IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/02316/2013

THE IMMIGRATION ACTS

Heard at The Royal Courts of Justice	**Determination Promulgated**
On 20 October 2014	**On 18 November 2014**

Before

UPPER TRIBUNAL JUDGE KING TD
UPPER TRIBUNAL JUDGE CRAIG

Between

ABDIRIZAK HUSSEIN SAID

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss O Ukachi-Lois, Counsel, instructed by MKM Solicitors
For the Respondent: Mr I Jarvis, the Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Somalia born on 4 April 1982. He sought to appeal against the decision of the respondent dated 7 November 2013 refusing to revoke the deportation made against him on 15 November 2006.

2. The appeal came before First-tier Tribunal Judge Pedro and Dr Okitikpi (non-legal member) on 25 March 2014. The appeal was dismissed.

3. It was the basis of the appeal that the appellant was a member of a minority clan and for that reason, including his prolonged absence from Somalia, would, upon return to Mogadishu, be at risk on account of is personal situation. It was also contended that the removal of the appellant would be in breach of his fundamental human rights.

4. The Tribunal reminded itself of a previous decision in the case of the appellant promulgated on 6 August 2007, which had on that occasion dismissed the appellant's appeal against the respondent's decision to make a deportation order. It was the finding of that Tribunal that the appellant was a member of a majority clan, namely the Hawiye. That decision was followed under the guidelines set out in **Devaseelan**. The Tribunal in considering the risk upon return paid specific attention to the decision in **AMM (Somalia) CG [2011] UKUT 00445 (IAC**). The Tribunal did not find any exceptional circumstances to outweigh the public interest in the appellant's removal from the United Kingdom.

5. The appellant sought to challenge the findings that were made by the Tribunal, contending that the Tribunal had acted in error in a number of respects and had also by its comments to the appellant's representative, Mr Mac, demonstrated a lack of impartiality such that the proceedings could properly be regarded as having been unfairly conducted.

6. Initially permission was refused by the First-tier Tribunal but permission was granted by Upper Tribunal Judge O'Connor on 23 June 2014 specifically on the issue of unfairness.

7. Thus it is that the matter comes before us to determine the issues raised in the appeal.

8. The immigration history of the appellant is of some significance for the purposes of this present appeal. He arrived in the United Kingdom on 4 August 1997 aged 15 in possession of a false passport. Thereafter he claimed asylum. On 9 February 1998 he was granted exceptional leave to remain in the United Kingdom for four years.

9. Between 10 March 1998 and 2 August 2002 the appellant was convicted of six offences ranging from robbery, theft, burglary and possession of controlled drugs.

10. On 2 May 2002, having completed four years' ELR, the appellant was granted indefinite leave to remain in the United Kingdom.

11. On 13 April 2005 at Wood Green Crown Court the appellant was convicted of attempted robbery and on 1 July 2005 he was sentenced to three years and eleven months' imprisonment. Thus he was served with a decision to make a deportation order and on 15 November 2006 such an order was made against him. The appellant made an out of time appeal against that

deportation and the appeal deemed to be in time was heard by an Immigration Judge on 19 February 2007.

12. Eventually the appeal was dismissed and his appeal rights became exhausted on 14 August 2007. Removal directions were set but because of the country conditions in Somalia such removal directions were not implemented.

13. Between 28 April 2010 and 14 January 2011 the appellant accumulated six convictions ranging from fare evasion, disorderly behaviour, burglary and theft and possession of controlled drugs. On 18 February 2011 he was convicted at Wood Green Crown Court of robbery for which he was sentenced to sixteen months' imprisonment.

14. Following his convictions he was informed on 17 February 2012 of the intention to exclude him from the Convention protection on Section 72 grounds. Further representations were made and on 7 November 2013 a decision was made to refuse to revoke the deportation order signed on 15 November 2006 and it is that decision which forms the basis of the appeal before us.

