Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/06703/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On Monday 29 January 2018	**On Wednesday 31 January 2018**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

M J

Respondent

Representation:
For the Appellant: Mr P Duffy, Senior Home Office Presenting Officer
For the Respondent: Mr T Lay, Counsel, instructed by Duncan Lewis solicitors

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity order was made by the First-tier Tribunal. As this is an appeal on protection grounds, it is appropriate to continue that order. Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

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Background

1. This is an appeal by the Secretary of State. For ease of reference, I refer below to the parties as they were in the First-Tier Tribunal albeit that the Secretary of State is technically the Appellant in this particular appeal. The Respondent appeals against a decision of First-Tier Tribunal Judge S Lal promulgated on 30 November 2017 ("the Decision") allowing the Appellant's appeal against the Secretary of State's decision dated 22 June 2017 refusing his protection and human rights claims.

2. The Appellant is a national of Somalia. He came to the UK in 1990 when he was aged ten to eleven years old. In 1995 he was involved in an aggravated burglary and attacked a PC. In 2000, he was nonetheless granted indefinite leave to remain. His criminal offending has continued apace. He was sentenced to three years' imprisonment in April 2005 for robbery. An appeal against a deportation decision was allowed under Article 3 ECHR by a Tribunal composed of Immigration Judge Pullig and Mr M L James (non-legal member). A further deportation decision was made in 2009 following further convictions but the Appellant was then granted discretionary leave. In November 2011, the Appellant was convicted of affray and sentenced to two years' imprisonment which led to yet another deportation decision, which was also withdrawn. The Appellant was granted discretionary leave. His last leave expired in June 2013. Between November 2014 and March 2015 the Appellant committed a further twelve offences.

3. In light of the above chronology, it is perhaps unsurprising that, on appeal, the Appellant's representatives did not dispute that he should be excluded from humanitarian protection under rule 339(d) of the Immigration Rules as a persistent offender. The appeal proceeded on the basis that the Appellant would be at real risk of ill-treatment contrary to Article 3 ECHR and that removal would be a disproportionate interference with his Article 8 rights. The Judge allowed the appeal on both bases.

4. The first ground challenges the allowing of the appeal on Article 3 grounds. That ground can be summarised by the following sentence:-

> "…the FTTJ fails to give clear reasons in light of the country guidance authority of MOJ as to how the Appellant satisfies the requirements for protection under Article 3."

5. The second ground which addresses the Article 8 conclusion is as follows:-

> "It is also respectfully submitted that the FTTJ approach to Human rights is flawed at paragraph 31 by initially placing reliance on Agyarko and the Razgar approach, although the FTTJ has referred to section 117 at paragraph 23 of the determination there is no evidence that the FTTJ has considered the mandatory requirements of

> para 5A before embarking on a brief Article 8 assessment at paragraph 31 of the determination, that fails to deal with the points raised at page 14 of the decision letter and if the Appellant cannot bring himself within the rules, deportation of such offenders can generally be outweighed only by countervailing factors which are very compelling that have not been evidenced."

6. Permission to appeal was granted by Designated First-tier Tribunal Judge Peart on 12 December 2017 in the following terms:-

> "…[4] I find the judge's analysis with regard to both Article 3 and Article 8 arguably inadequate. The judge identified the issue that as regards Article 3, the appeal was allowed in 2007 but that **MOJ** required consideration in terms of the changes that had taken place in Somalia in the meantime. The judge set out the reasons for his decision at [28] but there is no analysis in terms of the various issues considered in **MOJ** and why it is that the appellant fell within the category of persons who would be entitled to Article 3 protection notwithstanding beneficial changes in Somalia.
> [5] As regards Article 8, the judge simply relied upon a previous decision some ten years earlier. Arguably, the judge erred in not assessing the appellant's circumstances as of the date of the hearing before him in 2017.
> [6] All grounds are arguable."

7. The matter comes before me to determine whether the Decision contains a material error of law and if I so find, either to re-make the decision or remit the appeal for re-determination by the First-tier Tribunal.

