



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

Appeal Number: RP/00102/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 26<sup>th</sup> July 2018 and 5<sup>th</sup> November 2018**

**Determination & Reasons Promulgated  
On 29<sup>th</sup> January 2019**

**Before**

**UPPER TRIBUNAL JUDGE COKER**

**Between**

**OA**

Appellant

**And**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr R Toal, instructed by Wilson solicitors LLP  
For the Respondent: Mr P Deller, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

**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 appellant in this determination identified as OA. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings**

1. The appellant is a Somali citizen, born in 1986. In August 2002 he was granted indefinite leave to remain as a refugee. He commenced his offending in March

2003. He was convicted of numerous motor vehicle/ driving offences/theft offences which resulted in a variety of sentences ranging from conditional discharge to imprisonment. Full details of his offending are set out in the decision of the First-tier Tribunal decision, promulgated on 9<sup>th</sup> May 2018. On 27<sup>th</sup> August 2014 he was sentenced to 16 months imprisonment and notified, for the fourth time, of the Secretary of State's intention to deport him. On 10<sup>th</sup> April 2015 the Secretary of State notified him of an intention to cease his refugee status. The decision to cease his refugee status on the basis that Article 1(C)(5) of the 1951 Refugee Convention and paragraph 339(A)(v) applied and refuse his human rights claim was made on 9<sup>th</sup> October 2015. There is no statutory appeal against a decision to cease refugee status. The lawfulness of that decision was not challenged in judicial review proceedings although any challenge is effectively incorporated into the appeal against the refusal of the claim for international protection and the human rights claim – Article 3 and 8. It is the appeal against this which led to these proceedings.

2. The First-tier Tribunal allowed the appellant's appeal on protection and human rights grounds (Article 3 and 8) for reasons set out in a decision promulgated on 9<sup>th</sup> May 2018. The Secretary of State sought and was granted permission to appeal and, in a decision promulgated on 30<sup>th</sup> August 2018, Upper Tribunal Judge Kopieczek found material errors of law and set the decision of the First-tier Tribunal aside to be remade. The essence of the errors of law found were:
  - Although the First-tier Tribunal found there was a real risk the appellant would be homeless and consequently at risk of discrimination, harassment and arrest she had not explained why those risks amounted to persecution;
  - The First-tier Tribunal judge failed to explain the connection between the real risk of persecution and a Convention reason.
3. In 2017 the appellant was convicted of carrying a bladed weapon and sentenced to 12 weeks imprisonment.
4. Before me the following findings were retained:
  - OA was born in 1986;
  - OA belonged to the minority Reer Hamar clan;
  - OA would be returning to Somalia a someone 'who has, in effect, cut all ties with Somalia from a young age. Any distant relatives or friends who remained in Somalia would be wary of offering assistance even if they were in a position to do so'. OA 'has no family or friends to whom he can turn for assistance in Somalia';
  - OA's mother would not be able to send much, if any, money to him in Somalia; it was unlikely that his siblings would assist financially. He would have 'minimal, if any, financial assistance';
  - OA was a former drug user who had 'some mental health problems' but would be unable to access the medication that he was receiving in the UK;

- He had no real employment history and limited qualifications and he would not be able to find employment or accommodation;
- OA would have difficulty gaining access to an IDP settlement which would result in him being homeless on the streets, having to sleep on the streets or to find an abandoned building;
- OA belongs to a particular social group namely a returnee with no connections to his clan and a member of the Reer Hamar clan

