Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00581/2014

THE IMMIGRATION ACTS

Heard at : Birmingham Magistrates' Court	**Determination Promulgated**
On : 5 November 2014	**On : 11 November 2014**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK
UPPER TRIBUNAL JUDGE KEBEDE

Between

ALI OSMAN HIRSI
(NO ANONYMITY ORDER)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Howard of Fountain Solicitors
For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal comes before us following a grant of permission to appeal on 16 September 2014.

2. The appellant is a citizen of Somalia, born on 2 February 1993. He arrived in the United Kingdom together with his three brothers on 18 June 2003 to join

their father who was already settled here. He was ten years of age at the time. He and his brothers were granted indefinite leave to enter upon entry although, as was later confirmed to his solicitors, not by way of family reunion as refugees. From 2008/9 the appellant committed, and was convicted of, various criminal offences.

3. On 5 January 2009 he was convicted of attempt/robbery, for which he was made the subject of a referral order for 12 months and was ordered to pay compensation and costs. On 6 July 2010 he was convicted of assault occasioning actual bodily harm for which he was sentenced to a four month detention and also convicted, on the same day, of theft from a person for which he was sentenced to a detention and training order for four months to run concurrently. On 29 December 2011 he was convicted of assault occasioning actual bodily harm for which he was sentenced to 18 weeks in a young offenders institution.

4. On 4 May 2012 and 3 July 2012 the appellant was convicted on two counts of robbery for which he was sentenced on 15 August 2012 to 12 months' detention in a youth offenders institution for count one and received a concurrent sentence of 12 months' detention in a young offenders institution for count two. He did not appeal against his conviction or sentence. On 5 September 2012 he was served with a notice of liability to deportation to which he responded and claimed asylum. He was interviewed about his asylum claim on 4 December 2012. His asylum claim was refused. A decision was made on 13 August 2013 that section 32(5) of the UK Borders Act 2007 applied and a deportation order was signed against him the same day. He appealed against that decision.

5. The basis of the appellant's asylum claim was that he feared returning to Somalia because he had no-one there and that he would be at risk as his clan was not welcome there. He claimed that all of his family, including his father, three brothers, three step-brothers and two step-sisters, lived in the United Kingdom. His mother had died in 1998. His uncle was shot in Mogadishu and all of his family left the country. He was from the Habr Younis clan. His main reason for wishing to live in the United Kingdom was that he wanted to go to college and get a job and have a better life. All of his family was here and there was nothing for him in Somalia.

6. With respect to the deportation decision, the appellant relied on the exceptions in s33 of the UK Borders Act 2007, specifically the risk on return to Somalia and his human rights including his lack of family in Somalia and the fact that he had lived in the United Kingdom since the age of ten.

7. The respondent, in making the decision on 13 August 2013, considered the appellant's asylum claim and noted that his father, in his own asylum claim, had claimed to be from the Ashraf clan, sub-clan Rer Sharif Hassan, a minority clan. The Habr Younis clan, however, was a sub clan of the Isaaq clan which was one of the majority Somali clans. The respondent considered that the appellant would not be at risk on the basis of either clan membership. As a

member of the Habr Younis clan, he would have the protection afforded to members of a majority clan. With regard to membership of the Ashraf clan, consideration was given to the country guidance in AMM and others (conflict; humanitarian crisis; returnees; FGM) Somalia CG [2011] UKUT 445 and it was concluded that he would not be at risk. The respondent considered that the situation in Somalia, and in particular Mogadishu, had changed considerably since AMM, and concluded that there was no longer a general risk of Article 15(c) harm for the majority of those returning to the city and that the appellant would be able to work and avoid the Internally Displaced People's (IDP) camps. Accordingly he was not entitled to asylum or humanitarian protection and his removal would not breach Article 3 of the ECHR. It was considered, in any event, that the appellant was excluded from humanitarian protection under paragraph 339D(i) of the immigration rules, on the grounds that there were serious reasons for considering that he had committed a serious crime.

8. With regard to Article 8, the respondent noted that the appellant fell within paragraph 398(ii) of the immigration rules but that paragraphs 399(a) and (b) did not apply to him as he was not in a subsisting relationship and did not have any children. With respect to paragraph 399A, it was considered that he had not spent half of his life in the United Kingdom (taking account of periods of imprisonment) and that he had retained ties to Somalia. Accordingly he could not meet the requirements of that provision. It was considered that there were no exceptional circumstances that would outweigh the public interest in his deportation and it was therefore not accepted that his deportation would breach Article 8 of the ECHR.