15. At the hearing before the First-tier Tribunal it was advanced on behalf of the appellant by Mr Mac, firstly, that the removal of the appellant would be in breach of the United Kingdom's obligations under the 1951 United Nations Convention relating to the Status of Refugees. The second ground was that the decision to refuse him humanitarian protection was not in accordance with the Immigration Rules. It is contended that the situation and circumstances in Mogadishu were such that Article 15(c) of the Qualification Directive was to be applied in his case.

16. In relation to the claim for asylum the Tribunal noted at paragraph 12 in particular that the respondent had certified in the Reasons for Refusal Letter that Section 72 of the 2002 Act applies and that the presumption of Section 72(2) applies to the appellant. The presumption under Section 72(2) is that a person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community if he is convicted in the United Kingdom of an offence and sentenced to a period of imprisonment of at least two years.

17. In paragraph 14 the Tribunal reached its findings that the Section 72 certificate was properly made in relation to the decision to make a deportation order on the basis of the appellant's conviction on 13 April 2005. The Tribunal noted that the First-tier Tribunal in the determination promulgated on 6 August 2007 had reached the same conclusion and there was no basis to conclude otherwise in the material as presented before them.

18. The Tribunal also noted in paragraph 21 that the appellant was excluded from humanitarian protection as set out in paragraph 339C by reasons of

paragraph 339D of the Immigration Rules. The Tribunal noted the reasons given by the respondent as outlined in the letter of 21 May 2007.

19. At paragraph 22 the Tribunal also noted the Reasons for Refusal Letter dated 7 November 2013 and the same conclusions arrived at by the respondent, namely that the appellant was excluded from the grant of humanitarian protection by virtue of paragraph 339D(i) of the Immigration Rules.

20. Thus the Tribunal found little merit in the arguments presented to it by Mr Mac in respect of asylum or humanitarian protection under Article 15(c) of the Qualification Directive.

21. Part of the first grounds of appeal that are presented before us contends that there was a failure to consider and apply Article 15(c) of the Qualification Directive. As we indicated to Miss Ukachi-Lois, who represents the appellant before us, we saw little merit in that matter. The Tribunal was not obliged to consider Article 15(c) as that did not apply to the appellant. We see little merit, therefore, in that aspect of the appeal.

22. Ground 2 of the appeal contends that **Devaseelan** was applied inflexibly, given that the Tribunal seemingly refused to depart from the primary findings of fact that had been made by the Tribunal in the decision promulgated on 6 December 2007, namely that the appellant was a majority clan member.

23. For our part we can find little evidence of such inflexibility in the approach taken by the First-tier Tribunal. At paragraph 8 it was clearly recognised by the Immigration Judge that the previous decision of 6 August 2007 was not binding upon the Tribunal but it was properly the starting point. The Tribunal reminded itself that there may be relevant facts or evidence that need to be taken into account and indicated that it intended to rely upon the principles of **Devaseelan** and that Mr Mac was informed accordingly.

24. It is the criticism mounted in the grounds of appeal that the Tribunal was inflexible in its willingness to admit further evidence on the issue of clan membership.

25. Mr Mac, who is a solicitor and partner in the firm of NKM Solicitors and who represented the appellant before the First-tier Tribunal, has made a witness statement dated 9 July 2014. He relied upon that statement before us and indeed chose to give oral evidence about its contents.

26. In that statement he indicates that when he tried to put forward arguments relating to Article 15(c) and Articles 2 and 3 of the Human Rights, Act particularly by reference to the case of **AMM and Others (Somalia) CG [2011] UKUT 445 (IAC)** and **AM and AM (Armed conflict: risk categories) Somalia CG [2008] UKAIT 0091,** the

Tribunal refused to reconsider the earlier decision, expressing itself as being bound by **Devaseelan**.

27. We asked Mr Mac what evidence, that was not before the Tribunal in April 2007 relating to clan membership, was presented for the attention of the Tribunal in 2014. He indicated that nothing specific to clan membership was presented other than the general situation relating to the safety of return to Somalia.

28. In that connection reliance was placed on the Home Office OGN of Somalia dated September 2013 and a joint report from the Danish Immigration Service dated 12 March 2014. Those matters are set out at pages 99 to 155 of the appellant's bundle of documents.

