Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01395/2014

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice	**Decision & Reasons Promulgated**
On 2 March 2015	**On 24 March 2015**

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

MR ABDULLATIF MOHAMED

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms G Thomas, instructed by Freemans Solicitors
For the Respondent: Mr T Melvin, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Somalia born on 29 December 1983. He entered the United Kingdom unlawfully in 1995, with his mother and three siblings. Shortly thereafter the appellant's mother claimed asylum – the appellant and his siblings being dependants on such application. This application was refused in 1996; however, the family were granted exceptional leave to remain until February 1997, which was subsequently extended until February 2000. The appellant was granted indefinite leave to remain on 12 July 2002.

2. Between 1999 and 2008 the appellant was convicted of 23 offences. In January 2009 he was convicted of dangerous driving and was sentenced to ten months' imprisonment and on 7 April 2009 he was convicted of

possession of class A and B controlled drugs and sentenced to a further three months' imprisonment.

3. As a consequence of this offending behaviour the Secretary of State decided to make a deportation order against the appellant and informed him of such by way of a decision of 9 June 2009. The appellant appealed this decision to the Asylum and Immigration Tribunal and, in a determination promulgated on 21 August 2009, a panel, comprising of Immigration Judge Cooper and Mr P Bompas ("the 2009 Panel"), dismissed the appeal on asylum grounds but allowed it on Article 3 ECHR grounds.

4. Of particular relevance to the instant appeal are the following passages from the 2009 Panel's determination:

> "[8.15] (164)[1]: "We accept that as compared with the early 1990s clan protection is no longer as effective as it was... We think the preponderance of evidence is crystallised in the words of Matt Bryden (see Nairobi evidence) as follows: "Clans remain important but are no longer able to provide the level of protection or support that they used to"". These findings contribute to our conclusion that the prospects of the Appellant securing protection from the Marehan clan are slim.
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> [8.16] (178)[2]: This paragraph makes it clear that an individual such as the Appellant returning to Mogadishu, without any close connections with powerful actors in the city, would face a real risk of persecution or serious harm.
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> ...
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> [8.21]: Looking at all the Appellant's circumstances, we find that there is no obvious part of Somalia to which he could relocate, having no family or other connections in the country as a whole. He is a young man who has never lived in that country as an adult, who has a limited command of the language, and who will be perceived as a potential target for robbery or abduction as someone recently returned from Europe. We also find that he is at risk of forcible conscription into one of the various militias. We find that on being returned to Mogadishu the Appellant would be at real risk of treatment contrary to Article 3, and that it would be unduly harsh to require the Appellant to relocate to another part of the country. We therefore allow his appeal on Article 3 grounds."

5. The appellant was convicted of yet a further criminal offence at Kingston-upon-Thames Crown Court on 20 April 2012; this time for for attempted robbery. He was subsequently sentenced to 38 months' imprisonment. The Secretary of State informed the appellant of his liability to deportation on 5 July 2012, and the appellant made an asylum claim on 28 August 2013. On 15 July 2014 the Secretary of State informed the appellant that

[1] This being reference to paragraph 164 of the country guidance decision of AM & AM (armed conflict: risk categories) Somalia CG [2008] UKAIT 00091

[2] This being reference to paragraph 178 of the decision of AM & AM

Section 32(5) of the UK Borders Act 2007 applies to him and served him with a deportation order, dated 30 June 2014, on the following day.

6. In a determination promulgated on 30 December 2014 First-tier Tribunal Judge Miles dismissed, on all grounds, the appeal brought by the appellant to the First-tier Tribunal; however, on 19 January 2015 First-tier Tribunal Judge Andrew granted the appellant permission to appeal to the Upper Tribunal. Thus the matter came before me.

Error of Law – Discussion and Conclusions

7. The appellant's grounds of challenge to the decision of Judge Miles can be summarised thus:

(i) Judge Miles either failed to provide adequate reasons for departing, or perversely departed, from the decision of the 2009 Panel, when concluding that the appellant; (a) had not established that he would be unable to seek assistance from members of his clan upon his return to Mogadishu and/or (b) *"will have no difficulty in communicating because of his command of a Somali language"*.

