Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00226/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2 November 2015	**On 8 May 2017**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

Y- S-
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Coleman, counsel instructed by Kesar & Co Solicitors
For the Respondent: Ms A Fijiwala, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I make this order because the appellant claims to be a

refugee and there is always a risk (not necessarily a strong one) in case of this kind that publicity could enhance the claim.

2. The appellant is a Somali national who was born in 1993. He has lived in the United Kingdom since he was 11 years old having arrived in September 2004 as the son of a refugee.

3. He appeals the decision of the First-tier Tribunal dismissing his appeal against the decision of the respondent on 24 January 2013 to make him the subject of a deportation order.

4. Permission to appeal was refused by the First-tier Tribunal but granted by Upper Tribunal Judge McGeachy who said at paragraph 2 of his reasons:

> "I consider that it is, just, arguable that the determination is lacking in reasoning and does not show that the Judge of the First-tier Tribunal gave anxious scrutiny to the facts of this case. I will therefore grant permission to appeal."

5. I therefore consider particularly carefully the First-tier Tribunal's decision.

6. This shows that the appellant was in trouble following his conviction at the Crown Court at Woolwich for possessing a Class A controlled drug, namely heroin, with intent to supply. He was sentenced to 24 months' detention for two offences of possession with intent to supply committed on 11 January 2012 and one month for an offence of violent disorder committed, before the drugs offences, on 23 March 2011. All sentences were to be served concurrently.

7. The First-tier Tribunal Judge was critical of the respondent. She had not produced a copy of the judge's sentencing remarks. Apparently they could not be retrieved. It is much harder to determine the details of a person's offending without the sentencing remarks which can be expected to be considered, thorough and fair.

8. The judge referred to the "Section 72 certificate" which alludes to Section 72 of the Nationality, Immigration and Asylum Act 2002 and outlines the circumstances where a refugee can lose international protection by reason of his criminal conduct.

9. The judge lamented the absence of a pre-sentence report or an OASys Report to help him determine the likelihood of the appellant re-offending.

10. The judge said at paragraph 16:

> "The only evidence on the question of whether the Appellant constitutes a danger to the community is from Mr Alex Brown. He adopts his statement at p.A.36. In it he states that he is an Education Assistant at the "Fight for Peace Academy". His statement is dated 18.5.15."

11. The judge noted that the appellant had been accepted onto the Academy's "Pathway Module Number 2 Education Programme". This required the appellant to study basic English and maths and to work for a YMCA Personal Trainer's qualification at level 2. He also had to do voluntarily work on the placement at a local gym. The course required him to attend two days a week for five hours per day and Mr Brown said the appellant had made "an excellent start on the programme" and commended him for his punctuality, attitude, commitment and quality. "Fight for Peace" was described as a boxing academy targeting young people at risk. Mr Brown had known the appellant for just over a year. In his opinion he was no threat to the public. He said that he "Could not ask for a better student".

12. The appellant attributed his criminality to his being a drug user and submitted that the fact he had kept out of trouble since his release from custody on 1 January 2013 was an indication that he was not a danger to the community.

13. The First-tier Tribunal Judge was not persuaded by these arguments. The judge noted that he had not been shown an OASys Report. Neither had he been shown that such a report was hard to get or unavailable to the appellant had produced evidence that he had been on a course entitled "substance misuse awareness" he had not produced any evidence that he was drug free.

14. The First-tier Tribunal was not persuaded that the appellant had rebutted the presumption that his presence constituted a danger to the community.

15. The First-tier Tribunal Judge then went on to consider the asylum claim. The appellant was interviewed about his asylum claim on 6 October 2014. He said that he feared returning to Somalia because of his "tribe". However he did not know the name of the tribe. He also feared returning to Somalia because it was a war torn country and he had no job or relatives or home there.

16. The First-tier Tribunal noted that the appellant's father had identified himself as a member of the Qalinshube clan part of the Benadire tribal group. The appellant's father claimed to have been a goldsmith in Mogadishu.

17. The judge found that the appellant would be returned to Mogadishu as an "ordinary civilian" within the meaning of the terms in **MOJ and Others (return to Mogadishu) Somalia CG [2014] UKUT 00442 (IAC)**. The judge found that this case decided that a civilian returning to Mogadishu after a period of absence will not face a real risk of persecution or other serious harm either by reason of having lived in the European country or at all. The case also determined that although Mogadishu is far from peaceful there is not so much social unrest that the person about to be returned could rely on Article 15(c) of the European Union Qualification Directive.

18. Paragraphs 34 and 35 of the Decision are particularly interesting. The First-tier Tribunal Judge recognised that, following **MOJ**, a person returning to Mogadishu without family support might face difficulties and particular care was needed in assessing such a person's case. The judge then said at paragraph 35:

> "Taking those circumstances in turn, the appellant has been absent from Mogadishu for eleven years. On the evidence, I accept that the appellant has no close family in Mogadishu. However, there must be members of the Benadire clan there."

19. At paragraphs 36, 37 and 38 the judge explained that his family (presumably in the United Kingdom) could afford to maintain the appellant in Mogadishu for the foreseeable future. The judge reached this conclusion having noted from the evidence that the appellant's elderly grandmother had remained in Mogadishu on her own. The appellant's mother had supported her mother by sending remittances and US$60 a month was sufficient. In July 2013 the appellant's mother, with others, had gone to Dubai. The appellant's maternal grandmother was ill in Somalia and was flown to Dubai for hospital treatment. The appellant's mother and siblings spent about two months there before returning to the United Kingdom. The appellant's grandmother returned to Somalia but, sadly, died soon afterwards.

