



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/00691/2015

THE IMMIGRATION ACTS

Heard at Field House

On 1st May 2018

**Decision & Reasons
Promulgated
On 10th May 2018**

Before

**MRS JUSTICE O'FARRELL
UPPER TRIBUNAL JUDGE CANAVAN**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

[A A]

Respondent

Representation:

For the Appellant: Mr T Melvin (Home Office Presenting Officer)

For the Respondent: Ms A Nizami (instructed by Duncan Lewis & Co Solicitors)

DECISION AND REASONS

1. This is the appeal of the Secretary of State against the determination of the First Tier Tribunal Judge Metzger's decision dated 30 January 2018, promulgated on 31 January 2018, allowing [AA]'s appeal against the decision of the Secretary of State, on 20 July 2015 to make a deportation order against him on the grounds that his Article 3 rights would be breached.

Factual background

2. [AA] is a national of Somalia and a member of the Habar Younis sub clan of the Isaaq clan. He was born on [] 1964.
3. On 31 March 1989, [AA] entered the United Kingdom and on 22 April 1997 he was granted indefinite leave to remain.
4. On 8 November 2003 [AA] was convicted of the murder of [HA], a Somali national living in the United Kingdom and fellow member of the Habar Younis sub clan. He was sentenced to life imprisonment with a minimum term of 9 years and 8 months' imprisonment.
5. On 8 August 2011 [AA] was served by the Secretary of State with notification that he was liable to automatic deportation. On 20 July 2015 the Secretary of State served on [AA] her decision to make a deportation order in accordance with section 32 (5) of the UK Borders Act 2007, refusing his human rights and protection claim.
6. [AA] appealed against the Secretary of State's decision. On 18 July 2017 the decision of the FTT Judge Paul was promulgated, dismissing [AA]'s appeal.
7. [AA] appealed to the Upper Tribunal. On 1 December 2017 the Upper Tribunal determined that the FTT decision was vitiated by material errors of law and the case was remitted to the FTT for a fresh hearing.

FTT Decision

8. By a decision dated 30 January 2018, promulgated on 31 January 2018, FTT Judge Metzger allowed [AA]'s appeal on the basis that [AA] would be at risk of a breach of Article 3 of the ECHR were he to be returned to Somalia.

Grounds of appeal

9. The Secretary of State appeals to the Upper Tribunal on the grounds that the FTT Judge failed to give any clear reasons as to why he allowed the appeal and failed to deal with the submissions of the Presenting Officer or the points raised by the Secretary of State in the refusal letter.

Legal Framework

10. The appellant is a 'foreign criminal' is within the meaning of section 32 (1) of the UK Borders act 2007 because he is not a British citizen, he was convicted in the United Kingdom of an offence and was sentenced to a period of imprisonment of at least 12 months.
11. Section 32(4) of the 2007 Act states:

“For the purpose of section 3(5)(a) of the Immigration Act 1971 (c.77), the deportation of a foreign criminal is conducive to the public good.”

12. Section 32(5) of the 2007 Act states:

“The secretary of state must make a deportation order in respect of a foreign criminal (subject to section 33).”

13. Section 33, Exception 1 provides that sections 32 (4) and (5) do not apply where the removal of a foreign criminal would result in a breach of his Convention rights.

14. Article 3 of the Convention provides that no one shall be subject to torture or to inhuman or degrading treatment or punishment.

FTT decision

15. Before the FTT, [AA]’s appeal was based on Article 3 grounds only. The relevant test was whether substantial grounds were shown for believing that [AA], if deported, would face a real risk of being subjected to treatment contrary to Article 3.

16. [AA]’s evidence was that he feared that members of the Haba Younis sub clan and/or members of the family of the murdered [HA] would seek to avenge his death if he is returned to Somaliland. He relied on his witness statement and the statement of his cousin, [MS], who gave evidence that her uncle, [NE], who was one of the key negotiators involved in reaching agreements with the other family in relation to the murder, had died in 2014 and there was no other figurehead in the extended family to assist in tribal disputes. Reliance was also placed on the expert reports of Professor Mario Aguilar and Dr Marcus Hoehne, who provided expert opinion as to the risk of retribution if [AA] were to return to Somalia and the sufficiency of protection offered by the state.

