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Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: DA/00735/2013

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On 6 February 2014	**On 11th April 2014**

Before

The President, The Hon. Mr Justice McCloskey
Upper Tribunal Judge Chalkley

Between

OMAR HASSAN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr T Royston (of Counsel), instructed by Parker Rhodes Hicknotts Solicitors

For the Respondent: Ms Johnstone, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

INTRODUCTION

1. The Appellant is of Somalian nationality and is aged 51 years. This appeal has its origins in a decision made on behalf of the Secretary of State for the Home Department (the "*Secretary of State*") dated 28th March 2013, that the Appellant be deported from the United Kingdom on

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the ground that this would be conducive to the public good, pursuant to section 3(5)(a) of the Immigration Act 1971 and section 32(1) of the UK Borders Act 2007. The Secretary of State also refused the Appellant's claim for refugee status. His ensuing appeal to the First-Tier Tribunal (the "*FtT*") was dismissed. This appeal gives rise to consideration of the decision of the Upper Tribunal in AMM and Others [2011] UKUT 445 (IAC).

THE REFUSAL OF ASYLUM

2. On 13th January 2012, the Appellant was sentenced at Cambridge Crown Court for that the Judge described as "*a continuing fraud that you perpetrated on the Driving Standards Agency in relation to driving tests*". The Judge continued:

> "*You admitted that you had fraudulently attended to take the tests on behalf of other people .....*
>
> *I am afraid I simply cannot accept that there was no financial motive .....*
>
> *You are a man of previous good character .....* (the offences) *involved deliberate deception of a public official .....* [and] *..... an intention to put on the road people who have no qualification to drive, with the attendant dangers that that presents to other road users ..... and it provides an identification document, to be used by whoever you are doing it for, which they are not entitled to.*"

The Appellant's offending was aggravated by the consideration that it included offences committed while on bail. The Judge described his offending as "*a particularly serious form of fraud*". Giving him full credit for his guilty plea, he sentenced him to 18 months imprisonment and disqualified him for driving for 12 months. By statute, the maximum punishment for this type of offence is 10 years imprisonment.

3. On 2nd April 2012, consequent upon the aforementioned convictions, the Secretary of State determined to make a deportation order in respect of the Appellant. On 5th May 2012, the Appellant responded by making a fresh claim for international protection, in the following terms:

> "*My removal to Somalia would be contrary to the UK's obligations under ECHR, because ..... there is a real risk that I would suffer serious harm as defined in HC395, paragraph 339D and Article 3. In particular I would face:*
>
> *a. A real risk of suffering inhuman and degrading treatment or being unlawfully killed.*
>
> *b. A real risk of a serious and individual threat to my life by reason of indiscriminate violence in a situation of internal armed conflict .....*"

He asserted that he would be vulnerable to the aforementioned types of proscribed treatment as the member of a minority group, which he identified as Sufi Muslims. The Appellant claimed that he would suffer proscribed treatment at the hands of the terrorist organisation Al-Shabab ("AS"). He highlighted the length of his exile from Somalia, 13 years. He asserted that he has no family or friends in Somalia. He claimed that he would not receive adequate government protection there. He further claimed to be a prominent member of the Somalia community in Manchester, where he had participated in demonstrations and television debates in which he had condemned AS. Finally, he contended that his deportation would be in contravention of the rights enjoyed by him, his spouse and his son under Article 8 ECHR.

4. The Appellant's application for asylum was refused in a detailed letter, dated 28 March 2013. This noted his assertion that he had left Somalia in 1991 upon the outbreak of the civil war. It recorded that he had arrived in the United Kingdom in December 2000 and claimed asylum. On 19th March 2001, the Appellant's first asylum claim was refused. He was granted exceptional leave to remain, expiring on 19th March 2005. On 6th October 2005, his application for indefinite leave to remain was granted. This was his immigration status at the time of his offending and the ensuing impugned decision of the Secretary of State.

5. The refusal letter also contains the following noteworthy passages:

> *"It is noted that your current claim forms much the same basis as your original claim for which you were interviewed substantively on 22 December 2000".*

The letter continues, however, highlighting the following factors:

(a) When the Appellant first claimed asylum in December 2000, he claimed to have left Somalia in late 2000 after his life had been threatened upon his refusal to travel from Walaweey to Mogadishu. In the same claim, he had alleged arrest in March 1997 with ensuing detention for six months.