9. The appellant's appeal against that decision was heard before the First-tier Tribunal, by a panel consisting of First-tier Tribunal Judge Frankish and Mr G Getlevog. The panel heard oral evidence from the appellant and his brother and cousin/brother-in-law and considered a witness statement from another brother. It was noted that a reference by the respondent, in the reasons for deportation letter, to the appellant having been born and lived in Kenya before coming to the United Kingdom was in error and that he had in fact lived in Somalia from birth until the age of ten. The panel made particular observations about the limited support afforded to the appellant in his appeal by family members, with only two family members attending but no attendance by or letters of support from his father, his sister or his elder brother. They noted the contradictory evidence of the appellant and his witnesses as to the reasons for the absence of his father and brother and concluded that that, together with his denial of responsibility for the criminal offence, indicated that he had "mendacious propensities". They also concluded that the appellant's ties with his family in the United Kingdom, other than the witnesses, were tenuous and that they appeared to have washed their hands of him. The panel noted that the appellant was claiming before them to be from the Ashraf clan, as opposed to his previous evidence that he was from the Habr Younis clan, but they rejected that new claim. They also rejected his claim to know nothing of the Somali culture and little of the language. With regard to the appellant's criminal history and risk of re-offending, they concluded that he remained a continuing risk to the public.

10. Having made those findings of fact the panel then considered the country guidance in AMM and noted the improvements in the country situation since the guidance was issued. They concluded that the appellant was not in need of refugee status and that his Article 3 and humanitarian protection claims fell with his asylum claim. They noted that in any event he was excluded from humanitarian protection. With regard to Article 8, they considered paragraph 398 and 399A, concluding that he could not benefit from the latter as he had not spent half of his life in the United Kingdom outside prison and that there were no compelling circumstances insufficiently considered outside the rules. The appeal was accordingly dismissed on all grounds.

11. Permission to appeal to the Upper Tribunal was sought on the grounds that the First-tier Tribunal had erred by failing to apply the country guidance in AMM, in that it had failed to explain why the appellant would not be at risk on return considering his vulnerability, having arrived in the United Kingdom at the age of ten years; and that it had not given adequate consideration to Article 8, in that it had failed adequately to assess the appellant's particular circumstances and why he would have ties to return to in Somalia and had failed to give reasoning as to why his circumstances were not compelling and exceptional.

12. Permission to appeal was initially refused, but following a renewed application on the same grounds was granted on 16 September 2014, in particular on the grounds that the First-tier Tribunal had arguably failed to give adequate consideration to the question of Article 3 risk and Article 15(c) harm in the light of the decision in AMM.

Appeal hearing and submissions

13. At the hearing we raised the point that, whilst permission was given partly in relation to the First-tier Tribunal's assessment of risk under Article 15(c), the panel had in fact concluded that the appellant was excluded from humanitarian protection. Mr Howard was invited to address the point in his submissions if that part of the grounds was being pursued. He advised us that the finding at paragraph 21 of the determination, that the appellant remained a danger to the public, was not challenged and that the grounds did not challenge the finding that the appellant was excluded from humanitarian protection. He did not seek to amend the grounds and pursued the appeal in relation to Articles 3 and 8, although we had to remind him from time to time of the remit of the challenge when he appeared to be relying upon those parts of the country guidance relating to humanitarian protection.

14. Mr Howard submitted that the First-tier Tribunal gave no reasons for its findings in relation to Article 3 and failed to consider and undertake an assessment of the appellant's vulnerability pursuant to the findings at paragraph 595 of AMM. He submitted that the Tribunal's error in failing to consider the relevant country guidance at that time was material, since the more recent guidance in MOJ & Ors (Return to Mogadishu) [2014] UKUT 442

also required a detailed assessment of a person's circumstances on return, as set out in paragraphs 407(h) and 408 of that decision. The Tribunal had had no regard to the fact that the appellant came to the United Kingdom as a child of ten years of age. His lengthy absence from Somalia was relevant to the question of vulnerability. With regard to Article 8, Mr Howard accepted the Tribunal's findings at paragraph 25 of its determination and accepted that the appellant could not meet the requirements of paragraph 399A. However he submitted that there was no proper assessment of whether or not there were compelling circumstances, considering in particular the appellant's claim to have no family in Somalia, and no proper reasons were given for concluding that his circumstances were not compelling.

