Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04808/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On Tuesday 10 March 2020	**On 14 April 2020**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

ISMAN AIDID AHMED

Respondent

Representation:
For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondent: Mr A Burrett, Counsel instructed by Duncan Lewis & Co

DECISION AND REASONS

BACKGROUND

1. This is an appeal by the Secretary of State for the Home Department. For ease of reference, I refer to the parties as they were before the First-tier Tribunal even though, strictly, the Secretary of State is the appellant before this Tribunal. The Respondent appeals against a decision of First-Tier Tribunal Judge M P W Harris promulgated on 17 October 2019 ("the Decision") allowing the Appellant's appeal on

humanitarian protection grounds against the Respondent's decision dated 7 February 2018 refusing his human rights claim. The claim and decision were made in the context of the Respondent's decision to deport the Appellant to Somalia or Somaliland. The Appellant's appeal had previously been allowed by First-tier Tribunal Judge Chana on Article 8 grounds but dismissed on humanitarian grounds. Both parties successfully appealed that decision and the appeal was remitted to the First-tier Tribunal for a de novo hearing, culminating in the Decision.

2. The Appellant is a national of Somalia who came to the UK in October 1997 and claimed asylum. His claim was refused but he was granted exceptional leave to remain until May 2004 and subsequently indefinite leave to remain. He committed a series of offences the details of which appear at [12] and [13] of the Decision. He suffers from medical conditions which are recorded at [46] to [51] of the Decision. The Judge accepted that certain of the Appellant's family members are deceased and he has no idea of the whereabouts of the remainder. The Judge also accepted that he has no contact with his ex-wife or children. The Appellant is accepted to be a member of the Midgan minority group. The Judge concluded that taking all the relevant factors together, the Appellant would "face …the prospect of living in circumstances falling below that which is acceptable in humanitarian protection terms in the manner identified in paragraph 408 of MOJ Somalia" ([104] of the Decision) The Judge also concluded that it would not be reasonable for the Appellant to relocate to Somaliland.

3. The Respondent appeals on two grounds. First, she says that the Judge in his finding at [104] of the Decision to which I refer above, has materially misdirected himself by failing to apply the correct legal test. The Respondent refers to the cases of Secretary of State for the Home Department v Said [2016] EWCA Civ 44 ("Said") at [18] and Secretary of State for the Home Department v MS (Somalia) [2019] EWCA Civ 1345 ("MS (Somalia)"). Second, she says that the Judge has failed to point to evidence that the Appellant would be at real risk of harm on return to Somaliland.

4. Permission to appeal was refused by First-tier Tribunal Judge Holmes on 6 November 2019 in the following terms so far as relevant:

> "… 3. The grounds complain, solely, that the Judge failed to apply the correct tests. That complaint is not made out: the Judge applied the current country guidance, and the decision that he made was open to him on the evidence before him, and was adequately reasoned. The Judge correctly viewed the Appellant's circumstances both in the event of return to Mogadishu, or, to Somaliland directly – but as identified there was no material difference to his prospects for supporting himself and accessing the medication he required.

> 4. The grounds disclose no arguable error of law in the decision as to where the balance of proportionality lay on the facts as they were found to be by the Judge."

5. Permission to appeal was subsequently granted by Upper Tribunal Judge Kekic on 17 January 2020 in the following terms so far as relevant:

> "... 3. There is arguable merit in the assertion in the respondent's grounds that the judge arguably misdirected himself in law in relation to the appellant's entitlement to humanitarian protection following the guidance in Secretary of State for the Home Department v MS (Somalia) [2019] EWCA Civ 1345, for the reasons given in both grounds. Both grounds are arguable."

6. The matter comes before me to decide whether the Decision does contain any error of law and, if I so conclude, either to re-make the decision or remit the appeal to the First-tier Tribunal for re-making.

DISCUSSION AND CONCLUSION

GROUND ONE

7. The passage in Said on which the Respondent relies reads as follows:

> "These cases demonstrate that to succeed in resisting removal on article 3 grounds on the basis of suggested poverty or deprivation on return which are not the responsibility of the receiving country or others in the sense described in para 282 of Sufi and Elmi, whether or not the feared deprivation is contributed to by a medical condition, the person liable to deportation must show circumstances which bring him within the approach of the Strasbourg Court in the D and N cases."