(b) In contrast, the Appellant's renewed claim for asylum in 2012 was based on an assertion that he had left Somalia in 1991 due to the civil war. The decision maker considered this a fabrication.

(c) The Appellant is a member of the Rahanweyn Clan, which belongs to Southern Somalia. The relevant country evidence "strongly indicates" that members of this clan live predominantly in Southern Somalia. The Appellant would be able to avail of their support and assistance upon return.

(d) The letter of decision then gave extensive consideration to conditions in Mogadishu and the decision of the Upper Tribunal in AMM, concluding:

> "*It is proposed to deport you to Mogadishu by air. Therefore, further to the above case law, it is not considered that you will be at risk upon your return to Somalia.*"

(e) The Appellant's claims under Articles 2 and 3 ECHR were rejected on the basis that he had not demonstrated a real risk of suffering any of the relevant types of proscribed treatment "*because it is not accepted that you are of any interest to the interim Somalia Government or the Al Shabaab.*"

(f) It was considered, in the alternative, that he could avail himself of the protection of the Transitional Government Forces and support from his Clan.

(g) The claim for humanitarian protection was rejected on two grounds. The first was that the Appellant did not qualify for this discrete form of protection in any event. The second was that he is excluded from the protection provided by the Qualification Directive, pursuant to Article 17(1)(b) and Rule 339D(i) of the Immigration Rules, as he has committed a serious offence which generated a sentence of 18 months imprisonment.

(h) Finally, the Appellant's claim under Article 8 ECHR was rejected by reference to paragraphs 398 and 399 of the Immigration Rules on the grounds that (in summary) the potent public interest in play outweighed the competing factors, with the result that deportation would not be disproportionate in his particular circumstances.

THE DECISION OF THE FtT

6. We distil the following findings from the relevant passages in the determination of the FtT:

(a) The Appellant's asserted fear of prosecution is based on his membership of a minority clan. This is not demonstrated since this clan can live in Somalia without fear of harm.

(b) There is no specific threat to the Appellant.

(c) The Appellant has no profile which would make him of interest to any relevant organisation upon his return to Somalia. The Secretary of State's assessment of this discrete issue would prevail.

The remaining findings in the determination relate mainly to the consideration, and rejection, of the Appellant's case under Article 8 ECHR.

7. We turn to consider the terms in which the Appellant's claims under Articles 2 and 3 ECHR and his claim for humanitarian protection were dismissed. The FtT stated in [44]:

> "*It had been submitted on behalf of the Appellant that the conditions in Somalia were such that the Appellant's rights under humanitarian protection would be raised as the conditions are such that it would not be right to return individuals who would face fear of their life and safety. However we do not find that the evidence provided would establish that there would be real risk under Articles 2 and/or 3 and therefore the implementation of humanitarian protection was not necessary.*"

This paragraph continues:

> "*As to the submission that humanitarian protection would be put into doubt because of the criminality of the Appellant we do not accept or adopt the arguments of the Appellant's representatives that the offences to which he pleaded guilty were not serious as had been suggested. The period of 18 months imprisonment for somebody of no previous convictions was a lengthy sentence and it is clear that the nature of the offence for* [sic] *which he pleaded guilty was to obtain financial benefit and also place individuals in an extremely life threatening situation by obtaining driving licences for those who could not drive. The consequences of the actions of the Appellant were clearly known to him and it is terrifying in the extreme to have a scenario whereby because of the Appellant's actions an unqualified driver would be allowed to drive without insurance (as this would be avoided because of the lack of licence) on the streets and motorways of the United Kingdom. We find therefore that the rights to humanitarian protection have been taken away by the Appellant's criminality ……..*"

We have reproduced this passage in full since the main focus of the grant of permission to appeal is, per Upper Tribunal Judge Pinkerton:

> "*It is arguable that there is insufficient reasoning as to why he would not be at real risk of Article 15(c) harm as referred to in AMM ……*"

In the Secretary of State's Rule 24 Notice, it is stated:

> "*The Judge may have erred in his consideration of whether the Appellant was entitled to humanitarian protection, however it is contended that this is immaterial in light of the changes in the country situation since the latest CG was promulgated.*"

CONSIDERATION AND CONCLUSIONS

8. We have considered carefully the terms in which permission to appeal was granted and the submissions of the parties' representatives on this issue. Having done so, we consider that the central thrust of the ruling that permission to appeal be granted is as set out in paragraph [7] above.