Discussion and Conclusions

8. Both representatives accepted in submissions that the second ground concerning Article 8 does not require to be determined if the first ground is determined in the Appellant's favour as, if there is a real risk of ill-treatment contrary to Article 3, the Appellant cannot be removed to Somalia. I therefore begin with the first ground.

9. Mr Duffy relied on the Respondent's pleaded grounds. Those can be summarised as follows. It is accepted that the starting point for Judge Lal was the earlier decision of Judge Pullig allowing the appeal on Article 3 grounds. The Respondent says however that Judge Lal has failed to place the earlier findings in the context of the country guidance case of MOJ Somalia CG [2014] UKUT 0442 ("MOJ"). The Respondent notes that there is a typographical error in [28] of the Decision which contains the Judge's reasoning on this point. She accepts that this does not infect the Decision.

10. The Respondent relies however on the Judge's failure to take into account what is said in MOJ about the economic boom in Somalia. Given the advantages of an education gained in the UK, she says that the Appellant has failed to demonstrate that he could not benefit from that boom. In this vein, it is also said that the

Judge has failed to consider the financial assistance which the Appellant may be eligible to access from the Facilitated Returns Scheme.

11. The Appellant is said to suffer from mental health problems. He relies in this regard on a medical report from Dr Wootton. The Respondent says that this report does not make a formal diagnosis and submits that the Judge has failed to give clear reasons why the unspecified mental health condition would entitle the Appellant to protection under Article 3. It was made clear in the course of submissions by both representatives that this is not an Article 3 medical case; it is not suggested that the Judge concluded that the Appellant would be at real risk of ill-treatment by virtue of this condition alone. However, the Respondent says that this factor has contributed to the Judge's overall conclusion that the Appellant would face destitution in a camp for internally displaced persons (an IDP camp) in Mogadishu and that the evidence does not bear out the conclusion.

12. The Respondent also relies on the Court of Appeal's judgment in Secretary of State for the Home Department v Said [2016] EWCA Civ 442 ("Said"). It is said that the facts of that case are very similar to this case and that therefore it was not open to the Judge to find as he did. Mr Duffy accepted that the Court of Appeal's judgment in Said was not before the Judge but made the point that the same solicitors were instructed in that case as in this case and, given its relevance, those representatives should have drawn the Judge's attention to it.

13. In response, Mr Lay pointed out that the Respondent's challenge is either that there is an inadequacy of reasons or that the Decision is perverse having regard to what is said in MOJ and other case-law concerning the position in Somalia. Importantly, he submitted, the Respondent does not contend that MOJ is wrongly decided. In terms of the adequacy of reasons he submitted that the Judge's reasons at [28] are entirely adequate to explain to the Respondent why she has lost. He also made the point that the Decision is brief both because of the previous appeal findings and because a number of issues were conceded on either side. There was therefore a narrow focus. I will come on to deal with the substance of the Judge's reasoning below.

14. Mr Lay also pointed out that, contrary to the Respondent's contention, the facts in Said were not very similar to this case. It was not accepted that Mr Said was from a minority clan (although he accepted that this was also not necessarily accepted in this case and that in any event, membership of a minority clan is no longer a risk factor in itself). More importantly he drew my attention to what is said at [5] of the judgment that Mr Said had an extended family in the UK who could sent him money to help him while he established himself.

15. Mr Lay also drew my attention to the more recent Court of Appeal judgment in Secretary of State for the Home Department v FY (Somalia) [2017] EWCA Civ 1853 ("FY"). In that case, the Secretary of State's appeal failed. Mr Lay submitted that the facts of that case bore more similarities to this case. In that

case, the Court of Appeal upheld the Tribunal's decision which was based on FY's length of absence and lack of family ties in Somalia. In that case, complaint was also made about the Judge's failure to consider the impact of the economic boom. In that case, the Tribunal had given reasons why it was said that FY would be unable to find work.