8. Leading on from Said and by reference to this Tribunal's country guidance in MOJ & Ors (Return to Mogadishu) Somalia CG [2014] UKUT 00442 (IAC) (MOJ (Somalia)), the Court of Appeal in MS (Somalia) said this:

> "75. In *Said v SSHD* this Court disapproved of paragraph 408 of the above guidance in so far as it purported to establish the circumstances in which removal to Somalia would infringe Article 3. Burnett LJ, with whom the other judges agreed, stated as follows:
>
> > '26 Paragraph 407(a) to (e) are directed to the issue that arises under article 15(c) of the Qualification Directive. Sub-paragraphs (f) and (g) establish the role of clan membership in today's Mogadishu, and the current absence of risk from belonging to a minority clan. Sub-paragraph (h) and paragraph 408 are concerned, in broad terms, with the ability of a

returning Somali national to support himself. The conclusion at the end of paragraph 408 raises the possibility of a person's circumstances falling below what 'is acceptable in humanitarian protection terms.' It is, with respect, unclear whether that is a reference back to the definition of 'humanitarian protection' arising from article 15 of the Qualification Directive . These factors do not go to inform any question under article 15(c) . Nor does it chime with article 15(b) , which draws on the language of article 3 of the Convention, because the fact that a person might be returned to very deprived living conditions, could not (save in extreme cases) lead to a conclusion that removal would violate article 3 .

27 The Luxembourg Court considered article 15 of the Qualification Directive in Elgafaji v Staatssecretaris van Justitie [2009] 1 WLR 2100 and in particular whether article 15(c) provided protection beyond that afforded by article 3 of the Convention. The answer was yes, but in passing it confirmed that article 15(b) was a restatement of article 3. At para [28] it said:

> 'In that regard, while the fundamental right guaranteed under Article 3 of the ECHR forms part of the general principles of Community law, observance of which is ensured by the Court, and while the case-law of the European Court of Human Rights is taken into consideration in interpreting the scope of that right in the Community legal order, it is, however, Article 15(b) of the Directive which corresponds, in essence, to Article 3 of the ECHR . By contrast, Article 15(c) of the Directive is a provision, the content of which is different from that of Article 3 of the ECHR, and the interpretation of which must, therefore, be carried out independently, although with due regard for fundamental rights, as they are guaranteed under the ECHR .'

28 In view of the reference in the paragraph immediately preceding para 407 to the UNHCR evidence, the factors in paras 407(h) and 408 are likely to have been introduced in connection with internal flight or internal relocation arguments, which was a factor identified in para 1 setting out the scope of the issues before UTIAC. Whilst they may have some relevance in a search for whether a removal to Somalia would give rise to a violation of article 3 of the Convention, they cannot be understood as a surrogate for an examination of the circumstances to determine whether such a breach would occur. I am unable to accept that if a Somali national were able to bring himself within the rubric of para 408, he would have

> established that his removal to Somalia would breach article 3 of the Convention. Such an approach would be inconsistent with the domestic and Convention jurisprudence which at para 34 UTIAC expressly understood itself to be following.'
>
> 76. By relying upon and applying paragraph 408 of the *MOJ* decision in determining whether there would be a breach of Article 3 ECHR the FTT accordingly applied the wrong legal test, as *Said v SSHD* makes clear."

9. In essence, the Respondent's ground one turns on a short point. It is said that, because Judge Harris did not apply the appropriate test in D and N, that renders all his findings in relation to humanitarian protection unsafe.

10. In response, Mr Burrett pointed out that, if all the Judge had done was to base his conclusions on paragraph [408] of the decision in MOJ (Somalia), that might be an error of law. The criticism made by the Court of Appeal of what is said at [407] and [408] of MOJ (Somalia) (which decision was not overturned by the Court of Appeal) is that a person cannot succeed under Article 3 ECHR simply because he ticks the boxes in relation to the factors at [407(h)]. The issue is whether removal will breach Article 3 ECHR when the evidence is considered as a whole. In this case, says Mr Burrett, the Judge considered those factors alongside all others including, of particular importance in this case, the impact of the Appellant's minority clan membership and medical condition. The issue is whether Article 3 ECHR is breached.

11. The Judge clearly recognised at [92] of the Decision that the burden of establishing an entitlement to humanitarian protection lies with an appellant and that the test is whether the Appellant can "show that there are substantial grounds for believing that if returned to Somalia, he would face a real risk of suffering serious harm and is unable or owing to such risk, unwilling to avail himself of the protection of that country." The Judge also took as his starting point that an "ordinary civilian" would face no real risk of harm. However, taking into account the evidence that the Appellant has no family or close relatives in Mogadishu, a place he left in 1992, and his mental health and minor clan membership, the Judge found at [99] of the Decision that "these factors establish substantial grounds for believing the appellant would be marginalized both socially and physically in Mogadishu making him more vulnerable in the manner identified in MOJ Somalia".

12. The Judge's findings in this regard include what he says about Dr Hoehne's report as regards both clan membership and the Appellant's medical condition at [63] to [83] of the Decision. In particular, Dr Hoehne opines as recorded at [67] and [69] of the Decision that the Appellant would "face severe discrimination" and "severe exclusion" based on his minority clan status. As recorded at [69] of the Decision,

Dr Hoehne's opinion is that there is "a real risk that the appellant will suffer from life-threatening poverty if he cannot secure extensive and permanent support from family".