9. The substance of Mr Royston's argument on this issue focused on the country guidance decision of the Upper Tribunal in AMM (*supra*). Those aspects of the decision in AMM which seem to us to arise particularly for consideration are the following (summarised in our words):

a. Article 15(c) of the Qualifications Directive has a broader reach than Article 3 ECHR, embracing a more general risk of harm and types of harm less severe than those protected by Article 3.

b. There is, in general, a real risk of Article 15(c) harm for the majority of those returning to Mogadishu having spent a significant period of time abroad.

c. The aforementioned risk does not arise in the case of a person connected with powerful actors or belonging to a category of middle class or professional persons who can live to a reasonable standard.

d. Outside Mogadishu, the analysis is different. There is no general risk of Article 15(c) harm for those returning to other areas of central and Southern Somalia. In individual cases, it will be necessary to establish where the individual comes from and to consider the background information pertaining to the area concerned.

e. In general, persons returning to an AS controlled area will be at risk of suffering treatment proscribed by Article 3 ECHR.

f. If a person is at real risk in a home area in Southern or central Somalia, the alternative of relocating internally to Mogadishu is, in general, unlikely to be available, given the risk of indiscriminate violence in the city and the prevailing humanitarian situation.

g. Travel by land through central and Southern Somalia in general poses real risks of serious harm, by virtue of AS checkpoints and the prevailing famine conditions.

h. Flying into Mogadishu International Airport is reasonably safe.

The other aspects of the decision in AMM do not arise for consideration in the context of this appeal. The able submissions of Mr Royston had as their main focus that aspect of the decision of the Upper Tribunal in AMM which held that there is, in general, a real risk of Article 15(c) harm for

the majority of those returning to Mogadishu following a significant period of time abroad.

10. Council Directive 2004/83/EC (the *"Qualification Directive")* prescribes certain minimum standards whereby third country nationals or stateless persons qualify either as refugees or as persons who otherwise need international protection. The Directive also prescribes the protection to be granted. One of its central provisions is Article 15, which is inserted under the rubric of "Qualification for Subsidiary Protection" and provides:

> "Serious harm
>
> *Serious harm consists of:*
>
> *(a) Death penalty or execution; or*
> *(b) Torture or inhuman or degrading treatment or punishment of an Applicant in the country of origin; or*
>
> *(c) Serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict".*

Article 17 of the Directive regulates exclusion from eligibility for subsidiary protection. It provides:

> "*1. A third country national or a stateless person is excluded from being eligible for subsidiary protection where there are serious grounds for considering that:*
>
> *(a) He or she has committed a crime against peace, a war crime, a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;*
>
> *(b) He or she has committed a serious crime;*
>
> *(c) He or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations;*
>
> *(d) He or she constitutes a danger to the community or to the security of the Member State in which he or she is present.*
>
> *2. Paragraph 1 applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein".*

Article 17(1) of the Directive is the parallel provision of Article 12(2), which is concerned with exclusion from the protection of refugee status.

The main distinction is that the "*serious crime*" provision in Article 17(1)(b) lacks the elaboration and greater definition found in Article 12(2)(b). Articles 12 and 17 are closely comparable to Article 1(F) of the Refugee Convention, though couched in somewhat broader terms. Subject thereto, these three provisions of the two instruments in question have much in common.

