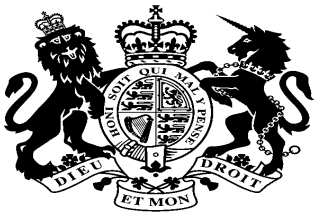

Upper Tribunal
(Immigration and Asylum Chamber) PA/12240/2018

THE IMMIGRATION ACTS

Heard at Glasgow
On 21 November 2019

Decision & Reasons Promulgated
On 28 November 2019

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ABDULRAHMAN MOHAMMED ALI

Respondent

For the Appellant: Mr A Govan, Senior Home Office Presenting Officer
For the Respondent: Mr U Aslam, of McGlashan MacKay, Solicitors

DETRMINATION AND REASONS

1. Parties are as above, but the rest of this determination refers to them as they were in the FtT.

2. FtT Judge Mrs Debra C Clapham allowed the appellant's appeal by a decision promulgated on 25 June 2019.

3. Permission to appeal to the UT was granted on grounds set out at [1 – 14] of the SSHD's application dated 5 July 2019.

4. Mr Govan referred at the outset to SB (refugee revocation; IDP camps) Somalia [2019] UKUT 00358 (IAC), published only recently.

5. Mr Aslam did not concede that SB shows that the FtT erred in its decision, but he accepted that although not available to the FtT, SB sets out the criteria by which its decision must now be assessed.

6. Mr Aslam showed in his submissions that parts of the SSSHD's grounds are badly taken. It is convenient to dispose of these first.

7. The decision was based to a large extent on an expert report by Professor Nurse, in turn based on a questionnaire sent to the appellant for completion through his representatives. The grounds at [7] suggest that the questionnaire might not have been completed by the appellant in presence of his representatives but "taken away to be completed at his leisure".

8. The report itself, and other materials which were before the FtT, show that the questionnaire was completed by the appellant in presence of his representatives in the manner prescribed by Professor Nurse. That information may not have been before the author of the grounds; as I understand it, applications for permission are prepared in a separate unit, with access to the decision but not to the complete file. Mr Govan did not mention this matter in his submissions, but the suggestion should not have found its way into the grounds in the first place, and should not have been left standing.

9. The grounds at [8] say that less weight should have been given to the evidence of a witness on the assumption that he had "not undergone the rigours of cross examination". There cannot be even a weak excuse for this ground, because the decision records the examination, cross-examination and re-examination of the witness in detail at [35 – 63]. Again, Mr Govan did not mention this matter in his submissions, but it should never have been in the grounds, nor been left there.

10. Mr Govan condensed the grounds into (1) error undermining the conclusion that the appellant is a Somali Bajuni, and (2) error in concluding at [98] that as a Somali Bajuni he faced "a real risk of having no alternative but to live in makeshift accommodation within an IDP camp", and so allowing the appeal "under s117 and article 3".

11. Mr Govan said, correctly, that if ground 1 was made out, ground 2 became irrelevant; but it is convenient to deal with ground 2 first, as it also requires a set aside, if made out, and its resolution is more obvious.

12. At [94] the judge said that applying MOJ & others (return to Mogadishu) Somalia CG [2014] UKUT 00442 the appellant could not succeed under the Refugee Convention "since relocation is now feasible". Mr Aslam accepted that no error could be suggested therein, as the authorities stood even before SB.

13. Despite valiant efforts by Mr Aslam, I find that conclusion irreconcilable with the conclusion at [98]. The outcomes are self-contradictory.

14. At [95-96] the judge finds that the appellant cannot meet the exceptions to deportation set out in paragraphs 399 and 399A of the immigration rules. The appellant suggests no error in that. Those conclusions appear to have been practically inevitable.

15. At [97] the judge turns to whether there are "very compelling circumstances in terms of s117 (c)". The reference should be to section 117C(6) of the 2002 Act, "very compelling circumstances over and above those described in exceptions 1 and 2", which is mirrored in paragraph 398 of the rules, "very compelling circumstances over and above those described in paragraphs 399 and 399A".

16. Such very compelling circumstances would also have to go beyond matters which had been held to defeat the Refugee Convention claim on grounds of relocation.

17. SB is headnoted thus:

> "(1) In Secretary of State for the Home Department v MS (Somalia) [2019] EWCA Civ 1345, the Court of Appeal has authoritatively decided that refugee status can be revoked on the basis that the refugee now has the ability to relocate internally within the country of their nationality or former habitual residence. The authoritative status of the Court of Appeal's judgments in MS (Somalia) is not affected by the fact that counsel for MS conceded that internal relocation could in principle lead to cessation of refugee status. There is also nothing in the House of Lords' opinions in R (Hoxha) v Special Adjudicator and Another [2005] UKHL 19 that compels a contrary conclusion to that reached by the Court of Appeal.
>
> (2) The conclusion of the Court of Appeal in Secretary of State for the Home Department v Said [2016] EWCA Civ 442 was that the country guidance in MOJ & Ors (Return to Mogadishu) Somalia CG [2014] UKUT 442 (IAC) did not include any finding that a person who finds themselves in an IDP camp is thereby likely to face Article 3 ECHR harm (having regard to the high threshold established by D v United Kingdom (1997) 24 EHRR 43 and N v United Kingdom (2008) 47 EHRR 39). Although that conclusion may have been obiter, it was confirmed by Hamblen LJ in MS (Somalia). There is nothing in the country guidance in AA and Others (conflict; humanitarian crisis; returnees; FGM) Somalia [2011] UKUT 445 (IAC) that requires a different view to be taken of the position of such a person. It will be an error of law for a judge to refuse to follow the Court of Appeal's conclusion on this issue.

18. It is the second headnote which is relevant to this case.

19. The decision at [98] turns on the appellant being at risk of having to live in an IDP camp, which (a) contradicts the finding at [95]; (b) was not in itself sufficient, in terms of MOJ; and (c) is plainly now not sufficient, in terms of SB.

20. Parties agreed that if set aside on ground 2, the case should be listed to enable both sides to lead such further evidence as they thought fit, and to make further submissions.

21. Ground 1 is less clear cut. Parts of it are not well taken, as dealt with above. Some parts are re-argument. Others are arguments that, as Mr Aslam pointed out, could have been advanced in the FtT. However, there was some force in the respondent's critique of the judge's treatment of the evidence from the appellant, both directly and through the medium of the report by Professor Nurse – in particular, that the more recent analysis had been accepted uncritically, with little reference to how the appellant presented himself at an earlier date.

22. It would be artificial and unworkable to evaluate evidence from the appellant about his prospects in Somalia without an overall assessment, beginning with his claim about his place of origin. The issues are inextricable. I do not limit the exercise by purporting to preserve any previous findings.

23. The decision of the FtT is set aside, and stands only as a record of what was said at the hearing.

24. The nature of the case is such that it is appropriate under section 12 of the 2007 Act, and under Practice Statement 7.2, to remit to the FtT for an entirely fresh hearing.

25. The member(s) of the FtT chosen to consider the case are not to include Judge Clapham.

26. The FtT would no doubt be assisted by written submissions, at least in outline, from both sides.

27. No anonymity direction has been requested or made.

Hugh Macleman

22 November 2019
UT Judge Macleman