Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01177/2012

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice on 15th July 2013	**Determination Promulgated On 22nd July 2013** ……

Before

UPPER TRIBUNAL JUDGE SPENCER

Between

ISMAIL DERIA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Ms F Allen, counsel, instructed by Polpitiya & Co. Solicitors
For the respondent: Mr S Walker, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Somalia, born on 15th July 1953. His appeal against the decision of the respondent, made on 29th November 2012, that section 32(5) of the UK Borders Act 2007 applied, so that he was subject to automatic deportation was dismissed after a hearing before the First-tier Tribunal, comprising First-tier Tribunal Judge Elek and Mrs R M Bray JP, in a determination promulgated on 3rd May 2013.

2. The offence which triggered the automatic deportation provisions of the UK Borders Act was an offence of wounding with intent to do grievous bodily harm, in respect of

which at the Crown Court at Manchester on 14th December 2002 the appellant received a sentence of life imprisonment with a tariff of four years under the provisions of section 109 of the Powers of Criminal Courts (Sentencing) Act 2000, which provided for a mandatory sentence of life imprisonment for a second section 18 offence. He remained in prison until sometime towards the end of 2012 when he was transferred to immigration detention. The circumstances of the second offence were that the appellant had an argument with a man whom he knew and with whom he was having a drink, in the course of which the appellant produced a knife and repeatedly stabbed him, causing a very serious wound from which he could easily have died. When arrested he was found to be in possession of a four inch kitchen knife, which he claimed was for his own protection. The first such offence was an offence of wounding with intent, of which he was convicted in 1991, in respect of which, together with an offence of possessing an offensive weapon, he received a total of twelve months' imprisonment. On that occasion the appellant went to meet the victim of the offence, with whom he had previously had an altercation, armed with a knife. On his arrival a fight ensued and the appellant picked up a bottle and smashed it into the victim's face, causing cuts and bruises.

3. Permission to appeal was granted in the First-tier Tribunal by First-tier Tribunal Judge Pooler on a number of grounds, to which he made specific reference. First it was arguable that the First-tier Tribunal erred in law by refusing to adjourn the hearing to enable more information to be provided by the parties in relation to the route of return to Hargeisa, Somaliland to which the respondent proposed to deport the appellant. The second ground was that the First-tier Tribunal judge made no finding in respect of the presumption under section 72(2) of the Nationality, Immigration and Asylum Act 2002 that for the purposes of Article 33(2) of the Geneva Convention the appellant was presumed to have been convicted of a particularly serious crime and constituted a danger to the community of the United Kingdom. The third ground was that it was arguable that in determining whether or not the appellant's deportation would infringe the appellant's article 8 rights the First-tier Tribunal failed to take account of relevant matters, particularly the appellant's low risk of re-offending and his health.

4. At the hearing before me it became apparent that the issue of whether or not the First-tier Tribunal had made an error of law in failing to adjourn the hearing was academic. In the notice of immigration decision the respondent indicated that the appellant would be deported to Somaliland by air to Hargeisa Airport. The expert whose report was relied upon by the appellant at the hearing before the First-tier Tribunal expressed the opinion that the appellant would be at risk if he were obliged to leave Mogadishu Airport if there was a stopover en route to Hargeisa. Mr Walker gave an undertaking on behalf of the respondent that the appellant would be deported to Hargeisa either by a flight which did not land in Mogadishu or by a flight which, if it did land in Mogadishu, would not involve the appellant leaving Mogadishu Airport. Ms Allen expressed concern that the appellant might not be appropriately documented which would oblige him to obtain travel documents in Mogadishu, but Mr Walker gave a further undertaking on behalf of the Secretary of State that the appellant would not be deported from the United Kingdom without

appropriate documentation which would enable him to enter Somaliland and remain there. On this basis Ms Allen conceded that if there had been an error of law in the determination of the appeal the decision would not be able to be re-made in favour of the appellant on the grounds that he would be at risk en route to Hargeisa.

5. The consequence of these undertakings is that if the respondent wished to depart from their terms a fresh removal decision affording the appellant a fresh right of appeal would have to be made.

6. So far as the section 72 point is concerned, it is apparent from paragraphs 14 and 15 of its determination that the First-tier Tribunal had regard to the Parole Board Oral Hearing Decision letter, dated 9th October 2012, which followed a panel hearing on 9th October 2012, in which the panel expressed itself satisfied that the appellant's risk to the public and in the community were low. The First-tier Tribunal said that it did not accept, in view of the Parole Board's conclusions, that the appellant was excluded from humanitarian protection. Ms Allen conceded that that inevitably meant that the First-tier Tribunal was satisfied that were the appellant to be at risk of serious harm on return to Hargeisa he would not be excluded from protection under the Refugee Convention by virtue of the provisions of section 72, although it did not expressly say so.