(ii) Judge Miles unlawfully concluded *"that it is reasonably likely that the appellant would receive financial support in the form of money transfer remittances from the United Kingdom if deported"* from his mother, in circumstances where his mother's only income is from receipt of disability benefit.

8. Before turning to a consideration of the specific challenges made by the appellant it is prudent to set out the binding guidance given by the Tribunal in the starred determination of Devaseelan [2004] UKIAT 00282; a decision which has been widely approved of by the Court of Appeal.

9. Devaseelan concerned a second appeal made on human rights grounds by an asylum seeker whose asylum appeal had previously been dismissed. The IAT gave guidance as to the weight to be attached to the findings of the Adjudicator who had rejected the asylum appeal. It is not in dispute that this guidance is of application in the instant appeal. Insofar as it is relevant, the IAT said as follows in paragraphs 39 to 42 of its decision:

(1) The first Adjudicator's determination should always be the starting point. It is the authoritative assessment of the Appellant's status at the time it was made. In principle issues such as whether the Appellant was properly represented, or whether he gave evidence, are irrelevant to this.

(2) Facts happening since the first Adjudicator's determination can always be taken into account by the second Adjudicator.

(3) Facts happening before the first Adjudicator's determination but having no relevance to the issues before him can always be taken into account by the second Adjudicator.

(4) Facts personal to the Appellant that were not brought to the attention of the first Adjudicator, although they were relevant to the issues before him, should be treated by the second Adjudicator with the greatest circumspection. An Appellant who seeks, in a later appeal, to add the available facts in an effort to obtain a more favourable outcome is properly regarded with suspicion from the point of view of credibility ... for this reason, the adduction of such facts should not usually lead to any reconsideration of the conclusions reached by the first Adjudicator.

(5) Evidence of other facts – for example country guidance – may not suffer from the same concerns as to credibility, but should be treated with caution.

(6) If before the second Adjudicator the Appellant relies on facts that are not materially different from those put to the first Adjudicator, and proposes to support the claim by what is in essence the same evidence as available to the Appellant at that time, the second Adjudicator should regard the issues as settled by the first Adjudicator's determination and make his findings in line with that determination rather than allowing the matter to be re-litigated ...

(7) The force of the reasoning underlying guidelines (4) and (6) is greatly reduced if there is some very good reason why the Appellant's failure to adduce relevant evidence before the first Adjudicator should not be as it were held against him. We think such reasons will be rare."

10. Moving on to a consideration of the first of the appellant's grounds of challenge i.e. that Judge Miles erred in his conclusions as to the ability of the appellant to secure assistance from his clan members in Mogadishu.

11. In his determination, at [10] & [11], Judge Miles accurately summarises the findings of the 2009 Panel, including its conclusions as to the prospects of the appellant securing the protection from members of his clan in Mogadishu – such conclusions being set out at [4] above.

12. Having set out both the evidence before him and the entirety of the headnote to the most recent country guidance decision on Somalia - MOJ & Others (Somalia) CG [2014] UKUT 00442 (IAC) – Judge Miles concluded as follows [24]:

> "I must apply that guidance in the light of the findings which I have set out above. I accept that the appellant has no nuclear family to whom he can return in Mogadishu. However, I am also satisfied he could look to members of the Darod clan for assistance if need be. That is a majority clan and the appellant is part of one of its sub-clans and the fact that he has no interest in his clan identity at the moment does not, in my judgment, mean that he would not be able to seek assistance from that quarter if minded so to do."

13. Ms Thomas asserts that the aforementioned conclusion is inconsistent with the decision of the 2009 Panel and, in particular, the following findings therein:

> "[8.11] The Appellant is a member of the Marehan clan by virtue of his parentage, but knows nothing of their heritage or customs, and has no connection with any members of the clan in Somalia."

and

> "[8.15] …the prospects of the Appellant securing protection from the Marehan clan are slim."

