



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

Appeal Number: RP/00072/2018

THE IMMIGRATION ACTS

**Heard at Birmingham
On 20th September 2019**

**Decision & Reasons Promulgated
On 3rd January 2020**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MSC

Respondent

Representation:

For the Appellant: Mr D Mills, Home Office Presenting Officer

For the Respondent: Mr A Pipe, instructed by Rashid & Co Solicitors

DECISION AND REASONS

1. An anonymity direction was made by the First-tier Tribunal (“FtT”), and as this a protection claim, it is appropriate that a direction is made. Unless and until a Tribunal or Court directs otherwise, MSC is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies amongst others to all parties. Failure to comply with this direction could lead to contempt of court proceedings.

2. The appellant in the appeal before me is the Secretary of State for the Home Department (“SSHHD”) and the respondent to this appeal is MSC. However, for ease of reference, in the course of this decision I adopt the parties’ status as it was before the FtT. I refer to MSC as the appellant, and the Secretary of State as the respondent.

3. The appellant is a national of Somalia. He arrived in the UK in 2003 and following a successful appeal he was granted refugee status in July 2004. On 6 April 2017, the appellant was convicted at Birmingham Crown Court of causing serious injury by dangerous driving for which he was sentenced, on 18 May 2017, to 18 months imprisonment. On 30 May 2017, the appellant was notified that s32(5) of the UK Borders Act 2007 (“the 2007 Act”) places a duty on the SSHHD to make a deportation order against him unless he can demonstrate that one or more of the specified exceptions set out in s33 of the 2007 Act applies to him. The appellant made representations on 10 June 2017 setting out why he should not be deported. Following consideration of the representations the appellant was served with a decision dated 9 April 2018 to refuse a protection and human rights claim. That decision gave rise to an appeal that was heard by First-tier Tribunal Judge Moan (“the judge”) on 10 September 2018. The appeal was allowed on all grounds for the reasons set out in a decision promulgated on 26th September 2018.

The decision of the First-tier Tribunal

4. A brief summary of the background and the matters relied upon by the appellant is set out at paragraphs [11] to [16] of the decision of the FtT judge. The judge noted the appellant is from Jowhar and his original asylum claim was based on his ethnicity as a member of the minority Ashraf clan. She noted the respondent claims the appellant can relocate to Mogadishu upon return to Somalia.

5. The Judge found, at [28], the appellant could not safely return to his home area in Jowhar, and noted at [29], the issue is whether it is

reasonable for the appellant to relocate to Mogadishu. At [32] and [33], the judge said:

“32. There is little from the case of **MOJ** or the CPIN to suggest that the appellant will be persecuted as a result of his minority clan status in Mogadishu. I note that even the UNHCR letter refers to marginalisation, lack of protection and instability rather than actual persecution. In my judgement, the issue the appellant would face is the conditions upon his return, including his treatment potentially as an IDP.

33. The CPIN confirms that minority groups are disadvantaged. It is agreed that the appellant is part of a minority clan. The CPIN states that some clans have well established communities in Mogadishu. The CPIN also confirms at para 2.3.4 that members of minority groups can end up in internally displaced person groups where they face particularly difficult treatment. This was emphasised in paragraph 8 of the CPIN. The case of **MOJ** emphasised that those returning to Somalia without support will end up in IDP camps and will face conditions that fall below humanitarian standards. The UNHCR had similar concerns. I also note the CPIN at paragraph 8 referred to threats from criminals and the police in IDP camps and that they ran with minimal support.”

6. At paragraph [35], the judge referred to the evidence that the appellant lives with his aunt and her son. She found that this is not a family with significant means to support the appellant financially upon his return to Somalia. She accepted the appellants claim that he has had no contact with his father and sister in Somalia since 2003. The judge found it is highly unlikely that the appellant will have access to clan support in Mogadishu. At paragraphs [36] to [38] the judge stated:

“36. There is little to suggest that it is safe for the appellant to return to Jowhar. The respondent has now (*sic*) shown that there has been a change in circumstances in that area. The respondent has shown that there has been a change in circumstances in Mogadishu that is significant and not temporary.