### Refugee Status

5. It is OA's case that the evidence and the preserved findings made by the First-tier Tribunal establish a real risk that he would suffer treatment amounting to being persecuted and it would be for his membership of the particular social group as identified by the First-tier Tribunal.
6. Physical integrity and the denial of access to the necessities of life with the risk of violation of socio-economic rights may amount to a risk of serious harm. In the Australian case of *Chen Shi Hai* (2000) 201 CLR 293 it was stated that the severe disadvantages imposed on the applicant "would deny the appellant basic entitlements enjoyed by other children in [China] and fundamental rights internationally enshrined in standards accepted as universal and basic...". At [303] the court said "Ordinarily, denial of access to food, shelter, medical treatment and, in the case of children, denial of an opportunity to obtain an education involve such a significant departure from the standards of the civilised world as to constitute persecution." As said by Hathaway<sup>1</sup>: "This is not to suggest, of course, that the relevance of socio-economic rights to the refugee enquiry means that everyone who is poor or who leads a life with few material advantages can successfully advance a claim to refugee status. The focus is rather on whether the risk to socio economic rights can be said to deny the person concerned that which is required for an "adequate" standard of living."
7. The Refugee Convention is engaged where there has been a breakdown in the ability of the State to provide the necessary protection between the individual and the State – persecution = serious harm + a failure of state protection. As discussed in Hathaway and the case law he refers to, and the caselaw to which my attention was drawn by Mr Toal, there must be a denial or lack of access or inability to provide access which has, as a consequence, (even though not the primary consequence) deprivation, hunger, lack of accommodation, lack of medical care.
8. Mr Toal submits that the appellant will be persecuted by reason of having no connection to his clan and/or for reason of his minority status. Were it not for that, the appellant would, Mr Toal submits be able to access sufficient resources to enable his socioeconomic rights not to be infringed such as to lead to the level of deprivation described. Underpinning the bleak assessment of the appellant's predicament and prospects on returning to Mogadishu is, Mr Toal submitted, the significance of having no effective clan ties. The Somali government has, Mr Toal submitted, failed to ensure a non-discriminatory

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<sup>1</sup> The Law of refugee Status, 2<sup>nd</sup> edition, p230

allocation of resources and has failed to ensure that lack of an effective tie to a clan is not a basis upon which resources are allocated or withheld. The primary source of the harm is not, he submits, the state, but the lack of an effective tie to his clan; the state does not have an effective mechanism to prevent, or at the very least, reduce, that serious harm from occurring. It is, he submits a failure of the State to ensure its international obligations to stop discrimination from occurring, in this case because the appellant has no effective tie to a clan which, as said in *MOJ*, now enables a form of social welfare support to be provided.

9. Although an attractive argument on its face, this does not address the requirements of the Refugee Convention and the Qualification Directive. In so far as it is relevant to Article 3 ECHR see below.
10. The submission by Mr Toal, in order to successfully establish sufficient nexus between the claimed persecution and the identified social group, requires the Somali authorities to undertake social engineering to change the way in which a clan provides the support he submits they should be providing in order to provide for protection, the lack of which would amount to persecution. The clan structure of Somalia has changed over the years, as set out in *MOJ & Ors (Return to Mogadishu) Somalia CG* [2014] UKUT 00442 (IAC), such that a role of the clans is now to assist in social welfare programmes or assistance. The clans no longer wage war and violence upon each other in search of influence, power and territory. It cannot be sustainably argued that for the Somali authorities to be responsible, they are to require a clan to build up its base in order to provide services as deemed appropriate and that the failure of a clan to undertake this lies with the Somali authorities. The corollary of that would be that the clan would provide legal and policing mechanisms, to enforce non-discrimination policies because to do otherwise would render such policy and provision meaningless and unenforceable. This has only to be said to show that the submission is not only circular (requiring the reintroduction of the power of the clans with the possible con-committant violence) but inherently contradictory. What is being demanded is social engineering, to an extent that cannot reasonably be expected, to require non-state agents to provide protection that the government is not providing.
11. In *AM & AM (armed conflict: risk categories) Somalia CG* [2008] UKAIT 00091, (considered in *HH (Somalia) & Ors v Secretary of State for the Home Department* [2010] EWCA Civ 426), the Tribunal considered the potential persecution of clan members. The change in clan activities was reflected in *MOJ*. In *AM and AM* the Tribunal held that the situation at that time in Mogadishu was such that it would amount to persecution, serious harm and ill treatment contrary to Article 3 to return anyone there unless they had close relationships with powerful actors<sup>2</sup>. [40] of *MOJ* acknowledged that *AM and AM* considered that the situation in Mogadishu was such that (in *parentheses*) it would be contrary to Article 1A(2) Refugee Convention to require anyone to return there save for those connected with powerful actors. This is a generalisation of the findings in *AM and AM*. At [201] in *AM and AM* the Tribunal found that persons who have “failed to show any personal risk characteristics

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<sup>2</sup> Summary taken from *MOJ* [35]

beyond their nationality and home area” cannot identify a Convention reason at that level. More was needed. But the emphasis in *AM and AM* was not protection as a refugee but Article 3 protection.