17. The Presenting Officer did not call any expert evidence before the FTT but relied on the matters set out in the Secretary of State’s decision dated 20 July 2015, in particular those dealing with the sufficiency of protection argument.

18. The findings of the FTT Judge are set out in paragraphs [18] and [19] of the decision:

“[18]. Having considered the evidence of the appellant, Ms Said Elni and the two expert reports in relation to the issues in which they are in agreement and applying the relevant and appropriate standard of proof, I find that even though the appellant is serving a substantial sentence, namely of life imprisonment in the United Kingdom and that there was at least some stage some possibility of blood compensation and the fact that there has been no threats to the appellant in the United Kingdom or to his family in Somaliland, nonetheless the appellant remains at substantial risk of a blood feud revenge killing

were he to be returned to Somaliland. Having considered the expert evidence and taking into account the fact that the only possible negotiator, namely [NE], has sadly passed away, and even allowing for the extended period of time the appellant has served his sentence in the United Kingdom, the appellant remains at real risk of ill treatment in breach of Article 3 of the ECHR were he to return to Somalia or Somaliland. Further in relation to the question of sufficiency of protection, it is clear from the report of Dr Hoehne and supported by Miss Said Elmi that the appellant would have difficulty even getting to his home area without risk of ill-treatment and that there is nowhere within the country where he could be safely returned. As I indicated above, Mr Harvey did not pursue the issue of internal relocation. I also find on the question of sufficiency of protection that given the prevalence of revenge killings, there would be no sufficiency of protection by either the police force or the court system within Somalia or Somaliland.

[19]. In all the circumstances, I find that the appellant has established to the relevant standard that were he to be returned to anywhere in Somalia or Somaliland where he has not been since 1989 and where he lacks any meaningful familial or clan support, the appellant would be at risk of a breach of Article 3 of the European Convention on Human Rights by reason of the actions of the family of the man he murdered or persons within their sub clan.”

Appellant's submissions

19. Mr Melvin, on behalf of the appellant Secretary of State, submits that the FTT Judge failed to deal with the submissions of the presenting officer or the points raised in the refusal letter.
20. Mr Melvin submits that the FTT Judge failed to consider the sufficiency of protection arguments set out at pages 12-13 of the refusal grounds or the evidence relied on. The report entitled government and clan system in Somalia dated 5 March 2013 included evidence that there was a functioning police force in Somaliland:

“Member of the Guurti stated that the police in Somaliland consists of people from different clans and that all Somali clans could thus be found within the police. Therefore, if a person commits a crime, others from their clan will be found within the police system. The police will contact the persons clan. It is primarily the police's responsibility to investigate crimes, but the clan will assist the police. The clan members are the police's eyes. In urban environments, the victim goes to the police station and reports crimes. In rural areas, the victim goes to the clan in the same case. This depends on the availability of police officers. In rural areas, two clans who do not agree can turn to the police.

An employee at UNDP stated that the police's capacity is limited in terms of human rights. All police stations have received training in the matter of human rights, which does not necessarily mean that these rights are implemented. More support is needed for the police in

Somaliland. The police cannot ensure law and order efficiently. Everything has to do with clan and the family can go through the clan to get relatives out of jail...”

21. Mr Melvin further submits that the FTT Judge failed to grapple with the underlying weakness in the expert reports relied on by [AA]. There were significant differences between the experts that the FTT Judge simply ignored. Professor Aguilar considered that [AA] would be at risk of the death penalty from the sharia courts. Dr Hoehne rejected that view but considered that [AA] would be at a more generalised risk of reprisal based on local, customary law. The risks identified by the experts were speculative, without any supporting evidence.
22. Mr Melvin’s case is that the FTT Judge failed to give any reasons for rejecting the Secretary of State’s criticisms of the expert reports. He reached a conclusion without giving adequate reasons for the same and, in so doing, failed to deal fairly with the legitimate submissions of the Secretary of State.