11. One of the claims of this Appellant was based on Article 15(c) of the Qualification Directive. In its determination, the Tribunal failed to consider the relevant jurisprudence, in particular the decision of the Court of Appeal in AH (Algeria) v Secretary of State for the Home Department [2012] 1WLR 3469: see paragraphs [33]-[42] and [52] especially. It is timely to recall what Ward LJ stated in [54]:

> *"Sentence is, of course, a material factor but it is not a bench mark. In deciding whether the crime is serious enough to justify his loss of protection, the Tribunal must take all facts and matters into account, with regard to the nature of the crime, the part played by the accused in its commission, any mitigating or aggravating features and the eventual penalty imposed"*

We would add that it is also relevant to consider the maximum punishment which could have been imposed. However, this must not be considered in isolation. Rather, it must be juxtaposed with the punishment actually imposed, any agreed basis of plea, the sentencing of the criminal court and any other relevant facts and considerations. This series of facts and factors should then be considered in the round. We are of the opinion that, having failed to consider the decision in AH, the Tribunal did not give adequate effect to the principles and guidance which it contains. While the panel found that the Appellant's criminality was sufficiently serious to exclude him from the scope of Article 15(c), it failed to adopt the correct approach in considering whether his offences fell within Article 17(1)(b). Both its finding that Article 17(1)(b) applied and the reasons which were expressed are unsustainable in consequence. The materiality of this error of law seems to us incontestable.

12. In the Refugee Convention, the provision equivalent to Article 17 of the Qualification Directive is Article 1F, which provides:

> "*The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:*
>
> *(a) He has committed a crime against peace, a war crime, or a crime against humanity as defined in the international instruments drawn up to make provision in respect of such crimes;*

(b) ***He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee****;*

(c) *He has been guilty of acts contrary to the purposes and principles of the United Nations.*"

We have highlighted Article 1F(b), as this is the kindred provision of Article 17(1)(b) of the Qualification Directive. Article 1F was considered by the Supreme Court in Al- Sirri and DD (Afghanistan) v Secretary of State for the Home Department [2012] UKSC54, in the following passages:

> *"*[12] *the Appellants, with the support of the UNCHR, argue that Article 1F must be interpreted narrowly and applied restrictively because of the serious consequences of excluding a person who has a well founded fear of persecution from the protection of the Refugee Convention ……*
>
> [13] *secondly, Article 1F(c) is applicable to acts which, even if they are not covered by the definitions of crimes against peace, war crimes or crimes against humanity as defined in international instruments within the meaning of Article 1F(a), are nevertheless of a comparable egregiousness and character, such as sustained human rights violations and acts which have been clearly identified and accepted by the international community as being contrary to the purposes and principles of the United Nations …..*
>
> [16] *in our view, this is the correct approach. The article should be interpreted restrictively and applied with caution. There should be a high threshold defined in terms of the gravity of the act in question, the manner in which the act is organised, its international impact and long term objectives and the implications for international peace and security. And there should be serious reasons for considering that the person concerned bore individual responsibility for acts of that character".*

The UNCHR approach, mentioned in the passage quoted above, espouses a definition of "seriousness" by reference to crimes which involve significant violence against persons such as homicide, rape, child molesting, wounding, arson, drugs traffic and armed robbery. Professor Hathaway comments:

> "*These are crimes which ordinarily warrant severe punishment, thus making clear the Convention's commitment to the withholding of protection only from those who have committed truly abhorrent wrongs.*"

(The Law of Refugee Status, p224.)

Given the close kinship which links the aforementioned instruments of international law, we consider that these passages provide guidance to the meaning of "*a serious crime*" in Article 17(1)(b) of the Qualification Directive.

13. We have identified a further error of law in the decision of the FtT. We consider that, in its determination, the FtT incorrectly elided the Appellant's claims under Articles 2 and 3 ECHR (on the one hand) and Article 15(c) of the Qualification Directive (on the other). This error of law is clearly demonstrated in the text of [44] (*supra*). The FtT failed to appreciate the distinctive nature and content of the protection provided by Article 15(c) and, in consequence, failed to apply the correct tests and to make appropriately reasoned findings. Furthermore, this error of law was compounded by the FtT's failure to make any reference whatsoever to the decision in AMM. We further consider that the FtT incorrectly conflated the Appellant's contention that his status of convicted prisoner would expose him to a risk of Article 15(c) treatment with the quite separate issue of whether he is excluded from the protection of the Qualification Directive under Article 17 (1) (b), to which the Tribunal gave no consideration whatever.