16. Before setting out the Judge's reasoning for allowing the appeal on Article 3 grounds, it is important to set those findings in the context of the factual background and evidence in this case as recorded at [18] to [20], [24] and [26] of the Decision:-

> "**C. The Evidence**
> [18] The Appellant gave evidence in English and relied on the contents of the detailed witness statement that had been signed by him and submitted to the Tribunal. He was asked no further questions in examination in chief.
> [19] He was cross examined only in the briefest of terms where he confirmed that when he was 9 years of age he spoke the Eli language as far as he could remember as he was from Badabo. He said people in Mogadishu spoke Somali.
> [20] In respect of the substantive claim itself, it is based on the following as set out in the Witness Statement and the interviews. He was taken to the capital when he was about 7 years old; he was sexually assaulted as a child there and taken out when he was about 8-9 years old. He was in Germany for a while and eventually smuggled into the UK. He was eventually placed in care and only speaks English. He has been in the UK for 27 years and suffers from mental health problems and substance abuse as set out in the Report of Dr Wootton in the Appellant's bundle. He has no contact with any Somali family.
> …..
> **E. Findings and Decision**
> ….
> [24] Both parties accepted that the biography and chronology as set out in the Refusal letter was accurate and the real issue was the impact of MOJ. The Tribunal started from the decision of Judge Pullig and his findings of fact when he allowed the Article 3 appeal in 2007.
> …..
> [26] The Appellant is 38 years old and has been in the UK for 27 years having arrived as a child. He is a member of a minority clan and that this was made out in 2007 before a Judge of the FTIAC. That Judge found that the Appellant has had a tragic and disturbing history which included domestic abuse and periods in care as well as serious sexual abuse in Somalia. The Judge found that he was excluded from Refugee status and HP on the basis of his crimes in the UK but was entitled to Article 3 protection as that is a non-derogable right."

17. As appears from the above, it is important to remember that this appeal follows on from an earlier allowed appeal and that the Respondent accepts that the earlier findings were the correct starting point for this Judge's assessment. In short summary, the earlier Tribunal found that the Appellant is a Somali of mixed clan ethnicity, that he does not speak Somali sufficiently to establish himself as a member of a majority clan, that his only family in Somalia is an aunt from whom he is estranged and who would not assist the Appellant, and that he would be

"exceedingly vulnerable in Somalia if returned there in the circumstances as they are". That though was the position in 2007 and is only the starting and not the end-point of the Judge's consideration some ten years' later.

18. Following his taking into account of the findings in the earlier appeal, the Judge goes on at [27] to have regard to MOJ. I accept the Respondent's point that the Judge has not there indicated what part of the guidance he considers relevant which might have indicated what of that guidance is taken into account. In order to consider though whether any failure to spell that out could be said to amount to an error, I set out below the parts of the headnote relied upon by the parties:-

> "…
> (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.

19. The Judge indicates at [27] of the Decision that, having considered MOJ, the Appellant's appeal succeeds under Article 3 ECHR. He then embarks on his reasons for that conclusion at [28] of the Decision which reads as follows:-

> "Firstly, his circumstances in Somalia prior to departure can only be described as dire and involved being raped as a young child. Secondly, he has been away for 27 years and it has already been accepted that he has no family or clan associations in Mogadishu. He has no access to financial resources in the sense that there is no wider family who could send remittances to him. Thirdly, he has documented and longstanding substance misuse and attendant mental health difficulties which Dr Wootton comments in the form of her Report noting that (page 57) that he is likely to remain disabled by his mental health difficulties for the foreseeable future, and most likely for the rest of his life. His difficulties make him vulnerable to substance misuse and at times of crisis, he is a risk to himself and others." The Tribunal is satisfied that [MJ] falls into precisely the category of person envisaged who would still be entitled to humanitarian protection and Article 3 protection the change in the case law to reflect that minority claim [sic] membership by itself would be [sic] enough."

I observe that it is the final sentence of that paragraph which contains the typographical error to which the Respondent's grounds allude. It is clear that the Judge meant to say that minority clan membership by itself would not be enough as otherwise the reference to the change in the case law would make no sense.