14. The background situation that pertained in Mogadishu at the time of the 2009 Panel made its decision were very different to those in existence when Judge Miles considered the appellant's appeal in 2014. The circumstances in Mogadishu that the 2009 Panel were faced with considering were comprehensively set out in the country guidance decision of AM & AM; the head note to which materially reads at [6(i)]:

> "There is now an internal armed conflict within the meaning of international humanitarian law and Article 15(c) of the Refugee Qualification Directive throughout central and southern Somalia, not just in and around Mogadishu. The armed conflict taking place in Mogadishu currently amount to indiscriminate violence at such a level of severity as to place the great majority of the population at risk of a consistent pattern of indiscriminate violence. On the present evidence Mogadishu is no longer safe as a place to live in for the great majority of returnees whose home area is Mogadishu."

15. The 2009 Panel's conclusions at [8.15] of its determination flow directly from its citation of the relevant passages of the decision in AM & AM, such passages identifying that whilst clan membership remained important, clans were no longer able to provide the level of protection and support that had previously been the case. It followed, concluded the 2009 Panel, that the prospects of the appellant being able to obtain protection from his fellow majority clan members from indiscriminate violence in Mogadishu were slim.

16. By the time Judge Miles considered the appellant's appeal in 2014 there had been a significant change in the circumstances in Mogadishu - as identified in the country guidance decision of MOJ; the headnote to which states at [vii] to [viii] :

> "A person returning to Mogadishu after a period of absence will look to his nuclear family, if he has one living in the city, for assistance in re-establishing himself and securing a livelihood. Although a returnee may also seek assistance from his clan members who are not close relatives, such help is only likely to be forthcoming for majority clan members, as minority clans may have little to offer.
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> The significance of clan membership in Mogadishu has changed. Clans now provide, potentially, social support mechanisms and assist with access to livelihoods, performing less of a protection function than previously. There are no clan militias in Mogadishu, no clan violence and no clan-based discriminatory treatment, even for minority clan members."

17. It was in this context that Judge Miles concluded that the appellant could look to members of his majority clan for assistance, if required. It cannot be said, in my view, that Judge Miles was not entitled to find as he did, given the extent of the change in the background circumstances in Mogadishu between 2009 and 2014. The finding that the appellant would be able to seek assistance in Mogadishu from members of the majority clan he belongs to is entirely consistent with the conclusions set out in MOJ - both as set out in the Tribunal's general guidance and in its application of that guidance to the cases of the individual appellants[3].

18. Turning to the second of the appellant's grounds, i.e. that Judge Miles erred in concluding that the appellant would have no difficulty in communicating in Mogadishu: this has at its foundation the following paragraphs from 2009 Panel's decision:

> "[8.9]: He is a 25 year old Somali male in good health. He has spent more than half his life in the United Kingdom, having arrived here at the age of 11. Despite his claim to speak 'very little Somali' we are satisfied that he does speak that language, it being the main means of communication between him and his mother. However, we accept that his command of a language is likely to be considerably less than a person who has spent his life in Somalia, particularly as his education has been in English.
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> ...
>
> [8.21]: Looking at all the appellant's circumstances, we find that there is no obvious part of Somalia to which he could relocate, having no family or other connections in the country as a whole. He is a young man who has never lived in that country as an adult, who has limited command of the language, and who will be perceived as a potential target..."

19. In her submissions Ms Thomas focused on the latter of these two paragraphs, but it is important that one considers the finding at [8.21] in its proper context. Paragraphs 8.9 and 8.21 of the 2009 Panel's determination must be read together in order to garner a full understanding of both the 2009 Panel's reasoning process and its conclusions. When identifying in [8.21] of its determination that the appellant had a *"limited command of the [English] language",* it is clear that the 2009 Panel were simply using that phrase as shorthand for its more detailed conclusion on this very issue set out earlier in its determination at [8.9].

20. It was Ms Thomas' case that the finding in paragraph 29 of Judge Miles' determination i.e. that *"he* [the appellant] *will have no difficulty in communicating because of his command of the Somali language."* is inconsistent with the conclusions of the 2009 Panel and was, therefore, a finding that breached the *Devaseelan principles*. I do not accept that this is so.

[3] See, for example, at [476] to [481] in which the tribunal considered the application of its guidance to appellant SMM, who had left Somalia when he was aged 12, had lived in the United Kingdom for 17 years and who had no connections to Somalia.