29. Clearly, as was recognised in such reports and particularly the OGN at page 109 of the bundle, clan membership was an important factor in the overall assessment of risk to the individual to be made. That having been said, it is clear to us and indeed it has not been suggested otherwise by Miss Ukachi-Lois on behalf of the appellant, that no fresh material was presented before the Tribunal in order to challenge the original findings that the appellant was a majority clan member. Of course the Tribunal was obliged to consider and indeed did consider the aspect of Article 3 that was advanced, but that was within the context of the original finding by the Tribunal that the appellant was a majority clan member.

30. In the absence of any fresh material challenging that finding as to clan membership, it is entirely understandable why the Tribunal would consider itself bound by the earlier decision on that point by the Tribunal. For our part we can detect no inflexibility by the Tribunal in its approach to clan membership. As the Tribunal quite rightly noted, the hearing before the panel was not an appeal against the original decision but rather was the opportunity for the appellant to produce new material in the expectation and hope that a different outcome would follow at the current hearing. On the issue of clan membership, that evidence simply was not forthcoming and we find therefore that the Tribunal was entitled to rely upon the findings of fact as to clan membership that had already been made.

31. The grounds contend that Immigration Judge Pedro placed significant reliance on the case of **Devaseelan** which resulted in the hearing in the appellant's representative being repeatedly stopped from making submissions on the Refugee Convention and Article 15(c) of the Qualification Directive. It is said that Immigration Judge Pedro blocked submissions on the Qualification Directive and fresh country guidance on Somalia by repeatedly stating that he was bound by **Devaseelan** and could not and would not hear any arguments on matters covered under that determination.

32. It is said that the Judge acted in a highly inappropriate manner towards Mr Mac by addressing the submission made by the Presenting Officer who

was referring to page 109 of the appellant's bundle on clan membership "that was the best submission you have made all day, Mr Mac." It was understood by Mr Mac that such a comment was sarcastic and inappropriate. It was also said that the Judge added "I mean no disrespect to Mr Mac but you should have made that submission". Mr Mac considered that comment to be offensive and disrespectful and repeats his concerns in the statement which he prepared.

33. It seems to us, as we have already indicated, that the grounds of appeal, and indeed the submissions which were made by Mr Mac to the Tribunal failed fundamentally to engage with the real issue in the appeal. As Miss Ukachi-Lois most fairly conceded, the central issue was that of Article 3 of the ECHR. The asylum aspect fell away by virtue of the certification that had been applied and for the reasons we have already indicated, Article 15(c) was not engaged.

34. It is therefore perhaps understandable that the Tribunal was feeling somewhat frustrated that matters which were not central to the appeal continued to be raised by Mr Mac. It is clear to us from reading the determination that the reliance upon **Devaseelan** and the previous decision was essentially on the basis of clan membership and no more. If the appellant's representative wished the Tribunal to fully engage with the current conditions in Somalia as at the time of the appeal, then it was necessary to consider such conditions in the light of the finding that the appellant was a member of the Hawiye clan. It seems to us that Mr Mac was throughout the hearing reluctant to engage in that process.

35. We readily accept that there may have been a degree of misunderstanding as between himself and the Tribunal not helped by the skeleton argument that was submitted which focuses particularly on Section 72 and Article 15(c) than rather perhaps more centrally upon Article 3.

36. It is said by Mr Mac in his statement that the panel refused to go behind the findings of the previous Tribunal in respect of the Section 72 certificate. However, it is not how the matter appears in paragraph 14 of the determination where clearly the Tribunal recognises that the starting point is in relation to the Section 72 certificate is the decision of 6 August 2007 and goes on to say:

> "Notwithstanding this, we have carefully considered the totality of the evidence before us in order to determine whether or not any facts have occurred or evidence has become available since that determination which would cause us to reach a different conclusion in relation to the Section 72 certificate now before us and which would enable us to find that the presumption raised under Section 72(2) of the 2002 Act has been rebutted."

37. It is entirely clear to us therefore that the Tribunal was not fixated upon **Devaseelan** but had admitted the possibility that matters had changed. In the event, as for the reasons set out in paragraph 19 in particular, the Tribunal saw no reason to depart from that position. We find nothing untoward or incorrect in that approach.