20. As Mr Lay submitted, and I accept, that paragraph shows that the Judge's conclusion was reached for the following reasons:-

- The history of child abuse (suffered I note whilst he was in Mogadishu and including male rape);
- That the Appellant has no access to financial resources, including from any family in the UK (he has none);
- The Appellant's history of substance misuse and mental health difficulties based on the medical evidence (which I consider below);
- The Appellant's perceived clan status.

21. Before considering the adequacy of those reasons and whether they fully reflect the guidance in MOJ, I comment briefly on the Respondent's ground concerning the medical evidence of Dr Wootton. Dr Wootton is a Consultant Forensic Psychiatrist. Contrary to what is suggested in the Respondent's grounds, Dr Wootton does diagnose PTSD as well as emotionally unstable personality disorder. She also points to episodes of depression and symptoms of anxiety.

She describes the Appellant's behaviour as "inflexible, maladaptive and dysfunctional". She opines that the Appellant's personality disorder is "lifelong" although can be improved through treatment and may attenuate with age.

22. Importantly, Dr Wootton concludes that "given his early and extensive history of trauma, the severity of his impairments, and the number of comorbid difficulties, he is likely to remain disabled by his mental health problems for the foreseeable future, and most likely for the rest of his life."

23. As Dr Wootton points out, being in Somalia is closely associated with the Appellant's traumatic experiences. She also goes on to identify the circumstances which she would expect him to face on return and says this:-

> "…in [MJ]'s case removal to Somalia and the threat of removal to Somalia are likely to result in perpetuation and an acute exacerbation of his symptoms. This is likely to be compounded by any difficulties he will experience there; these might include difficulties finding shelter, difficulties finding work/supporting himself, not being able to access treatment, social isolation, witnessing/experiencing further traumatic events etc. Clearly his mental health is relevant here as given that his level of functioning is impaired and he has significant problems in the UK, it is likely to be more difficult for him to meet his needs than other people in a similar situation would…."

24. There was no medical evidence to counter that of Dr Wootton and she did not attend to give oral evidence so there was no cross-examination challenging her evidence. The Judge was therefore entitled to accept her conclusions as they stood including those which I set out above.

25. Looking therefore at the Judge's reasons as expressed at [28] of the Decision against the guidance in MOJ, the Judge has not decided the issue (as had the previous Tribunal) based on the Appellant's clan affiliation (once the typographical error is removed from the equation). He took into account the Appellant's circumstances in Mogadishu before departure (which in this case included a history of abuse there) and the length of time that the Appellant has been in the UK (twenty-seven years and from a young age). He took into account the Appellant's lack of family or clan associations in Somalia. He took into account that the Appellant has no access to finance from, for example, family in the UK which incorporates consideration of availability of remittances from that source.

26. Although the Judge does not expressly mention the ability to secure a livelihood by employment or self-employment, which is the Respondent's main complaint, that is in my judgement subsumed in the Judge's consideration of the medical evidence and the Appellant's mental health difficulties. In light of the references I have made to that medical evidence, the Judge was entitled to the conclusion that the Appellant has a level of mental health disability which would, in Dr Wootton's words, "make it more difficult for him to meet his needs than other

people in a similar situation". Although there is no express mention of the Appellant's means of support during his time in the UK, it is clear from the evidence that he has been supported throughout by the State.

27. The Judge has therefore taken into account the factors set out at [ix] of the headnote in MOJ. Paragraph [x] of the headnote is said to express the same point in a different way. However, since this is in reality the focus of the Respondent's complaint in the grounds, I turn to look at the relevance of the case-law to which I was taken.

28. In Said, the Appellant's mental health coupled with lack of family or social support in Somalia and lack of familiarity with the customs and traditions in Somalia had led the Tribunal to conclude that removal would breach Article 3. The Court of Appeal in allowing the Secretary of State's appeal observed at [19] of the judgment, that the highest Mr Said could put his case was that his mental health condition would make it difficult for him to integrate and for him to work. On the evidence there, the Court did not accept that this case was made out and also drew attention to the assistance which his family in the UK would be able to provide as well as the assistance he could obtain from his clan in Somalia.