15. Mr Mills submitted that it was clear from the Tribunal's findings at paragraph 23 of its determination that it had the respondent's position, as set out in the refusal letter, in mind, in concluding that circumstances had changed in Mogadishu since AMM. The Tribunal therefore properly considered that it was not bound to follow the guidance in AMM. However even if it was bound to follow AMM, the Tribunal made clear adverse credibility findings against the appellant and concluded that he had made up his claim as to the risk on return to Mogadishu. The panel rejected his claim to be from the Ashraf clan and implicitly found that he was from the Habr Younis clan, part of a majority clan, and as such would not be returning as a vulnerable individual but as a member of a powerful clan who could provide him with support. The only evidence relied upon by the appellant in claiming to be vulnerable was the age when he left Somalia, but that was not a category referred to in the country guidance as being vulnerable. The appellant would not end up in an IDP camp as he would be able to work. Any error in failing to specifically consider vulnerability was not in any event material, given the new guidance in MOJ. With regard to Article 8, the Tribunal had considered all relevant matters and there was nothing that they had overlooked in terms of compelling circumstances.

16. Mr Howard, in reply, reiterated his earlier submissions, in particular that the Tribunal was required to make findings on the appellant's vulnerability and likelihood of having to go into an IDP camp but failed to do so.

17. We asked Mr Howard to clarify, in the context of considering materiality of any arguable error by the panel, whether there was any evidence before them of vulnerability other than the fact that the appellant had been in the United Kingdom since the age of ten. He advised us that the evidence consisted of the accounts given by the appellant and the witnesses, that he been in the United Kingdom since the age of ten, that all his family was in the United Kingdom and that his ability in the Somali language was limited. He confirmed that there was no documentary evidence and no medical evidence relevant to the question of vulnerability.

18. After careful deliberation, we advised the parties that we did not accept that the Tribunal had made any errors of law such that its decision ought to be set aside. Our reasons for so concluding are as follows.

Consideration and findings.

19. As clarified at the hearing, the grounds relating to Article 15(c) of the Qualification Directive were not pursued, given the Tribunal's unchallenged finding that the appellant was excluded from humanitarian protection. As such the references made by Mr Howard to paragraphs 357 and 594 of AMM were of no relevance, they being related to the question of Article 15(c) risk in Mogadishu.

20. It was Mr Howard's submission that the Tribunal had erred by failing to follow the country guidance in AMM in relation to an assessment of Article 3 risk, as set out at paragraph 595, which states as follows:

> "The armed conflict in Mogadishu does not, however, pose a real risk of Article 3 harm in respect of any person in that city, regardless of circumstances. The humanitarian crisis in southern and central Somalia has led to a declaration of famine in IDP camps in Mogadishu; but a returnee from the United Kingdom who is fit for work or has family connections may be able to avoid having to live in such a camp. A returnee may, nevertheless, face a real risk of Article 3 harm, by reason of his or her vulnerability."

21. Mr Howard's submission was that the Tribunal ought to have undertaken a detailed consideration of the appellant's circumstances on return in order to assess his vulnerability and that it had not done so.

22. Whilst, in light of paragraph 407(h) of MOJ, we do not necessarily agree with the submission that the new country guidance does away with such a requirement and thus renders any such omission immaterial, we consider that the Tribunal did in fact take into account all factors relevant to the appellant's circumstances. We agree that it could have done so in clearer and more organised and detailed terms. Nevertheless, there was an assessment.

23. The panel were plainly aware of the age at which the appellant came to the United Kingdom and his period of absence from Somalia, but they noted that he had spent his entire life in a Somali household and amongst the United Kingdom expatriot Somali community. They rejected his claim to know nothing of the Somali culture and little of the language, concluding that he was immersed in the Somali culture and that the first language of his household was Somali. They considered the appellant's clan and rejected his claim to be from the minority Ashraf clan, concluding implicitly at paragraph 18 of its determination that he was from the Habr Younis clan. That clan, as the respondent has clarified in the reasons for deportation letter, is part of the powerful majority Isaaq clan and is connected to another majority clan, the Dir clan. The Tribunal's conclusion in that respect has not been challenged in the grounds. The panel found the appellant's family ties in the United Kingdom to be largely tenuous. Whilst they did not make any specific findings in regard to family ties to Somalia, it is apparent from their findings at paragraph 27 that they did not accept the uncorroborated evidence of the appellant and his witnesses as to the lack of such ties, considering them to be unreliable witnesses and, in the case of the appellant, to be "mendacious". There has