12. It is important not to conflate the elements required to enable a finding that a person is a refugee. That the finding that OA will be homeless and at risk of violence amounts to serious harm. That is not persecution without more. As I have set out above, in this appeal it was found that OA falls within a particular social group. But although a particular social group has been found to exist, what has not been established is that OA is at risk of being persecuted. That he will be homeless, without employment and likely to be a victim of violence is established given the findings of the First-tier Tribunal which have not been disturbed, but the causative link between that and his social group is not there. It would only be there if that group could itself be in the position of being able to and indeed expected to and required to provide a level of protection that could not exist without such a large scale of social engineering as would replace Somali authority with a clan-based authority answerable to no-one save other clan members. Even though the causal link does not have to be a primary or very significant link, there has to be some nexus. There is no causative link between the serious harm that OA will be likely to suffer and his membership of a particular social group. That he will not be able to access protection does not amount to persecution, as required in order to be recognised as a refugee.

### Article 3

13. Mr Toal submitted that the dire circumstances in which OA would find himself would amount to serious harm and a breach of Article 3. He relied upon the Tribunal’s country guidance decisions and submitted that the decision in *Said* [2016] EWCA Civ 442 in so far as it dealt with IDPs and article 3 was obiter and should not be followed because Burnett LJ, who gave the lead judgment, had failed to have regard to relevant country guidance. Mr Toal also, however, acknowledged that *Said* was a judgment of the Court of Appeal which has not been subsequently distinguished or rendered inapplicable.
14. The Court of Appeal identified the different basis of consideration for a refugee claim and a claim under Article 3 ECHR and confirmed that an appeal on Article 3 grounds which suggested that the person concerned would face poverty on removal should be viewed by reference to the test in *N v UK* (2008) 47 ECHR 39 which followed the House of Lords decision in *N* [2005] UKHL 31.
15. I do not agree that the references in *Said* were obiter – they were the fundamental issue before the Court of Appeal. As held [31]:

“I entirely accept that some of the observations made in the course of the discussion of IDP camps may be taken to suggest that if a returning Somali national can show that he is likely to end up having to establish himself in an IDP camp, that would be sufficient to engage the protection of article 3. Yet such a stark proposition of cause and effect would be inconsistent with the article 3 jurisprudence of the Strasbourg Court and binding authority of the domestic courts. In my judgment the position is accurately stated in para 422. That draws a proper distinction between humanitarian protection and article 3 and recognises that the individual circumstances of the person

concerned must be considered. An appeal to article 3 which suggests that the person concerned would face impoverished conditions of living on removal to Somalia should, as the Strasbourg Court indicated in *Sufi and Elmi* at para 292, be viewed by reference to the test in the *N* case. Impoverished conditions which were the direct result of violent activities may be viewed differently as would cases where the risk suggested is of direct violence itself.”

16. The expert report refers to OA being particularly vulnerable to violence. Mr Toal drew attention to the report’s conclusions that OA would be unlikely to gain access to an IDP camp, that there was a clear and significant risk of violence/detention by the police and societal response to drug abuse all constituted personal circumstances that crossed the threshold into article 3 mistreatment such as to fall within [31] of *Said*. The report records different views as to the risk of arrest or violence. Although they are expressions of opinion validly held, it is not possible to conclude from those opinions that the risk likely to be faced by OA would approach the threshold in *N*. I do not accept that the report can be seen as bringing, or potentially bringing, OA within the final sentence of [31] of *Said*.
17. In so far as reference was made to *MSS v Belgium and Greece* (2011) 53 EHRR 28, the Strasbourg Court decided there would be a violation of Article 3 because the dire conditions which MSS would face in Greece whilst his asylum claim was considered were the responsibility of the Greek authorities. As set out above, the responsibility for the conditions in Somalia do not lie with the Somali authorities.
18. Removal of OA to Somalia will not render him at risk of breach of Article 3.

**Conclusions:**

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law and is set aside.

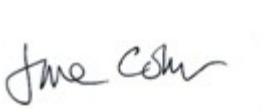
I re-make the decision in the appeal by dismissing it

**Anonymity**

The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Date 9<sup>th</sup> January 2019



Upper Tribunal Judge Coker