Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00131/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22nd January 2020	**On 4th February 2020**

Before

THE HONOURABLE LORD UIST
and
UPPER TRIBUNAL JUDGE MANDALIA

Between

IMA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Sellwood, Counsel instructed by Wilson Solicitors LLP
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. The First-tier Tribunal ("F*t*T") made an anonymity direction and it is appropriate to continue that direction. 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

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of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

2. The appellant is a national of Somalia. His appeal against the respondent's decision that his entitlement to refugee status has ceased, that he is excluded from the protection of the Refugee Convention and that his deportation to Somalia will not be in breach of his human rights, was allowed on Article 3 grounds only by First-tier Tribunal Judge Bart-Stewart ("the judge") for reasons set out in a decision promulgated on 15th October 2019.

3. The appellant appeals the decision of the judge that the respondent is entitled to invoke Article 1C(5) of the Refugee Convention such that notwithstanding the previous grant of refugee status to the appellant, the Refugee Convention ceases to apply to him. Permission to appeal was granted to the appellant by Upper Tribunal Judge Kebede on 13th November 2019. There is a cross-appeal by the respondent against the decision to allow the appeal on Article 3 grounds. Permission to appeal was granted to the respondent by First-tier Tribunal Judge Beach on 16th December 2019.

<u>The decision of First-tier Tribunal Judge Bart-Stewart</u>

4. The judge refers to the background, including the appellant's immigration history and his criminal convictions at paragraphs [3] to [7] of her decision. The Judge noted the appellant was convicted at Wood Green Crown Court of two counts of possession/control of identity documents with intent and sentenced to 3 months imprisonment. He was also convicted of five counts of dishonestly making false representations to make gain for himself or another. On 5th June 2017 he was sentenced to 27 months imprisonment concurrent on each count, but consecutive to the three-month sentence of imprisonment, making a total of two years and six months imprisonment.

5. The judge referred to the previous grant of refugee status at paragraph [13] of her decision, noting in particular:

> "… The appellant was 14 at the time of application. He stated he is from Mogadishu and faced persecution Somalia *(sic)* as a member of the Reer Hamar-Faqi minority clan. The claim was accepted, and he was granted refugee status…."

6. The judge noted the respondent had contacted the UNHCR inviting comments regarding the intention to revoke the appellant's refugee status, and at paragraphs [17] to [23] the judge set out the response from the UNHCR. At the hearing of the appeal the judge heard evidence from the appellant, his sister, and two brothers. Their evidence is set out at paragraphs [41] to [60] of the decision.

7. The judge's findings and conclusions are set out at paragraphs [62] to [93] of the decision. The judge noted, at paragraph [64], that the first issue for determination is the presumption under section 72(2) of the Nationality, Immigration and Asylum Act 2002. The appellant's conviction on 24th August 2017 and sentence of two years and six months imprisonment imposed on 5 June 2017 was not challenged. The judge rejected the appellant's claim that he had not been convicted of a 'particularly serious crime' for reasons set out at paragraph [66] of her decision. The judge went on to consider whether the appellant constitutes a danger to the community of the United Kingdom. For reasons set out at paragraphs [68] to [73], the judge found the appellant does not constitute a danger to society and concluded the appellant had rebutted the presumption in s72(2) and could not be excluded from protection under the Refugee Convention.

8. The judge nevertheless went on to consider the respondent's decision relying upon Article 1C(5) of the Refugee Convention. The judge referred to the previous grant of refugee status and summarised the appellant's claim as put before the First-tier Tribunal at paragraph [75] of her decision:

> "The appellant was granted refugee status because of his own experiences in his home country Somalia. The Secretary of State accepted that the appellant and his family are members of the Reer Hamar minority clan who at the time were at risk from majority clan members and had no protection. The appellant's evidence is that he and the rest of his family left Somalia and fled to Ethiopia when he was eight years old. Some members remain in Ethiopia and others in Kenya. The majority of his siblings are in the UK, providing financial assistance to his parents and siblings in Ethiopia. There is no suggestion that any of these family members have returned to Somalia. There is no evidence of any direct family members there. The Secretary of State's position is that there has been a durable change in Somalia and protection is available to the appellant."