13. In relation to the Appellant's medical condition, having concluded that the Appellant would have to pay for treatment in Somalia and that facilities in both Somalia and Somaliland are sub-standard, Dr Hoehne is recorded as saying the following about the conditions which the Appellant might face on return due to his condition:

> "80. In Somalia and Somaliland (auto-) aggressive persons with mental health issues are frequently incarcerated and chained. Among Somali society in general there is stigma related to mental illnesses. From his own observations during field research Dr Hoehne is of the view that people who are mentally ill are usually perceived as possessed by evil spirits or bewitched. Being mentally unfit carries a connotation of having done something wrong in the past and having been punished by god for that. See paragraph 66 of the report."

14. Having found on the evidence that the Appellant would not be in a position to rely on any financial remittances from others on return and that, due to the cost of medical treatment, he would not be able to secure such treatment and therefore would not find work on return, the Judge concluded, based on Dr Hoehne's report that "there is a high risk that the appellant as a minority clan member who has no family support on the ground and has been away from Somalia for the past 27 years, and who has mental health problems could fall destitute and then end up in an IDP camp, where conditions are very poor". That finding chimes with paragraph (xii) of the headnote in MOJ (Somalia) as follows:

> "… 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."

15. I accept as Mr Burrett submitted, therefore, that the reasoning which lies behind the Judge's conclusions that the Appellant succeeds on humanitarian protection grounds is not simply based on [407] and [408] of MOJ (Somalia) but takes into account all factors including the stigma and discrimination which the Appellant would face on return.

16. The Respondent has not demonstrated that the Decision contains any error of law based on her ground one.

GROUND TWO

17. That then brings me on to the Respondent's ground two which reads as follows:

> "At para [86] Judge Harris notes:
>
> > 'No doubt in light of the decision in YS and HA and the opinion of Dr Hoehne, the appellant does not argue that in any part of Somalia he is at real risk of serious harm by reason of being a member of the Midgan minority clan.'
>
> Judge Harris goes on to consider the report from Dr Hoehne's and notes and para [114] the discrimination that the Appellant may face on return to Somaliland. However, it is submitted that Judge Harris in his findings has failed to point towards evidence to suggest that such level of discrimination is at the required level to render the Appellant at real risk of harm even when taking into consideration the Appellant's mental health which has not been suggested to be at a critical stage."

18. In light of the preceding discussion under ground one, I can deal with this ground very shortly. What is recorded about Dr Hoehne's evidence at [67] and [69] of the Decision relates to both Somalia and Somaliland. Similarly, paragraph [80] which I set out above relates to both places.

19. It was also suggested by Mr Whitwell orally (if I understood his submission correctly) that it was no part of the Appellant's case that he would suffer discrimination based on his minority clan membership. I reject that submission for two reasons. First, Dr Hoehne has addressed the relevant circumstances of the Appellant's case as he sees it. The fact that the Appellant had not expressly raised this as part of his human rights claim is neither here nor there. He has not lived in Somalia or Somaliland for over two decades and might not therefore know what the circumstances are there for members of his clan. He did in fact raise this in his initial asylum claim. Second, and in any event, this is not a complaint made within the Respondents' pleaded grounds of appeal. The Judge was therefore entitled to rely on what was said at [49] and [50] of Dr Hoehne's report.

20. Taking ground two as pleaded, therefore, the Judge considers the position specifically relating to Somaliland from [105] of the Decision and it is important to record the starting point of the Judge's consideration as follows:

> "105. That said, a person will not qualify for humanitarian protection if in part of the country of return the person would not face a real risk of suffering harm <u>and the person can reasonably be expected to stay in that part of the country</u>."
>
> [my emphasis]

21. It is important to note therefore that what the Judge is there considering is a slightly different issue, namely whether the Appellant can be expected to internally relocate to Somaliland. It is for that reason that, when reaching his conclusions at [119] of the Decision, the Judge says this:

> "119. Weighing up the matters before me, I find that in the particular circumstances of the appellant it would not be reasonable for him to relocate to Somaliland. It is not argued by the respondent that there is any other place in Somalia to which it is reasonable for the appellant to relocate."

22. Properly understood in that context, therefore the Judge's conclusions contain no error of law based on the reasons given at [110] to [118] of the Decision.

CONCLUSION

23. For the above reasons, I am satisfied that there is no material error of law disclosed by the grounds of appeal. I therefore uphold the Decision with the consequence that the Appellant's appeal remains allowed.

DECISION

I am satisfied that the Decision does not contain a material error of law. I uphold the decision of First-tier Tribunal Judge M P W Harris promulgated on 17 October 2019 with the consequence that the Appellant's appeal stands allowed

Signed Dated: 19 March 2020
Upper Tribunal Judge Smith