7. As the terms of the permission to appeal permitted all grounds to be argued Ms Allen drew my attention to paragraph 5 (IV to VI) of the grounds of appeal in relation to the appellant's article 3 claim. Paragraph (IV) criticised the finding of the First-tier Tribunal that the appellant would have contacts through two friends who had recently visited Somaliland and its conclusion that he would have financial support from his relations in the United Kingdom in Somaliland. Paragraph (V) asserted that the First-tier Tribunal had failed to have regard to the expert evidence that the appellant would be socially isolated in Somaliland. Paragraph (VI) asserted that the First-tier Tribunal did not address the evidence that the appellant was likely to be kidnapped on return and held to ransom.

8. The First-tier Tribunal took the view, despite the appellant's assertion to the contrary, that the financial support that he had obtained in prison from his family would be able to continue if he were returned to Hargeisa. The First-tier Tribunal found that the appellant would have clan protection there. In paragraph 18 of its determination it considered the evidence that he would be viewed as someone likely to have wealth and a prime target. It took account of the statement in the expert's report that on return someone like the appellant would face huge expectations by close or distant relatives or friends to 'bring something' and if he had nothing they would suspect him of being stingy and hiding his wealth. In his view that would not, however, lead to physical attacks but rather to increase psychological/moral pressure. Social isolation would be the probable result. The First-tier Tribunal said that they considered that the expert's conclusions did not in their severity engage article 3. In any event, the appellant told the court he had two lady friends, who recently returned from holidays in Hargeisa, where they visited relatives. They came to no harm and the First-tier Tribunal did not doubt that the appellant would have

contacts through them to protect him from social isolation, if indeed he did not have any relatives at all in Somaliland, about which they were sceptical. In any event, he would have clan protection. In my view all of these conclusions were open to the First-tier Tribunal on the basis of the evidence before it and it was perfectly entitled to conclude that the high threshold involved in article 3 was not reached as a result of the matters which had been advanced on the appellant's behalf.

9. This leaves the third ground mentioned in the grant of permission, namely that the First-tier Tribunal judge made an error of law in the assessment of the proportionality of the appellant's deportation in failing to take account of material matters, particularly his low risk of re-offending and his health. As to the general matters advanced on the appellant's behalf in the grounds of appeal, I take the view that they involved matters of advocacy. In some respects they rely upon matters, such as the length of time which the appellant had spent in the United Kingdom, the fact that he had relations in the United Kingdom who supported him financially and his lack of relations in Somaliland, which were accepted by the First-tier Tribunal, as is apparent from reading its determination. In other respects, as in relation to the risk of destitution and the risk of kidnapping, they amount to disagreement with the findings of the First-tier Tribunal, as has been seen.

10. In relation to the appellant's low risk of re-offending, it is apparent from what has already been said that the First-tier Tribunal accepted the conclusion of the Parole Board that the appellant's risks to the public and in the community were low. In paragraph 14 of its determination it said that in assessing whether he remained a danger to the community it took into consideration the Parole Board Oral Hearing Decision letter. It said the panel noted that in the OASys, dated 9th September 2011, it was said that the appellant's risk of serious harm in the community was assessed as medium to the public and to known adults and all other risks in the community and in custody were assessed as low. The First-tier Tribunal cited the panel's statement that it was noted that the CALM programme taught him how to manage anger. In paragraph 15 of its determination the First-tier Tribunal set out the Parole Board's conclusions that the appellant's risks were low and that his current risks were manageable in either open conditions or in the community. The First-tier Tribunal said it accepted the appellant's representative's submission that "having regard to the totality of the evidence this is a case where the appellant has very carefully and seriously focused on the cause of his offending in particular alcohol and addressed such issues as guilt and remorse".

11. Notwithstanding the acknowledgement by the First-tier Tribunal that the appellant's risks to the public and in the community were low, Ms Allen argued that in paragraph 26 of its determination when dealing with the question of the proportionality of the appellant's deportation the First-tier Tribunal failed to make mention of these low risks. She relied upon a passage in paragraph 30 of the judgment of Moses LJ in MM (Zimbabwe) v Secretary of State for the Home Department [2012] EWCA Civ 279, in which he said that an assessment of the risk of re-offending was a vital ingredient in reaching the conclusion that deportation was necessary for the purposes of protecting the public. She also relied on a further

passage in paragraph 35 in which he said that if the correct view was that there was no realistic risk of further offending and the prognosis was excellent then it was difficult to see how it could be proportionate to deport that appellant. So far as the latter statement is concerned, it is to be remembered that each appeal has to be determined on its own facts. In MM the appellant's offending had been caused by his schizophrenia and there was evidence that continued medication and support would remove the risk of further offending. In that case there was no realistic risk of further offending, whereas such cannot be said to be the case here.

