returned to Mogadishu with no discernible skills in the job market, speaking broken Somali which would immediately identify him as a

returnee, with no contacts in the city. In those circumstances, the Tribunal concluded, the risks identified *inter alia* by UNHCR and the US State Department (evidence replicated in the Secretary of State's own CPIN) became highly relevant. I am satisfied that these were matters that the Tribunal was entitled to weigh in the balance.

21. As to the "general" conclusion in MOJ that ordinary civilians are not at risk, I find nothing in the First-tier Tribunal decision to indicate that this is a finding that it departed from. The point was that Mr [Y] is not, for the reasons identified, an 'ordinary' civilian. The Tribunal properly directed itself to the considerations set out at paragraph (ix) of the headnote in MOJ and conducted its assessment in light of those matters.

22. Finally the Secretary of State disagrees with the conclusion that Mr [Y] would be unable to avail himself of the opportunities afforded by the 'economic boom' discussed in MOJ. The guidance given by the Upper Tribunal was that it would be for individual appellants to establish why they would be vulnerable to destitution, taking into account the following matters:

> (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**.

23. It was the finding of the First-tier Tribunal that Mr [Y] fell squarely into that risk category described at the end of that paragraph. That was a finding open to it on the evidence, and it properly applied the country guidance. No error of law arises.

Decisions

24. The determination of the First-tier Tribunal contain no error of law and it is upheld.

25. There is no order for anonymity.

Upper Tribunal Judge Bruce
15th May 2019