Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/02049/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22nd February 2016	**On 1st June 2016**

Before

UPPER TRIBUNAL JUDGE STOREY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR AHMED ALI MAHAMOUD

Respondent

Representation:

For the Appellant: Mr K Norton, Home Office Presenting Officer
For the Respondent: Mr M Symes, Counsel, instructed by Sam Solicitors

DECISION AND DIRECTIONS

1. The respondent (hereafter the claimant) is a national of Somalia whose home area before he left in 2004 was claimed to be Qoryooley Distinct, South-East Lower Shebelle. He was born in October 1989 and came to the UK illegally in January 2004. In a determination in 2004 an immigration judge found him to be a member of a minority clan, the Shekal, but dismissed his asylum appeal nonetheless. The claimant had been granted leave to remain from 3 July 2004 - 2 July 2007, but on 7 July 2007 he had been arrested and on 6 December 2007 following his plea of

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guilty he was convicted upon indictment of an offence of wounding with intent to do grievous bodily harm and was sentenced to a term of 6 years in a young offenders institution less 160 days spent on remand. On 6 October 2009 the appellant (hereafter the Secretary of State or SSHD) made a deportation order pursuant to s.32(5) of the UK Borders Act 2007. Following further representations the SSHD made a decision on 19 September 2013 refusing to revoke the deportation order. The SSHD had also decided to certify the case under s.72 of the Nationality, Immigration and Asylum Act 2002.

2. The claimant appealed and in a determination sent on 5 June 2015 First-tier Tribunal (FtT) Judge Keane allowed his appeal on human rights (Articles 3 and 8) grounds.

3. Several aspects of the judge's determination are not challenged before me. One is the judge's finding that the s.72 certificate had not been made out because "I find that the presumptions in s.72 … are displaced" [14]. Another is that the judge concluded in light of more recent DNA evidence linking the claimant and his brother who had been accepted as a member of the minority clan Ashraf, that the immigration judge's earlier finding made in 2004 about the claimant's clan status was to be reconsidered and the claimant was to now be treated as belonging to a different minority clan, the Ashraf. A third aspect of his findings, not actively challenged, is that the claimant would face a real risk of ill treatment if returned to his home area of Quryooley

4. The SSHD's grounds challenged the judge's findings on both Article 3 and 8. It must be said that the drafting of her grounds betrays a degree of muddle but before me both representatives were agreed that their gravamen was the challenge to the judge's Article 3 findings. Since at [23] the judge allowed the Article 8 grounds of appeal "for the same reasons" as those he had given for allowing it on Article 3 grounds, the grounds stand or fall with the challenge to the latter.

5. I am persuaded that the FtT judge materially erred in law. The judge's principal reason for allowing the Article 3 appeal was that in light of the background and expert evidence and the recent country guidance decision of MOJ & Others[2014] UKUT 00442 (IAC), the claimant's particular circumstances would place him at real risk of ill treatment if returned to Somalia. At this juncture it is convenient to set out the country guidance given in MOJ & Others in full:

"COUNTRY GUIDANCE

(i) The country guidance issues addressed in this determination are not identical to those engaged with by the Tribunal in AMM and others (conflict; humanitarian crisis; returnees; FGM) Somalia CG [2011] UKUT 445 (IAC). *Therefore, where country guidance has been given by the Tribunal in AMM in respect of issues not addressed in this determination then the guidance provided by AMM shall continue to have effect.*

(ii) Generally, a person who is "an ordinary civilian" (i.e. not associated with the security forces; any aspect of government or official administration or any

NGO or international organisation) on returning to Mogadishu after a period of absence will face no real risk of persecution or risk of harm such as to require protection under Article 3 of the ECHR or Article 15(c) of the Qualification Directive. In particular, he will not be at real risk simply on account of having lived in a European location for a period of time of being viewed with suspicion either by the authorities as a possible supporter of Al Shabaab or by Al Shabaab as an apostate or someone whose Islamic integrity has been compromised by living in a Western country.

(iii) There has been durable change in the sense that the Al Shabaab withdrawal from Mogadishu is complete and there is no real prospect of a re-established presence within the city. That was not the case at the time of the country guidance given by the Tribunal in AMM.

(iv) The level of civilian casualties, excluding non-military casualties that clearly fall within Al Shabaab target groups such as politicians, police officers, government officials and those associated with NGOs and international organisations, cannot be precisely established by the statistical evidence which is incomplete and unreliable. However, it is established by the evidence considered as a whole that there has been a reduction in the level of civilian casualties since 2011, largely due to the cessation of confrontational warfare within the city and Al Shabaab's resort to asymmetrical warfare on carefully selected targets. The present level of casualties does not amount to a sufficient risk to ordinary civilians such as to represent an Article 15(c) risk.

(v) It is open to an ordinary citizen of Mogadishu to reduce further still his personal exposure to the risk of "collateral damage" in being caught up in an Al Shabaab attack that was not targeted at him by avoiding areas and establishments that are clearly identifiable as likely Al Shabaab targets, and it is not unreasonable for him to do so.

(vi) There is no real risk of forced recruitment to Al Shabaab for civilian citizens of Mogadishu, including for recent returnees from the West.

(vii) 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.

(viii) 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.

(ix) If it is accepted that a person facing a return to Mogadishu after a period of absence has no nuclear family or close relatives in the city to assist him in re-establishing himself on return, there will need to be a careful assessment of all of the circumstances. These considerations will include, but are not limited to:

- *circumstances in Mogadishu before departure;*
- *length of absence from Mogadishu;*
- *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;*
- *availability of remittances from abroad;*
- *means of support during the time spent in the United Kingdom;*
- *why his ability to fund the journey to the West no longer enables an appellant to secure financial support on return.*

(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.