21. In paragraph 19 of his determination Judge Miles stated as follows:

> "In terms of his language skills, he [the appellant] claimed at his previous appeal that he spoke very little Somali but the Tribunal was satisfied that he did speak the language, it being the main means of communication between him and his mother. However, it was accepted that his command of the language was likely to be considerably less than a person who had spent his life in Somalia, particularly as his education has been in English (paragraph 8.9). In this appeal the appellant again asserted that he does not speak Somali anymore and, indeed, that he had forgotten that language and Arabic. In my judgment that was contradicted to some extent by the submissions of his Counsel who referred to him as a person with limited command of the language. In answer to questions from me he stated that he continued to speak Somali until he was aged 15 or 16 years, i.e. some four years after his entry. In his previous appeal the panel noted that Somali was the main means of communication between him and his mother. Although his mother did not give evidence in this appeal she submitted a letter/document in English language on his behalf and reference to her as a possible witness was made in the reply filed on the appellant's behalf for the case management review. That document was received by the tribunal administration on 14 August 2014 and refers to the appellant's mother as a witness who would require a Somali interpreter. I find that the appellant can speak Somali to the point where he can communicate effectively with other Somali speakers because that is the language he uses with his mother. In my judgment a person does not forget completely a language which he spoke exclusively for the first sixteen years of his life, and he was found to be a Somali speaker by the previous Tribunal which noted that that was the main means of communication with his mother. When she was identified as a potential witness his representative stated unequivocally that she would need a Somali interpreter, and in her letter of support she stated that she speaks to the appellant every day by telephone. In my judgment he would not be at a disadvantage through inability to communicate in Somalia if deported. He is also fluent in, and has a high level of understanding of English."

22. I find that Judge Miles had well in mind, and used as a starting point, the findings made by the 2009 Panel as to the appellant's abilities in the Somali language. Although 2009 Panel accepted that as a consequence of the time the appellant had spent in the United Kingdom his Somali language abilities would be considerably less than those of someone who had lived their entire lives in Somalia, it did not conclude that the appellant could not communicate effectively with other Somali speakers – indeed it found that it was the main language of communication between him and his mother.

23. Judge Miles took full account of this finding and thereafter considered the up-to-date position insofar as the evidence allowed him to do so. Judge Miles gave clear and cogent reasons for rejecting the appellant's assertions that he no longer speaks Somali and I can find no contradiction between his conclusions on this issue and the conclusions of the 2009 Panel. Neither do I accept that Judge Miles failed to give adequate reasons for rejecting the appellant's evidence in this regard or that such conclusion is perverse.

24. Turning finally then to the third of the grounds raised by the appellant. The issue to be determined centres on paragraph 21 of Judge Miles' determination, which reads:

> "In terms of his clan, the appellant states that he has no interest in clan affiliation in Somalia, but that does not alter the fact that he is from the Marehan, a sub clan of the Darod, which is a major clan. That was accepted on his behalf at his previous appeal and the appellant has never sought to move away from that position. I accept that he has no immediate or extended family members living in Somalia. In terms of the prospect of financial support if deported the appellant stated that his mother was in receipt of benefits because of the serious back condition which I am prepared to accept. However, he also stated that one of his brothers is in employment, but when asked if that brother could support him he stated that he could not be dependent on him because he was the older brother and should be the head and leader of the family. He 'doubted' if his brother would support him. In my judgment that response clearly did not state that his brother would not support him and his brother made no witness statement and therefore has not provided any evidence that he would not provide financial support. Furthermore, and despite the fact that his mother is in receipt of benefits it is not uncommon for persons in receipt of that type of income to provide financial support for other close relatives who need it. In those circumstances I find on this evidence that it is reasonably likely that the appellant would receive financial support in the form of money transfer remittances from the United Kingdom if deported."