38. Mr Mac in his statement, particularly in paragraphs 8 to 18, repeatedly refers to his attempt to deal with Article 15(c) harm by relying upon **AM and Others (Somalia) CG** and being rebuffed by the Tribunal for his attempts to do so. Once again we can detect no impropriety in the Tribunal for so doing. At paragraph 22 the Tribunal upholds the decision of the respondent that the appellant is excluded from the grant of humanitarian protection by virtue of paragraph 339D(i) of the Immigration Rules. Once again there was no basis to reach a different finding to that reached by the Tribunal in the determination of 6 August 2007. We can detect no error in approach in that.

39. The reference made to page 109 of the OGN report is some importance. Paragraph 2.1 deals with clan affiliation and protection. It may be helpful to summarise in part that which is set out:-

> "Regarding Mogadishu, clan affiliation is still a very important issue when it comes to identity as well as protection, according to UNHCR. In some districts of Mogadishu the population is more mixed than in other districts, but one clan would be predominant. A prior clan affiliation will not be a problem. But there are cases in the circumstances when it matters. For example, in cases where a girl or woman is raped by someone from another clan, if the victim's clan does not obtain a satisfactory solution from the perpetrator's clan, the victim's clan may resort to raping three girls from the perpetrator's clan, according to UNHCR.
>
> Regarding clan identity and security an international agency (A) explained that there are fewer war lords than previously, but clan identity is still very important. One can put a clan name of any area in Mogadishu. In addition there are clans who have their own militia. However, clan protection is decreasing as the government and Amisom provide increasing security. On the other hand, there are minority clans who are more vulnerable than other groups.
>
> According to the international agency (A) there is no one in Mogadishu who is at risk of attacks or persecution only because of his or her clan affiliation.
>
> Regarding the importance of clan, a diaspora of research in Mogadishu stated that clan is no longer as important as it was in the past. Protection is not dependent on one's clan affiliation. Today it is much more important to have connections i.e. to know people in power, than to be a member of a certain clan. Clan is more important

> to the elderly. It was added that clan is something you may talk about at your home or when you are together with fellow clan members. The diaspora of research in Mogadishu also stated that people might wish to present themselves as more cosmopolitan and modern and not necessarily wanting to share points of views on clans to westerners."

40. Thus the point perhaps which is potentially favourable to the appellant arises that clan membership is less important as a way of protection but more important is to have connections. It is of course the case for the appellant as presented that he had not been to Mogadishu for a long term.

41. Thus rather than seeking to challenge clan membership, and indeed no evidence has been presented on that matter, it would have been helpful to Mr Mac had he concentrated more upon the connection issue rather than the clan one. That is not to say of course that he necessarily would have succeeded but it was perhaps in the circumstances one of the better points to arise from the background evidence.

42. We have no comment by the Immigration Judge as to the criticism made in respect of such remarks as addressed to Mr Mac. We can readily understand that the Tribunal may well have been somewhat frustrated at the failure by Mr Mac to address with clarity the precise issues under concern. Indeed it would seem, according Mr Mac, that it was the Home Office Presenting Officer who actually highlighted the important factor in the case for the appellant rather than Mr Mac discovering it. Indeed the "connection" point could fairly be said to have been the best submission that had been made on behalf of the Appellant.

43. We are not persuaded that the remark of the Judge if made was intended to be sarcastic or inappropriate. Indeed as the grounds make clear, the Judge added the words "I mean no disrespect to you, Mr Mac, but you should have made that submission". It seems us that that was a comment properly open to be made to the Judge. Rather than making submissions as to Article 15(c) it is clear that Mr Mac should perhaps have more helpfully assisted the Tribunal as to what is highlighted in the case of **AMM and Others**, namely that whether or not the appellant faces a risk under Article 3 depends very much upon his circumstances and his lack of connection may be said to be an important element in that consideration.