been no challenge to the Tribunal's adverse credibility findings. The Tribunal also plainly had regard to AMM and the guidance therein and furthermore, on the basis of the background evidence before them, noted at paragraph 23 of its determination that the situation in Somalia had improved since the decision in AMM, having particular regard to reports of economic prosperity returning to the country. Again, that conclusion has not been challenged and indeed has been supported by the new country guidance in MOJ. Accordingly it is plain that the Tribunal did undertake an assessment of relevant factors and circumstances, both particular to the appellant and in general, in the United Kingdom and on return to Mogadishu.

24. It is the case that the Tribunal did not address the question of the appellant's vulnerability on return to Somalia in specific terms. However, when asked to clarify what evidence had been before the First-tier Tribunal to support the submissions now made in regard to his vulnerability, Mr Howard accepted that, other than the fact of his age on entry to the United Kingdom and length of absence from Somalia, there was only the oral evidence of the appellant and the witnesses as to the lack of family, linguistic and cultural ties. The claim in those respects, in particular the latter two, had, however, been rejected by the Tribunal. We note that there was no documentary or other evidence before the Tribunal to suggest that the appellant had any medical or other problems which could give rise to particular difficulties in Somalia and neither were any reasons given as to why he would be unable to find employment, other than his claim as to his limited ability in the Somali language, which the panel had rejected. On the contrary, the evidence produced demonstrated that he had acquired some qualifications which, together with his ability to converse in English, would no doubt assist him in finding employment in Somalia. It was also apparent from the evidence before the Tribunal that far from being a vulnerable character, the appellant's criminal history suggested that he was a particularly robust character.

25. In the circumstances, it seems to us that there was nothing before the Tribunal to demonstrate that the appellant would face a real risk of Article 3 harm in Somalia by reason of vulnerability. In terms of the guidance in paragraph 595 of AMM, even if he had no family connections in Somalia, there was no evidence before the Tribunal to suggest that he would have to live in an IDP camp, given his employment prospects and ability, as a member of the Habr Younis clan, to access majority clan support. The same would apply to the terms of the relevant assessment at paragraph 407(h) of MOJ, which is, significantly, qualified by the requirement for the potential returnee to provide an explanation why he would be unable to access the economic opportunities produced by the 'economic boom' in the country. As already stated, the appellant provided no such explanation.

26. Accordingly we find no error of law in the Tribunal's Article 3 assessment and conclusions.

27. Turning to the second ground, in the absence of any challenge to the Tribunal's findings under paragraph 399A of the immigration rules – which we

consider were properly made – the only issue is the Tribunal's assessment of compelling or exceptional circumstances for the purposes of paragraph 398. In that respect we agree with Mr Mills' submission that, on the available evidence, there was nothing that the Tribunal could be said to have overlooked by way of compelling circumstances. As we have stated above the panel gave careful consideration to the appellant's clan membership and cultural and linguistic ties to Somalia and rejected the claims that he made to be at risk on the basis of clan membership and in regard to a lack of relevant cultural and linguistic ties. Whilst they did not make any specific finding in regard to family ties to Somalia they noted that his family ties in the United Kingdom were limited in so far as it appeared that many of his family members had washed their hands of him and they were not prepared to place weight upon his own unsubstantiated claim as to a lack of ties in Somalia. In any event they found that he was a member of a majority clan and that he was immersed in his Somali culture and language. There was no reason for them to consider his age on arrival in the United Kingdom and the period of time spent in the United Kingdom as amounting to compelling circumstances, given the many other adverse factors to which they referred in detail. Accordingly we find no error of law in the Tribunal's consideration of Article 8 and the conclusions reached in that regard.

28. For all of these reasons we conclude that the grounds of appeal do not disclose any errors of law in the Tribunal's decision requiring the decision to be set aside.

DECISION

29. The appellant's appeal is accordingly dismissed. The making of the decision of the First-tier Tribunal did not involve an error on a point of law, such that the decision has to be set aside. We do not set aside the decision. The decision to dismiss the appellant's deportation appeal therefore stands.

Anonymity

The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. However, we do not consider that there is any need for such an order to continue and accordingly, having regard to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008), we decline to continue that order.

Signed Date **11 November 2014**

Upper Tribunal Judge Kebede