25. In the written grounds Ms Thomas asserts that the approach taken by Judge Miles is inconsistent with the legal principle established in MN (Pakistan) [2002] UKIAT 0139, that; *"when benefits are paid to a person in respect of a disability, it is simply improper to conclude, without more, that that person would be maintained adequately if he or she made the benefits available to someone else."*

26. I accept as a matter of legal principle, although not necessarily one which can be derived from the decision in MN (Pakistan), that it is not reasonable to expect or require an individual whose income is derived solely from public funds in the United Kingdom to provide financial assistance to a person such as the appellant - who is to be deported.

27. However, in my conclusion Judge Miles was not, in his determination, considering whether it was reasonable to expect or require the appellant's mother to provide financial assistance to the appellant if he were to be deported, but rather whether she would in fact provide such support if he were to be deported.

28. It cannot be sensibly be argued that if, as a matter of fact, the appellant's mother were to send monies to the appellant in Mogadishu (whether it was reasonable to expect her to do so or not) the receipt of such monies by the appellant would be an irrelevant consideration in the assessment of whether his deportation would lead to a breach of Article 3 ECHR. The question of whether the appellant's deportation would breach Article 3 must be considered on the basis of the actual circumstances that he would

be faced with in Mogadishu. In particular, the assessment of whether the appellant would be destitute and forced to live in a camp upon return to Mogadishu must be informed by the appellant's actual financial circumstances there.

29. As I read paragraph 21 of the Judge Miles' determination, the judge was saying no more than that the appellant had not demonstrated that his mother would not provide him with financial assistance if he were to be removed to Mogadishu. That, in my conclusion, is a finding of fact that Judge Miles was entitled reach on the available evidence.

30. If I am wrong about this and Judge Miles treated the appellant as though he would have access to monies from his mother - not because his mother would, as a matter of fact, send such monies to him, but rather because it is reasonable to expect her to do so, I find that such error is not capable of affecting the outcome of the appeal.

31. Irrespective of the possibility of remittances being made by the appellant's mother, Judge Miles also found, as he was entitled to, that; (i) the appellant's brother would provide financial support to the appellant upon his return to Mogadishu, (ii) the appellant could seek assistance from clan members there and (iii) in any event, the appellant's skills are such that he would obtain employment in Mogadishu.

32. In particular, Judge Miles found in paragraph 26 of his determination that:

> "While the appellant may well not have access immediately to financial resources on return I find that the skills that he has obtained and used in the United Kingdom, particularly in the area of computer repairs, would be of significant advantage and assistance in improving his chances of security a livelihood and that there is a reasonable likelihood that he could achieve either employment or self-employment within a reasonable period of arrival. I am also satisfied that it is reasonably likely there would be remittances sent to him from the United Kingdom for the reasons which I have given. I reiterate that I am satisfied that he can speak Somali and would therefore have no communication problems in terms of language on return."

33. This is a significant finding when viewed in the context of the country guidance decision of MOJ, the Tribunal stating therein in its head note:

> "(x) Put another way, it will be for the person facing return to explain why he would not be able to access the economic opportunities that have been produced by the economic boom, especially as there is evidence to the effect that returnees are taking jobs at the expense of those who have never been away.
>
> (xi) It will, therefore, only be those with no clan or family support who will not be in receipt of remittances from abroad and who have no real prospect of securing access to a livelihood on return who will face the prospect of living in circumstances falling below that which is acceptable in humanitarian protection terms."

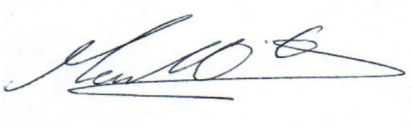
34. For all of these reasons I reject Ms Thomas' submissions made in relation to the third of the appellant's grounds.

35. When the First-tier Tribunal's determination is considered as a whole, I find that it discloses clear and cogent reasons as to why the appellant would not face a real risk of being the subject of treatment contrary to Article 3 ECHR if removed to Mogadishu, despite the conclusions of the 2009 Panel to the contrary which Judge Miles paid proper regard to. The conclusions reached by the First-tier Tribunal were in my view entirely open to it on the available evidence.

Notice of Decision

For all of the reasons given above, I find that the First-tier Tribunal's determination should remain standing and this appeal is dismissed.

Signed:



Upper Tribunal Judge O'Connor
Date: 12 March 2015