



IAC-FH-LW-V1

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

Appeal Number: RP/00142/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 20 August 2018
Extempore**

**Decision & Reasons Promulgated
On 03 September 2018**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

[H A]

~~(ANONYMITY DIRECTION NOT MADE)~~

Respondent

Representation:

For the Appellant: Mr L Tarlow, Home Office Presenting Officer

For the Respondent: Mr H Malik, Thompson & Co Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Aziz promulgated on 2 January 2018 in which he allowed the appeal of [HA] whom I refer to as "the respondent" against the decision of the Secretary of State made on 19 October 2017 to make a deportation order against him on the basis that he is a foreign criminal and been sentenced to a period of at least twelve months' imprisonment.

2. The Secretary of State's case is that following the conviction on 18 January 2017 at which the appellant was convicted of importing a Class C drug and was sentenced to twelve months' imprisonment, he was a foreign prisoner. It was also the Secretary of State's case that his refugee status was to be ceased as the circumstances and connection with which he had been recognised as a refugee had ceased to exist and thus he could not refuse to avail himself of the protection of the country of nationality.
3. The circumstances of the respondent's case are that he arrived in the United Kingdom in 2006 having been granted family reunion to join Fadumo Abdi Abdirahman and was granted indefinite leave to remain after his arrival. He entered in 2006 and was issued with a travel document, presumably as a refugee. There is no suggestion that he has returned to Somalia in the interim and it is to be noted that the respondent has in this case lived outside Somalia for a significant period after his birth. It appears that he in fact left the country when he was approximately 2 years of age. His case is that he could not return to Somalia, first of all arguing there had been no real change in the circumstances; and second, that owing to a tattoo on his chest he was at risk by groups such as Al-Shabaab. It is said also that the economic statement of the country is unstable, there is no prospect of improvement, and it was not reasonable to expect him to relocate to Mogadishu.
4. The judge directed himself that he should follow MOJ & Ors (Return to Mogadishu) Somalia CG [2014] UKUT 00442 (IAC). The judge heard evidence from the appellant's sister and submissions from both representatives. The judge directed himself with regards to cessation and set out the relevant law. He then set out the relevant cases and then turned at paragraph 55 to MOJ & Ors setting out in full the head note. The judge found, dealing in particular at [62] that the situation for an ordinary civilian after periods of absence that they will face no real risk of persecution or harm, but having had regard at [63] to in particular paragraphs (ix) and (x) of MOJ's head note, in assessing the evidence he found him to be credible, finding as his circumstances and the prospects of earning a livelihood, availability of remittances and means of support and ability to fund the journey, the sub-headings set out in (ix) that he accepted the respondent would have no family support, that he had no real prospect of securing access to a livelihood, he may not be able to avail himself the support of his clan, the only matter going against him is that he had been in receipt of some remittances, although he was not sure of their support because he has not discussed it with the family.
5. The judge also noted that he had been cross-examined on the financial circumstances and that he might be in receipt of some remittances, he was concerned about the level of them given the lack of resources of family in the UK and given that he had no prospect of securing access to a livelihood. The judge then concluded:-

"I am just persuaded that the appellant is able to make the argument that the circumstances in connection with which he had been recognised as a refugee have still not ceased to exist upon consideration and reliance on head note (ix) and (x) of MOJ and Others".

6. The Secretary of State then sought permission to appeal on a number of grounds. It is asserted first that the respondent had never been assessed as a refugee, it was said that there had never been a finding that he would be at risk in Somalia. Second, that the judge had erred in finding that the respondent would be unable to return to Somalia in that the judge had failed properly to engage with head note at (ix) and (x) of MOJ, it being averred that the judge fails to set out properly why the respondent could not receive remittances and had not shown why he could not return to Mogadishu, it being averred that he would receive the assistance he needs and may be in a better position in terms of him obtaining employment.
7. Finally, the Secretary of State stated she reserves the right to argue in these proceedings that the appellant is not a refugee, thus arguably Article 1C (5) and paragraph 339A(v) of the Immigration Rules are not engaged. Alternatively, that the appellant can lawfully be deported on grounds of public order set out in Article 32(1), and in any event there is no impediment to his deportation arising from the Human Rights Act.
8. Permission was initially refused by Designated Judge Shaerf but was granted by Upper Tribunal Judge Kebede on a renewed application. Judge Kebede stated: -
- “There is arguable merit in the assertion in the grounds that the judge’s decision was, in parts, arguably inconsistent with the guidance in MOJ & Ors (Return to Mogadishu) Somalia CG [2014] UKUT 00442, with particular reference to headnote (x) and the prospects of securing a livelihood.”
9. It is, appropriate to address initially the first and last grounds raised by the Secretary of State. First, if it is the Secretary of State’s case the appellant was not recognised as a refugee, then it begs the question of why he expressly stated that he had been recognised as a refugee in the refusal letters. If it is the Secretary of State’s case now that the respondent is not and never has been a refugee, then it is of course open to him to withdraw the decision and make a fresh decision on the basis that he was never granted refugee status, but that is not what the Secretary of State has done. Further, what is set out in paragraph 9 of the grounds, that the Secretary of State reserves the right to argue in these proceedings, makes little sense in that context. If that was the case then that is how he should have presented it in the first place. An appeal to the Upper Tribunal is not an opportunity for the Secretary of State to change his case from that put when to the First-tier Tribunal. , and finally it is difficult to see how Article 32(1) was engaged in any event in this case, given the procedural protections in article 32 (3).
10. The challenge brought by the Secretary of State is that the findings of fact are, in light of MOJ, perverse. I consider that there is merit in the submission by Mr Malik following on from FY [2017] EWCA Civ 1853 that what the Secretary of State is seeking to do is to attack the findings of fact which led to a conclusion with which the Secretary of State does not agree. As was noted in FY at [24]:
24. I agree with Mr Toal's principal submission that properly analysed this appeal is a straightforward attack upon findings of fact which led to a conclusion with which the SSHD does not agree. As has been said repeatedly in this court