Respondent’s submissions

23. The respondent’s case is that the Secretary of State has not identified any material error of law in the FTT Decision. The Secretary of State is seeking, improperly, to re-argue the appeal on the evidence.
24. Reliance is placed on the decision in *Mukarkar v Secretary of State for the Home Department* [2006] EWCA Civ 1045 at paragraph [40]:

“...different tribunals, without illegality or irrationality, may reach different conclusions on the same case... The mere fact that one tribunal has reached what may seem an unusually direct generous view of the facts of a particular case does not mean that it has made an error of law, so as to justify an appeal under the old system, or an order for reconsideration onto the new. Nor does it create any precedent, so as to limit the Secretary of State’s right to argue for a more restrictive approach on a similar case in the future. However, on the facts of the particular case, the decision of the specialist tribunal should be respected.”
25. Ms Nizami, on behalf of [AA], submits that the sufficiency of protection issues were before the FTT Judge and he expressly referred to pages 12-13 of the Secretary of State’s refusal letter as containing the submissions relied on by the Presenting Officer.
26. Ms Nizami disputes Mr Melvin’s characterisation of the expert reports as conflicting. Although there were differences between the expert views, both Professor Aguilar and Dr Hoehne agree that [AA] would be at risk of ill-treatment if he were to be returned to Somalia. She relies on Dr Hoehne’s assessment at paragraphs [10] to [11], namely, that [AA] would be at risk of encountering Habar Yuonis from other lineages on his journey to Erigabo and that he would be at a high risk of falling victim to revenge

killing on his return. At paragraph [12] of his report, Dr Hoehne states that he agrees largely with the deliberations of Professor Aguilar in this case.

27. Dr Hoehne identifies two substantial points of disagreement with Professor Aguilar at paragraphs [13] and [14] of his report. Contrary to Professor Aguilar, he does not consider that a state of execution under sharia law would be likely and his view is that the jurisdiction of the clans is recognised by the government of Somaliland. However, he states clearly at the end of that section of his report that [AA] would be at risk of a revenge killing. Therefore, although the experts disagree on the source of the risk, through the sharia courts or local elders, they agree that there would be such a risk.
28. Ms Nizami submits that there is no material error of law in the FTT Decision. However, if she is wrong, it would not make any difference to the outcome because the expert evidence was so clear and compelling.

Discussion and conclusion

29. We have some sympathy for the position of the Secretary of State in that, aside from the reference to the reasons in the refusal letter, the FTT Judge did not set out the points raised by the presenting officer and explain his reasons for rejecting them.
30. However, the Secretary of State did not call any factual or expert evidence to challenge [AA]'s case and therefore, the FTT Judge did not have the same volume of material to consider. He identified and considered the key points relied on by the Secretary of State by reference to the relevant factual and expert evidence before him.
31. The FTT Judge considered the risk that would be faced by [AA] on his journey to Erigavo. That was addressed by Ms Said Elmi (at paragraph [12] of the decision) and by Dr Hoenhe (at paragraph [15] of the decision). Mr Melvin makes the point that no evidence is produced to support those assertions. Dr Hoenhe does refer to supporting evidence in paragraph [10] of his report. In any event, that is an attack on the underlying merits of the appeal and not an error of law on the part of the FTT Judge.
32. The FTT Judge considered the sufficiency of protection issue. Both experts referred to this issue in their reports. At paragraph [24] of his report, Professor Aguilar considers that there would be no government or police capability to intervene to prevent a revenge killing. At paragraph [10] of his report, Dr Hoehne states that the police would not intervene and cites an incident of which he has personal knowledge. Although it would have been clearer if the FTT Judge had referred to the 2013 report relied on by the Secretary of State, that report is equivocal as to the capability of the police. It confirms that there is a functioning police force in Somaliland but also states that: *"the police's capacity is limited in terms of human rights ... The police cannot ensure law and order efficiently."*

Therefore, even if the FTT Judge had analysed that report, it would not have outweighed the views expressed by the experts.

33. The FTT Judge recognised and referred to the disagreements between the experts. He did not analyse those disagreements in his decision. However, he was entitled to reach the conclusion that they were in agreement on the fundamental issue in the case, namely, whether [AA] would be at risk of a revenge killing.
34. The FTT Judge gave adequate reasons for his decision. He set out the relevant factual and expert evidence and explained the matters that persuaded him that, despite the absence of threats made to [AA], there was a risk that [AA]'s Article 3 rights would be breached if he returned to Somalia.
35. There was no error of law in the decision. The FTT Judge directed himself to the appropriate test and was entitled to conclude, on the basis of the evidence before him, that the Article 3 case was established.

Notice of Decision

The First-tier Tribunal decision did not involve the making of an error of law

The decision shall stand

Signed:

Date: 03 May 2018

Mrs Justice O'Farrell