14. As noted above, the Secretary of State did not dispute that the decision of the FtT is infected by error of law with regard to the issue under Article 17 of the Council Directive. It was contended, rather, that these errors are immaterial "*... in light of the changes in the country's situation*" since promulgation of the decision in AMM. We have already highlighted in the proceeding paragraph an incontestably material error of law in the approach of the FtT. At this juncture, it is appropriate to highlight the country guidance issue formulated for consideration and determination by the Upper Tribunal in MOJ and Others:

> "*Whether the current situation in Mogadishu was such as to entitle nationals of Somalia whose home area is Mogadishu or whose proposed area of relocation is Mogadishu to succeed in their claims for refugee status, humanitarian protection status under Article 15(c) or protection against refoulement under Articles 2 or 3 ECHR solely on the basis that they are civilians and do not have powerful actors in a position to afford them adequate protection.*"

We remind ourselves of the following passages in the Secretary of State's letter of decision:

> "*The above objective evidence strongly indicates that the Rahaweyn clan predominantly live in Southern Somalia with strong affiliations with other Somali clans and that they have gained increasing control over their own areas where Al-Shabaab is predominantly situated today. It is considered therefore that as a member of the Rahaweyn clan that you would be able to avail yourself of their support and assistance on return ……*

> *You claimed that you lived mainly in the capital Mogadishu ……*
>
> *It is considered that you can return to Mogadishu which now enjoys comparative peace with an improving security situation ……*
>
> *It is considered highly unlikely that you would be recognised on your return to Mogadishu because of your political opinion and your opposition to the Al-Shabaab Islamists. Even if you were to come to the adverse attention of the Islamists extremists, which is not accepted, then as already stated above in this letter, you can avail yourself of the protection of your clan and the Transitional Federal Government Forces who have taken full control in Mogadishu ……*
>
> [The evidence] *strongly suggests that you would be able to utilise* [your] *skills to find suitable employment in Mogadishu with the help and assistance of your clan and other support networks available to you on return ……*
>
> *It is noted that you have considerable connections with the Somalia community in the United Kingdom …… who still maintain contacts with their families and communities in Somalia. They would be in a position to provide funds to you which …. would be of some considerable value in Somalia. It is also considered that they could also provide you with advice and contacts that you could use on your return. It is considered therefore that you could avail yourself of the support of your majority clan affiliations in Southern Somalia and in particular Mogadishu…… "*

Later passages in the refusal letter lay repeated emphasis on the Appellant's ability to avail himself of the protection of both his clan and the Transitional Government Forces in the event of returning to Somalia.

15. We are conscious that substantial body of evidence, both factual and expert, has been assembled by all parties, including the Secretary of State, in MOJ and Others. Much of this was available at the time of the decision giving rise to this appeal, in March 2013. We are not satisfied that this evidence was properly considered by the Secretary of State when formulating the passages in the letter of decision which we have highlighted immediately above. Furthermore, we consider that the errors of law which we have found in the determination of the FtT are profound in nature. We are not satisfied that their avoidance would have produced the same outcome. For these reasons we reject the Secretary of State's contention of immateriality.

16. Finally, while we permitted the Appellant's Counsel to develop certain further arguments relating to Article 8 ECHR and Section 55 of the 2009 Act and the Secretary of State's related policies, we did so *de bene esse*, with certain reservations. Much of this argument was *ad hoc* in nature, giving rise to spontaneous consideration of materials such as the UKBA Criminal Casework Directorate policy documents "Separating Families for

Deportation and Detention Purposes" (9 November 2012) and "Introduction to CCD Children and Family Cases". It will be more appropriate for arguments and issues of this kind to be considered in a somewhat more orderly fashion in some future case where they are directly relevant. Given our conclusion on the primary issue, we do not consider it appropriate to address this further in the present case.

DECISION

17. For the reasons elaborated above, we conclude that the decision of the FtT is infected by material errors of law and must be set aside in consequence. At the conclusion of the hearing, we ventilated the possibility of deferring our decision until promulgation of the Upper Tribunal's decision in MOJ and Others. Having reflected, we do not consider this appropriate. Having regard particularly to the nature of the errors which we have identified in the determination of the FtT, we remit the case for the purpose of a fresh decision by a differently constituted panel of the FtT. We direct that the hearing be listed so as to postdate promulgation of judgment in MOJ and Others (the hearing whereof was completed on 25 February 2014), which has the potential to be designated a country guidance decision.

Signed:

Leonard McCloskey.

THE HON. MR JUSTICEMCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 28 March 2014