12. It is clear that the appellant's risk had been assessed. In relation to the issue of whether or not the First-tier Tribunal failed to take account of the appellant's low risk of re-offending, it is evident that in paragraph 26 of its determination it said that it noted the principle considered in the case of AM v Secretary of State for the Home Department [2012] EWCA Civ 1634, that deportation in pursuit of the legitimate aim of preventing crime and disorder was not to be seen as one-dimensional. The public interest in deterrence was a material and necessary consideration in measuring proportionality and was an important component of the balancing exercise. It was in paragraph 24 of the judgment that Pitchford LJ said this:

> "Deportation in pursuit of the legitimate aim of preventing crime and disorder is not, therefore, to be seen as one-dimensional in its effect. It has the effect not only of removing the risk of re-offending by the deportee himself, but also of deterring other foreign nationals in a similar position. Furthermore, deportation of foreign criminals preserves public confidence in a system of control whose loss would itself tend towards crime and disorder."

In my view the reference by the First-tier Tribunal to deportation not being seen as having a one-dimensional effect demonstrates a regard to the risk of re-offending and shows that it considered that the appellant's low risk of re-offending was not in itself sufficient to make his deportation disproportionate. In my view it is impossible to conclude that the First-tier Tribunal failed to have regard to the appellant's low risk of re-offending since it specifically made reference to it in paragraphs 14 and 15 of its determination. It cannot be assumed that thereafter the First-tier Tribunal completely forgot about it.

13. So far a the question of the appellant's health is concerned, in paragraph 20 of its determination the First-tier Tribunal observed that in relation to the appellant's health problems no medical evidence had been submitted. It said the appellant said he suffered from diabetes. His expert stated that the prevalence of persons suffering from diabetes was quite high in Somaliland. His impression was that most diabetes patients could get some form of treatment. His explanation was that if one had the financial means and family support one could secure reasonably well diabetes treatment in most open areas in Somaliland. In paragraph 19 of its determination the First-tier Tribunal referred to remittances which the appellant received from his family in the United Kingdom and said it had no reason to believe, despite his assertion to the contrary, that the support would not continue were he to be removed to Hargeisa. It said the appellant's expert stated that family survival in Somaliland depended to a considerable degree on sharing within kinship networks and

remittances sent by (sic) the diaspora. It did not doubt the appellant would be supported in this way on return.

14. The First-tier Tribunal had already found that the appellant was a member of the Isaaq clan from whom he would have clan protection in Somaliland. In paragraph 20 of its determination the First-tier Tribunal went on to say that it had already concluded that the appellant would not be without financial support from his family in the United Kingdom and that he already had contacts with friends and/or clan protection. The expert was not sure about medication for glaucoma and raised concerns about the appellant's injuries sustained whilst in prison but the First-tier Tribunal reiterated that no medical evidence was adduced. The appellant appeared in court and it noted that he walked with a stick and gave evidence without difficulty. It was satisfied that there was a hospital in Hargeisa. It found that article 3 was not engaged as far as the appellant's medical conditions were concerned.

15. Ms Allen submitted that when the First-tier Tribunal came to assess the proportionality of the appellant's deportation it made no mention of his medical problems. In paragraph 26 of its determination, however, the First-tier Tribunal did point to the fact that the appellant would be able to return to Hargeisa in Somaliland, where it did not doubt he had social contacts and would be supported financially from the United Kingdom. The First-tier Tribunal had previously pointed out this support would prevent the appellant's medical conditions from engaging article 3.

16. In paragraph 17 of his judgment in MM, Moses LJ said that the essential principle was that the ECHR did not impose any obligation on the contracting states to provide those liable to deportation with medical treatment lacking in their "home countries". In paragraph 18 he said although that principle was expressed in those cases in relation to article 3, it was a principle which must apply to article 8. It made no sense to refuse to recognise a "medical care" obligation in relation to article 3, but to acknowledge it in relation to article 8. In paragraph 23 he said the only cases he could foresee where the absence of adequate medical treatment in the country to which a person was to be deported would be relevant to article 8, was where it was an additional factor to be weighed in the balance, with other factors which by themselves engaged article 8. It is not the case, however, that the appellant had established that there would be an absence of adequate medical treatment in Somaliland for his medical conditions. In these circumstances in my view no reasonable First-tier Tribunal could have been persuaded that the appellant's medical conditions should have affected the outcome as to whether his deportation would be proportionate or not.

17. The appellant did not succeed in establishing, despite having a number of relations in the United Kingdom, that he enjoyed family life here. I am satisfied that, given the weight to placed upon the public interest in the deportation of foreign criminals as illustrated by the decision of the Court of Appeal in SS (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 550 and the seriousness of his offence, it cannot be said that the First-tier Tribunal erred in law in concluding that it would not be disproportionate to deport the appellant to Somaliland, in the light of all of the

circumstances, notwithstanding the length of time that he had been in the United Kingdom and his low risk of re-offending.

18. In these circumstances the appeal to the Upper Tribunal is dismissed so that the decision of the First-tier Tribunal shall stand.

Signed Dated

P A Spencer
Judge of the Upper Tribunal