and elsewhere, more usually when the appeal is by the individual to be deported, the courts will not interfere with findings of fact made by a specialist tribunal unless the findings are perverse. The findings here were not perverse. Looking at the case on the papers I think it likely that I would not have made the same finding in respect of FY's ability to obtain work as the FtT judge made and that may well have led me to a different conclusion but I am looking at the case on the papers only. The FtT judge had the advantage of seeing and assessing FY, an important advantage that should not be underestimated. The judgment of Lady Hale in *AH (Sudan) v Secretary of State for the Home Department* [\[2007\] UKHL 49](#), [\[2008\] AC 678](#) emphasises this issue at paragraph 31:

"... This is an expert tribunal charged with administering a complex area of law in challenging circumstances. To paraphrase a view I have expressed about such expert tribunals in another context, the ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field the tribunal will have got it right: see *Cooke v Secretary of State for Social Security* [\[2001\] EWCA Civ 734](#), [\[2002\] 3 All ER 279](#), para 16. They and they alone are the judges of the facts. It is not enough that their decision on those facts may seem harsh [I interpolate or generous] to people who have not heard and read the evidence and arguments which they have heard and read. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently."

11. Insofar as it could be argued that the reasons are inadequate, I bear in mind that both parties were aware of the material and the issues. Overall, and for the reasons set out below I conclude that it could not be said that the Secretary of State did not know why he lost the appeal. Further, and in any event, on a proper examination of the material, the judge's reasons can properly be deduced.
12. The judge in this case considered sequentially and in detail the sub-headings of paragraph (ix), as set out above. He noted that the respondent had not lived in Mogadishu since 1988 when he was 2 years old; that he is now 30 years old which is significant period of absence and would have no memories of the city of his birth; that he has no family left, and that although he belongs to one of the major clans, he does not feel he would be able to rely on them for assistance. He has lived outside Somalia for such a long time that he would be considered an outsider and this may limit any assistance which his clan may provide him. I find this finding has merit, given the unchallenged finding as to credibility, this is a sustainable finding. It was open to the judge to find, and he gave adequate reasons for finding there is a high risk that the appellant would be seen as an outsider, given his prolonged absence, and he would have difficulty in was a finding open to the judge on the evidence, as was the finding that it would be difficult for him to secure a livelihood despite him having worked in the United Kingdom given his lack of knowledge of the culture and norms of Somalia as his only real experience of Somalia culture is limited to the experience he has of growing up in a Somali family in the diaspora.

13. It was open to the judge to find, on the particular facts of this case that this situation would prejudice the appellant and would impact upon him securing a livelihood. It was also open to the judge on the evidence to make a finding that the remittances if they were such available, would be very limited given that the family in the United Kingdom are either studying or on benefits, and there was merit in the concern that the family would not be able to support him on a long-term basis given that most of them do not work.
14. The judge then found, in light of **MOJ**, that at paragraph 76, there was no clan or family support, he will not be in receipt of remittances and have no real prospect of securing access to a livelihood or face the prospect of living in circumstances falling below that which is acceptable in humanitarian protection terms.
15. I consider that the judge has adequately dealt with all the matters set out in paragraphs (ix) and (x) of the head note of **MOJ** and that on that basis his decision is sustainable. It follows from that as pleaded by the Secretary of State the decision did not involve the making of an error of law.
16. I do however find it necessary to record that there appears to have been no challenge in the grounds as to absence of whether there had in fact been a change in circumstances such that article 1(C) 5 was engaged. In essence, what the judge has done is to look at **MOJ** and look at the factors regarding the possibility of return, but has failed really to consider what the dangers are, that is to say it is difficult to see how the Refugee Convention is still met given the apparent absence of any nexus of any difficulties the appellant may face on return with the Convention, but as I have said during submissions that is not an error canvassed by Secretary of State argued in his grounds.

Notice of Decision

1. The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.
2. No anonymity direction is made.

Signed

Date 24 August 2018



Upper Tribunal Judge Rintoul