(xii) The evidence indicates clearly that it is not simply those who originate from Mogadishu that may now generally return to live in the city without being subjected to an Article 15(c) risk or facing a real risk of destitution. On the other hand, relocation in Mogadishu for a person of a minority clan with no former links to the city, no access to funds and no other form of clan, family or social support is unlikely to be realistic as, in the absence of means to establish a home and some form of ongoing financial support there will be a real risk of having no alternative but to live in makeshift accommodation within an IDP camp where there is a real possibility of having to live in conditions that will fall below acceptable humanitarian standards.

6. There are several difficulties with the judge's assessment. First, he identified one of the main bases for his assessment as the expert report of Dr Bekalo. Dr Bekalo, the judge wrote in [20]:

> "... had published publications which enable him to pass expert opinion on the subject matter of his report and identified factors which would exacerbate the risk posed to the appellant if he returned to Somalia (I particularly incorporate Section 2 of his report into the decision)."

7. Yet Dr Bekalo's report does not refer to MOJ & Others and, in contrast to the findings made by the Tribunal in MOJ & Others, portrays Mogadishu and Qoriyooley Towns in 2014 as being "under the control of numerous warlords and armed groups, including more recently the Al-Quada affiliated insurgent groups called Al-Shebab". Even assuming the expert were correct in describing this

situation as obtaining in the Qoriyooley Towns, his opinion on the situation in Mogadishu was palpably at odds with that found to obtain in MOJ & Others. If the judge was to depart from the findings in MOJ, he was obliged to identify relevant new evidence warranting a departure. He did not do so.

8. A second difficulty is that the judge appears mistakenly to have considered the guidance given in MOJ & Others to be confined to those who had lived in Mogadishu before departure. The judge said that the MOJ & Others considerations "are arguably inapt in the case of a Somalian resident who has never lived in the capital…" That is incorrect. At (xii) of the head note the Tribunal stated (emphasis added):

> *"The evidence indicates clearly that it is not simply those who originate from Mogadishu that may now generally return to live in the city without being subjected to an Article 15(c) risk or facing a real risk of destitution. On the other hand, relocation in Mogadishu for a person of a minority clan with no former links to the city, no access to funds and no other form of clan, family or social support is unlikely to be realistic as, in the absence of means to establish a home and some form of ongoing financial support there will be a real risk of having no alternative but to live in makeshift accommodation within an IDP camp where there is a real possibility of having to live in conditions that will fall below acceptable humanitarian standards."*

9. This is perhaps not a fatal difficulty because the judge did go on to state in [22] that "if nevertheless applied" the guidance in that case "would point, individually and cumulatively, to the utter lack of practicality in the notion that one such as the appellant might settle safely in the capital". However, this oversight is indicative of an inattention to the breadth of the Tribunal's assessment of evidence relating to conditions in Mogadishu in MOJ & Others.

10. A third difficulty is that in seeking to apply the risk factors identified in MOJ and Others the judge at one point based himself on a sweeping factual premise that was not warranted on the evidence before him. He stated in [22] that "Miss Hersi [the claimant's girlfriend whom he had earlier found credible] said that she would not provide financial support to the appellant upon his deportation from the UK". This was one of what the judge described as "exclusively favourable findings of fact to which have arrived in respect of her evidence." He continued: "I find that that the appellant would not receive financial support from her or from any other person". Yet on the evidence before the judge the claimant had family members in the UK including a full brother whose DNA had helped establish his status as Ashraf.

11. A fourth difficulty resides in the judge's finding that the claimant would not have prospects of securing employment. Given that earlier he had recorded at [5] that whilst in prison the claimant had been awarded certificates that equated to A-level, it was necessary for the judge to explain on what evidence the finding that the claimant would not have prospects of securing employment was based.

12. In my judgment these difficulties in the judge's assessment, taken together, constituted a material error of law in failing to apply relevant country guidance and a failure to take into account relevant evidence and make proper findings regarding it.

13. For completeness I should observe that whilst on its face the judge's assessment of the risks arising from the claimant's clan association might appear tenable, it is not apparent to me that he engaged with the fact that the claimant was a member of the Ashraf minority clan and with the evidence relating to how members of that clan fare in Mogadishu. All the judge said at [22] was that "[h[e lacks … clan associations". But there are other Ashraf in Mogadishu and so a possible basis for association with them. At the same time, there was some evidence that this clan faces a situation of exploitation. Since a principal finding in MOJ & Others at (viii) of the head note is that:

    "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."

    it cannot be said that the claimant's minority clan status was decisive, but neither can it be said that the judge showed sufficient awareness of this dimension to the claimant's claim

14. For the above reasons the judge materially erred in law and in a way necessitating that his decision is set aside. I asked both parties what they would urge by way of method of disposal of the case were I to find (as I have) that the judge materially erred in law. Both said they considered the case should be remitted to the First-tier Tribunal. Notwithstanding that I see no reason to interfere in the judge's DNA-based findings that the claimant is an Ashraf, I consider that that effectively leaves a great many findings of fact that have to be made and it would serve the interests of justice best for the case to be remitted to be heard afresh save for the preservation of the finding that he is an Ashraf.

15. For the above reasons:

    the judge materially erred in law and his decision is set aside.

    the case is remitted to be heard by a judge of the First-tier Tribunal other than Judge Keane.

Signed   Date 1st June 2016
Judge of the Upper Tribunal