29. Having directed its attention to what was said in MOJ, the Court of Appeal did not accept that, just because a person might end up in an IDP camp, that would automatically mean that Article 3 would be breached. As it said at [31] of the judgment, the individual circumstances of the person concerned must be considered. In the case of Mr Said, the Court held that the Tribunal's allowing of the appeal was in error because, due to the prospect of employment, clan support and availability of remittances from his family in the UK, "AS would have the financial wherewithal to establish himself in Mogadishu". The Secretary of State's appeal was therefore allowed.

30. I accept Mr Lay's submission that Said is distinguishable, both because of what is said about the evidence concerning Mr Said's mental health and also that he could look to family in the UK to provide financial support to establish himself in Mogadishu.

31. FY is closer to the facts of this case. However, I note what is said by the Court of Appeal in Said concerning the need for the facts of the individual case to be considered. I need therefore say no more about that case. I do note however the acknowledgement made on behalf of the Secretary of State in that case as recorded at [9] of the judgment that for the purposes of that appeal, if FY were to have to live in an IDP camp in Somalia there would be a real risk of a breach of Article 3. The Court observed that this concession was "inevitable" in light of MOJ (although that conclusion does appear to be somewhat at odds with what is said at [31] of the judgment in Said).

32. In my estimation, neither of the two cases to which I was referred alters my conclusion about the lawfulness of the Decision in this case.

33. For the reasons which I have set out, I do not accept that the Judge has failed to consider the guidance in MOJ in this case. His reasoning at [28] of the Decision points to various factors which are very obviously lifted from that guidance. That the Judge does not expressly consider the factor that the Respondent says is the important one does not amount to an error when one takes into account the medical evidence.

34. Put another way, even though the Judge does not expressly refer to it in these terms, if one looks at what is said at [xi] and [xii] of the guidance in MOJ, the Appellant falls within the ambit. The Judge was therefore entitled to reach the conclusion he did based on that guidance.

35. Nor can it be said that the Judge has failed to give adequate reasons. I accept Mr Lay's submission that the brevity of the Decision has to be considered in light of both the previous appeal and sensible concessions made on both sides as the Decision records. In any event, the Decision has to be read as a whole and if what is said at [28] is read in the context of the evidence and factual background, the reasons are certainly adequate to explain to the Respondent why she has lost.

36. For all of those reasons, the Judge was entitled to conclude that there would be a real risk to the Appellant of treatment contrary to Article 3 ECHR if deported to Somalia.

37. As I indicated at the outset, it was agreed by both representatives that if I accepted there was no error of law in relation to the Article 3 finding, the second ground falls away. I should say that if I had been considering only whether there was an error in relation to the Article 8 assessment, I would have found that ground to be made out. There is no consideration of the public interest in relation to the Appellant's extensive criminal offending. Mr Lay accepted that Agyarko and Razgar were probably not the most apposite cases against which to consider Article 8 in this case. It is though possible that the Judge could have reached the same conclusion even when weighing the force of the public interest against the impact on the Appellant given his background and mental health issues.

38. In light of the concession made by the Respondent, though, and my conclusion regarding the first ground, the error in that regard is immaterial. The Appellant cannot be removed to Somalia in breach of Article 3 ECHR. I therefore need say no more about the second ground.

39. For the above reasons, the Decision does not disclose a material error of law and I uphold the First-tier Tribunal's decision. I therefore uphold the Decision.

DECISION

The First-tier Tribunal Decision did not involve the making of an error on a point of law. I therefore uphold the Decision of First-tier Tribunal Judge S Lal promulgated on 30 November 2017 with the consequence that the Appellant's (MJ's) appeal remains allowed.

Signed Dated: 30 January 2018
Upper Tribunal Judge Smith