37. Whilst I find that the appellant will not be persecuted in Mogadishu, I consider that he would be at risk of Article 3 treatment upon his return due to the lack of support noting his minority clan status and his long absence from Somalia. He is likely to end up in an IDP camp and **MOJ** confirms that the conditions therein fall below those that are humanitarian.

38. Noting that I consider that the appellant is at real risk of article 3 treatment in Mogadishu, I do not consider it a reasonable for him to relocate to Mogadishu. On that basis, he retains his refugee status as he cannot internally relocate.”

7. For the reasons set out in paragraphs [40] to [48], the judge felt unable to conclude that the appellant poses a danger to the community and was unable to conclude that the appellant is excluded from a grant of humanitarian protection in any event.
8. The judge went on to consider the appellant's Article 8 claim at paragraphs [49] to [52] of the decision. The judge concluded at paragraph [53] as follows:

“For the reasons given for the appellant's ongoing need for protection, I consider that the appellant would have very significant obstacles in integrating. He lacked support from his family, and he had no established clan support. He would have difficulty supporting himself and was likely to end up in an IDP camp. I do not accept that subsisting in an IDP camp is integration into the community. For those reasons, I am satisfied that he would have very significant obstacles in integrating in Somalia.”
9. Having concluded the appellant is able to satisfy the requirements set out in paragraph 276ADE of the immigration rules, the judge concluded at [56], that the deportation of the appellant is disproportionate, and in breach of his Article 8 rights.

The appeal before me

10. The respondent claims the appellant was granted refugee status on the basis of his membership of a minority clan, and the country guidance set out in **MOJ** now establishes that there are no clan militias in Mogadishu, no clan violence, and no clan-based discriminatory treatment even for minority clan members. The respondent claims the judge failed to sufficiently engage with the country guidance and if the availability of internal relocation is sufficient to prevent a person acquiring refugee status, it must also be sufficient to justify the cessation of such status provided the change of circumstances is of such a significant and non-temporary nature that the refugee's fear of persecution can no longer be regarded as well founded. Furthermore, the respondent claims that a lack support and destitution leading to the appellant having to reside in an IDP camp does not of itself amount to a protection claim or entitlement to

refugee status. The Judge found the appellant is likely to find himself living in makeshift accommodation in an IDP camp but in considering the appellant's return to Mogadishu the judge failed to have regard to other relevant factors including his prospects of securing a livelihood, the skills and qualifications he has obtained in the UK and the fact that he is a young healthy male who is able to speak Somali. The respondent claims these are all factors relevant to the appellant's ability to integrate economically upon return to Mogadishu. The respondent claims that while the appellant's family may not be able to support him entirely (*although that has not been determined by the judge*), some remittances coupled with an ability to work, could conceivably avoid the appellant's forced residence in an IDP camp. It was for the appellant to explain why he would not be able to access the economic opportunities that have been produced by the economic boom in Mogadishu, and the judge simply fails to make sufficient findings in respect of material matters.

11. Permission to appeal was granted by First-tier Tribunal Judge Manuell on 22nd October 2018. He considered it arguable that the judge fails to engage with the evidence provided of current country conditions and has arguably not followed the country guidance set out in **MOJ**.
12. Before me, Mr Mills refers to the decision of the Court of Appeal in MS (Somalia) [2019] EWCA Civ 1345. Hamblen LJ, with whom Newey LJ and Underhill LJ agreed, held the SSHD could rely upon the availability of internal relocation as the basis for the cessation of refugee status under the Refugee Convention. Mr Mills submits the judge accepted, at [36], there has been a change in circumstances in Mogadishu that is significant and not temporary. The judge found at [37] the appellant will not be persecuted in Mogadishu but would be at risk of treatment contrary to Article 3 due to the lack of support and the likelihood of the appellant ending up in an IDP camp. Mr Mills submits the judge erroneously followed the guidance set out at headnote (xii) of MOJ in reaching her conclusion that the appellant would be at risk of treatment

contrary to Article 3 because he is likely to end up in an IDP camp and MOJ confirms that the conditions therein fall below those that are humanitarian. The guidance was disapproved by the Court of Appeal in Said -v- SSHD [2016] EWCA Civ 422 in so far as it purports to establish the circumstances in which removal to Somalia would infringe Article 3. In MS (Somalia), Hamblen LJ stated at paragraph [76]:

“By relying upon and applying paragraph 408 of the *MOJ* decision in determining whether there would be a breach of Article 3 ECHR the FTT accordingly applied the wrong legal test, as *Said v SSHD* makes clear.”

13. Mr Mills submits the country guidance in MOJ makes it clear that it will be for the person facing return to explain why he would not be able to access the economic opportunities that are being produced by the economic boom in Mogadishu and it will only be those with no clan or family support, 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. There was no evidence before the FtT that the appellant has no real prospect of securing access to a livelihood and the judge had found, at [52], that English is a major language in Somalia and the appellant will have some cultural heritage with Somalia.
14. On behalf of the appellant, Mr Pipe accepts that the issue in the appeal, as set out at paragraph [29], was whether the SSHD could rely upon the availability of internal relocation as the basis for the cessation of refugee status under the Refugee Convention. He submits the appellant simply had to establish that it would be unduly harsh for him to relocate to Mogadishu and he was not required to establish that his return to Mogadishu would be in breach of his Article 3 rights. He submits the judge had regard to the country guidance set out in MOJ at paragraphs [30] to [33] of the decision and considered the personal circumstances of the appellant at paragraphs [34] to [37] of her decision. It was open to

the Judge to find that the appellant's family is not a family with significant means to support the appellant financially upon his return to Somalia and that he would have a lack of support in Mogadishu such that he is likely to end up in an IDP camp. Mr Pipe submits that when the decision is read as a whole it must be implicit that in considering the totality of the evidence, the judge had in mind the economic opportunities that have been produced by the economic boom and the prospect of securing access to a livelihood on return, notwithstanding the judge's failure to expressly refer to those matters in the decision. He submits that if there is an error in the Judge's approach, that error is immaterial even on the limited findings made. The Judge found the high threshold required to establish an Article 3 claim was met by the appellant and it must follow that it would be unduly harsh for the appellant to internally relocate to Mogadishu.

Discussion

15. The appellant comes from Jowhar and his original claim for asylum was based on his ethnicity as a member of the Ashraf clan. The Judge found the respondent has not shown that there has been a change in circumstances in Jowhar and the appellant cannot return to Jowhar. That finding is not challenged by the respondent. It is common ground that the issue for the judge was whether the SSHD could rely upon the availability of internal relocation as the basis for the cessation of refugee status under the Refugee Convention. Such an assessment must be based on an individual and not merely a general evaluation of the changed conditions and risks arising in the country of return.
16. In SSHD -v- MA (Somali) [2018] EWCA Civ 994 Lady Justice Arden made it clear that there should be a symmetry between the grant and cessation of refugee status. The Court of Appeal held that a state seeking to terminate a person's status as a refugee did not have to investigate whether there would be a violation of Article 3 if the refugee was

returned to their country of origin. All that is required, on a proper construction of Abdulla -v- Germany (C-175/08) is for the circumstances leading to the grant of refugee status, to have ceased to exist such that it could be described as 'significant and non-temporary' within the terms of article 11(2) of the Qualification Directive. At [47] she said, "*There is no necessary reason why refugee status should be continued beyond the time when the refugee is subject to the persecution which would entitle him to refugee status or any other persecution which would result in him being a refugee, or why he should be entitled to further protection.*".