44. We therefore do not detect any lack of objectivity on the part of the Tribunal, even if what Mr Mac says was spoken was indeed spoken. The Tribunal was, as we so find, entitled to focus upon the real issue of the matter, namely Article 3 of the ECHR.

45. The grounds also contend a failure to consider Article 8 but we regard that of little merit. Given the serious nature of the offending, the length of residence and private life of the appellant would seem to count for little in

the overall balancing exercise. The grounds indeed do not condescend upon particulars as to what factor under Article 8 would succeed if it did not succeed under Article 3.

46. Thus we come to what we consider to be the crux of the appeal, namely the contention that the Tribunal had failed to engage with the submissions relating to Article 3 ECHR.

47. Once again we find little merit in such a contention. The Tribunal at paragraph 25 reminded itself of the country guidance of **AM (Somalia)** and noted in paragraph 25 in particular that that decision had indicated that the armed conflict in Mogadishu did not pose a real risk of Article 3 harm in respect of any person in that city, although the person's particular circumstances must of course be considered. The Tribunal went on therefore to consider the circumstances of the appellant and noted the information set out in the reasons for refusal. The fact that the appellant was a member of majority clan was a significant feature in that analysis. Even from the passage of the OGN as cited, clan membership provided some degree of protection.

48. Considering the head note of **AMM**, it is clear that the Tribunal in that case found that the armed conflict in Mogadishu did not pose a real risk of Article 3 harm in respect of any person in that city regardless of circumstances. The risk did exist for those who found themselves 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.

49. In that connection the report of Dr Sarkar dated 28 July 2009 was taken into consideration by the Tribunal, in paragraphs 16 to 18 in particular. The matter was also revisited specifically in the context of Article 3 in paragraph 26 of the determination.

50. It is entirely clear from paragraph 24 that the fact that the appellant was a member of the Hawiye majority clan was an important factor in the overall approach of the Tribunal.

51. **AMM** dealt with the issue of Article 8 so far as Mogadishu is concerned in paragraphs 364 to 367. It concluded that an Article 3 risk did not exist in the absence of any special factors to the contrary. The fact that the appellant is a member of the majority clan and could access some clan protection is of itself a very relevant feature and we have no doubt, from reading the determinations a whole, that that was very much in the mind of the Tribunal in approaching its task.

52. We can find nothing in the decision of **AMM** which materially assists the appellant in his case. The grounds express the contention that membership of the dominant clan is not sufficient to show that a returnee

would not be at risk but only connections at the very highest level to powerful actors would be sufficient. We do not detect that statement as having any support in **AMM** at all.

53. It is said that there has been no proper assessment of the appellant's personal circumstances relevant to risk but we find that there has been. Once again the grounds revert largely to a criticism of the Tribunal when talking as to indiscriminate violence and humanitarian protection which is not entirely relevant. The appellant was seemingly judged fit for work and a member of a majority clan and it seems to us that we can find little in **AMM** that would assist him to argue to the contrary.

54. Looking at the matter overall, we find that the Tribunal has given clear consideration to all relevant issues and has made sustainable findings upon them.

55. In those circumstances we conclude that there was indeed no material error in the approach taken by the Tribunal or any lack of fairness or objectivity.

56. Even were there to be some concern expressed as to the lack of any specific reference to connections, it is in our decision not a material error, particularly in the light of a more recent country guidance decision which is to be promulgated by the Upper Tribunal. It is recognised that clan membership in Mogadishu can provide potentially social support mechanisms and assistance with access to livelihood.

57. It is accepted that if the person facing return to Mogadishu after a period of absence has no nuclear family or close relatives in the city to assist him and re-establish himself on return, there will need to be a careful assessment of all the circumstances. Family or clan associations to call upon in Mogadishu; access to financial resources; prospects of securing a livelihood whether that be employment or self-employment, available to remittances from abroad are all relevant factors. We find that these factors were properly considered by the Tribunal.

58. In the circumstances, therefore, the appellant’s appeal before the Upper Tribunal is dismissed. The original decision of the Tribunal shall stand, namely that the appeal against the refusal to revoke a deportation order is dismissed.

Signed Date **17 November 2014**

Upper Tribunal Judge King TD