20. The judge said at paragraph 38:

> "From this evidence, I concluded that the costs of maintaining the appellant in Mogadishu would be relatively modest. I found that the family could afford to maintain him there for the foreseeable future."

21. The judge then went on to say that given the appellant was young, able bodied and a competent English speaker who had not lost his ability to speak Somali, he could be expected to get his own job.

22. The judge did not believe that the appellant needed humanitarian protection but if he would otherwise have been entitled he had disqualified himself by reason of committing a serious crime.

23. The judge then dismissed the appeal with reference to Article 8 of the European Convention on Human Rights.

24. I have considered carefully the very full grounds settled by Mr Guy Davison of Counsel who represented the appellant at the First-tier Tribunal hearing and the submissions of Mr D Coleman who appeared before me.

25. There are really two attacks on the Decision.

26. The first challenges the finding that the appellant had not rebutted the presumption that he was a danger to the community. The second is that he can be returned safely to Somalia.

27. The problem with the finding that the appellant has not rebutted the presumption is that there was evidence Mr Brown that praised the appellant. The evidence was not challenged and was not specifically addressed when the judge made his finding. Associated with this point was the contention that the period of time spent without attracting the attention of the police was a valuable indicator about the appellant's alleged changed life. The period of eighteen months (or thereabouts) might not seem impressive to persons unfamiliar with the difficulties drug addicts find in changing their lifestyle but to a person with some experience it was, it was suggested, a useful indicator.

28. These points have merit. There is no specific finding about the evidence of Mr Smith. I agree that the period spent without further trouble is of *some* significance. Further Mr Brown gave evidence as an Education Assistant. His statement was based on a letter dated 18 May 2015 which does not disclose any professional qualifications. This is not in any way to devalue Mr Brown's evidence but he was put forward to the Tribunal as someone who knew the appellant in an educational role and spoke well of him. He was a character witness and his evidence should have been evaluated accordingly.

29. With respect to the First-tier Tribunal Judge the Decision would have been better if the judge had made express findings but I do not read the Decision as if the judge recorded the evidence and then ignored it. He considered it, as he considered the time the appellant had spent out of trouble but found it more significant that there was no evidence of an objective or scientific kind that confirmed that the appellant was drug free. It was the appellant's case the drugs were his problem. He had to rebut a presumption.

30. Mr Coleman pointed out that the judge's findings do not show any or at least any adequate consideration of the detailed evidence in the statements of close members of the appellant's family about how he had turned round his life. Clearly evidence from close relatives is inherently likely to be biased but that does not make it dishonest or wrong. The appellant's close relatives are also likely to be uniquely well placed to opine on how much a person has changed. It is clear from the judge's notes that he heard evidence from relatives. He really should have indicated what weight, if any, he gave to that evidence and his reasons.

31. Further, the fact that a person may have rebutted the presumption of being a danger to the community in a sense that means he would be entitled to keep refugee status if he were at risk does not mean that he is a refugee and does not mean that he cannot be deported if he is not a

refugee. Deportation does more than protect the community from further offences. It recognises society's disapproval of people who break its laws.

32. The First-tier Tribunal Judge correctly addressed himself to the difficulties a Somali national faces when attempting to claim asylum that are identified in **MOJ and Others**. He noted the developments in the operation of the clan system in Somalia so that people can look to their clans for social support and found that it was a reasonable assumption (albeit only an assumption) that "There must be members of the Benadire clan there". As an expert Tribunal the First-tier Tribunal is surely entitled to know that the Benadire (more commonly spelt Benadiri) is seen as a large tribal grouping albeit often identified as the minority clan.

33. However the grounds emphasise the need to take care and make a reasoned decision which was emphasised in **MOJ**. I can understand the judge's optimistic finding that the appellant will have the wherewithal to establish himself in Somalia. He does have the advantage of fluent English and I see nothing wrong in the finding that he has some understanding of Somali because that would be the language of his home.

34. There are two things though that do concern me. There is a finding that the appellant's family would support him. This is based on a finding that they supported another relative in the not too far distant past. The apparent means of the family are very limited. It is at least possible that the money that was available for the other relative has extinguished their resources. This does not seem to have been considered. The income of the appellant's mother and father, if I may say so respectfully, is very modest and there cannot be a lot left after they have discharged their responsibilities.

35. I am also particularly concerned by paragraph (vii) of the judicial head note in **MOJ** which is in the following terms:

> "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."

36. I do not know if the First-tier Tribunal considered this point or how it resolved it if it did.

37. I indicated at the hearing that I wanted a little time to reflect on this decision.

38. Parts of it, I am satisfied, are open to the judge and are explained adequately but I am not satisfied having considered the matter that the judge's findings about the appellant's ability to reintegrate in Somali society have been explained adequately. In particular, I am not making a

complete list, I do not know where the money will come from and I do not know how he will manage on his return. However this is not a case where I can confidently separate the wheat from the chaff. The findings must be made on the evidence as a whole and so I cannot be satisfied that any of the findings are sound, even if they are reasoned on their own.

39. It follows that although I accept the Secretary of State's arguments in part the Decision is not satisfactory and I set it aside in all respects.

40. As there has to be a rehearing I think it a better use of resources of First-tier Tribunal and I so order.

Decision

The First-tier Tribunal erred in law. I set aside its decision and order that the appeal be decided again in the First-tier Tribunal.

Signed
Jonathan Perkins
Judge of the Upper Tribunal Dated 17 December 2015