17. As here, the appellant in MS (Somalia) had been granted refugee status and following a conviction for which he was sentenced to 20 months imprisonment, was notified of the SSHD's intention to cease his refugee status. Following consideration of representations, MS was made the subject of a deportation order and a decision to refuse his protection and human rights claims. The FtT judge allowed MS's appeal on the basis that the criteria for cessation of refugee status had not been made out and MS should continue to have protection under the refugee Convention and Article 3 ECHR. Hamblen LJ, endorsed the 'mirror image' approach referred to by Arden LJ in SSHD -v- MA (Somalia). Hamblen LJ said, at paragraph [49]:

"In summary, in a case in which refugee status has been granted because the person cannot reasonably be expected to relocate, a cessation decision may be made if circumstances change, so as to mean that that person could reasonably be expected to relocate, provided that the change in circumstances is, in the language of the Qualification Directive, "significant and non-temporary". Helpful guidance in relation to the assessment of the reasonableness of internal relocation is given in the recent decision of this Court in *AS (Afghanistan) v SSHD [2019] EWCA Civ 873*.

18. Having carefully read the decision of First-tier Tribunal Judge Moan, in my judgement, the judge erred in her consideration of the issue before her, by applying the wrong test to the cessation of refugee protection issue, by conflating it with Article 3 and the prospect of the appellant returning to live in an IDP camp, in conditions that fall below those that are humanitarian. As Lady Justice Arden explained at [56] of MA (Somalia),

"humanitarian standards are not the test for a cessation decision.". At [61], she made it clear that a cessation decision does not involve the question whether Article 3 would be violated.

19. The Court of Appeal in Said -v- SSHD held that there is no violation of Article 3 by reason only of a person being returned to a country which for economic reasons, cannot provide him with basic living standards. The Upper Tribunal had allowed a Somali national's appeal against deportation following a sentence of five years for rape under Article 3 (he being excluded from protection under the Refugee Convention and on humanitarian protection grounds), finding that for the purposes of MOJ he was vulnerable, had PTSD, and would be at risk of destitution and thus likely to end up in an IDP camp. The Court of Appeal held that to succeed in resisting removal on Article 3 grounds on the basis of suggested poverty/deprivation, which was not the responsibility of the receiving country, whether or not the feared deprivation was contributed to by a medical condition, the person liable to deportation was required to show circumstances which brought him within the approach in D v UK (1997) 24 EHRR 423 and N 47 EHRR 885.
20. The judge should have properly addressed whether internal relocation to Mogadishu would be unduly harsh. An individual excluded from the protection of the refugee Convention cannot defeat the cessation decision or bring himself within Article 3 ECHR to defeat deportation on grounds of the conditions upon return, including his treatment potentially as an IDP. Although I accept that it is potentially open to a judge to make findings on humanitarian protection grounds, the judge's consideration was not in my judgment, properly part of her consideration as to the cessation of refugee status.
21. The judge relied upon (xii) of the headnote in MOJ on the basis that "*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.". I accept, as Mr Mills submits, the judge failed to have regard to relevant factors such as whether the appellant has a prospect of securing access to a livelihood on return, in reaching her decision. If the judge did consider such matters, the judge did so, without supporting reasoning. Although the judge found the appellant's family is not a family with significant means to support the appellant financially upon his return, the judge appears to have discounted the possibility of the Assisted Voluntary Return financial assistance that would be available to him and did not take into account the finding at [351] of MOJ that returnees from the West may have an advantage since they are likely to be better educated and considered more resourceful. It was also for the appellant to explain why he would not be able to access the improving economic situation in Mogadishu. The decision does not explain that this was done.

22. The decision of the judge to allow the appeal on Article 8 grounds is inextricably linked to the conclusions reached by the Judge as to the need for ongoing protection.
23. In my judgement the decision of First-tier Tribunal Judge Moan is infected by a material error of law and should be set aside. As to disposal, in my judgement the remaking of the decision will involve extensive fact-finding, particularly in respect of the issue that is at the heart of the appeal as to whether the appellant can internally relocate to Mogadishu.

Decision

The decision of First-tier Tribunal Judge Moan promulgated on 26th September 2018 is set aside and remitted for rehearing before the First-tier Tribunal afresh

with no findings preserved. The parties will be notified of a hearing date in due course.

Signed

Date

20th December 2019

Upper Tribunal Judge Mandalia