9. The judge referred to the country guidance set out in MOJ & Others, and at paragraph [79], noted the appellant's claim that the country guidance should not be followed, and the appellant's reliance upon the expert report of Dr Hoehne dated 16th September 2019. The evidence set out in the expert's report is referred to at paragraphs [79] to [86] of the decision. Insofar as Article 1C(5) is concerned, at paragraphs [87] to [89], the judge concludes as follows:

> "87. Dr Hoehne accepts that in line with case law the individual circumstances of the returnee must be considered. The appellant is now 35 years old. He has been away from Somalia for most of his life. I find no reason to reject his evidence that he has no direct family in Somalia. While his siblings will not be able to provide regular remittances, the appellant has his uncle whom he said was his guardian, is a businessman and travels regularly to Kenya. Even if his siblings were unable to assist, they are evidently a close family and I am satisfied that they would provide assistance to their brother in the short or long term as they have been doing for their other relatives who have lived regularly in Ethiopia for very many years.
>
> 88. The appellant also has academic qualifications which he obtained at school and college. His evidence is that he also applied himself to study whilst he was imprisoned. He obtained functional skills qualifications in English and ICT and completed an e-learning course in personal finance. He completed a resettlement workshop a year ago and held paid employment in prison. He was working in the UK until 2008. It was his drug and alcohol abuse that prevented him returning to work at that time. He said that he is no longer abusing drugs and alcohol. He is familiar with the language and although he is now experiencing some mental health issues, there is insufficient evidence to suggest that this would prevent him from working. Although there is little supporting evidence in respect of his mental health condition, from an early stage he had also mentioned to the Offender Manager his depression and insomnia from which he has suffered from *(sic)* many years and recollection of things that he saw there.

> 89. The number of killings of civilians has increased and the risk of indiscriminate killing is high. The UNHCR and Dr Hoehne provide objective country information to demonstrate that Al-Shahaab continue to be a threat. I accept that there is the possibility of the appellant securing access to a livelihood in Somalia but that is not the same as any real likelihood when he does not have any initial contacts or sources of initial support or accommodation. He left Somalia as a child and is unlikely to have any real knowledge of life there. I do not accept the assertion in the decision letter that having left at the age of 14 he would still have initial social networks in Somalia. I am satisfied that the appellant would face the prospect of living in circumstances falling below that which is acceptable in humanitarian protection terms. Consequently I find that the Secretary of State is entitled to invoke Article 1C(5) in the particular circumstances and deportation would not breach the Refugee Convention."

10. The judge addressed the Article 3 and 8 claims at paragraphs [90] to [93] of her decision. The judge found, at paragraph [91], the evidence is enough to show a serious and individual threat to the appellant by reason of indiscriminate violence in or around Mogadishu or other parts of southern Somalia. At paragraph [92] of her decision, the judge noted there was little evidence of a formal diagnosis in respect of the appellant's mental health. The judge concluded:

> "…as the appellant has now initial former *(sic)* support in Mogadishu and in light of the circumstances described there by Dr Hoehne, I consider it likely that the appellant would be destitute or find himself in an IDP camp. I accept the submission that there would be a real risk of violation of Article 3 if the appellant was deported to Mogadishu."

11. The judge did not expressly consider Article 8, but stated, at paragraph [93], that for similar reasons she finds there are very significant obstacles to the appellant's reintegration into Somalia and there are very compelling circumstances over and above those set out in paragraph 399 of the Immigration Rules that outweighs the public interest in the appellant being deported from the UK.

The appeal before us

12. On behalf of the appellant, Mr Sellwood submits that, although the judge refers to the decisions of the Court of Appeal in SSHD v MA (Somalia) [2018] EWCA Civ 994 and SSHD -v- MS (Somalia) [2019] EWCA Civ 1345,

the judge failed to adopt the 'mirror image' approach that must be applied.

13. Mr Sellwood submits the judge relied upon the country guidance set out in MOJ & Others, but fails to give any or any adequate for reasons rejecting the submission made on behalf of the appellant that the judge should depart from the country guidance in view of the expert evidence of Dr Hoehne, that the judge appears to accept. It is said that in considering whether there has been a significant and non-temporary change in circumstances in Somalia, the judge failed to consider all the country material, including the respondent's CPIN, the report of Dr Hoehne and the position advanced by UNHCR.

14. In reply to the respondent's cross-appeal, Mr Sellwood submits it was open to the judge to allow the appeal on Article 3 grounds, and in doing so the judge had regard to all of the appellant's circumstances including *inter alia* the fact that he belongs to a minority clan, the absence of any direct family in Mogadishu, the length of his absence from Mogadishu, and, the absence of any initial contacts or sources of initial support and accommodation. Mr Sellwood submits the judge reached her decision following a careful assessment of the appellant's personal circumstances and not simply because the appellant would find himself in an IDP camp.

15. On behalf of the respondent, Mr Tufan submits there is a fundamental error in the conclusion reached by the judge regarding the Article 3 claim. The judge appears to allow the Article 3 claim on the premise that the appellant will be destitute upon return to Mogadishu and find himself in an IDP camp. He submits the judge made contradictory findings and failed to give clear reasons for the conclusion that the deportation of the appellant to Somalia would be in breach of Article 3. He submits the judge found at paragraph [87], that whilst the appellant's siblings will not be able to provide regular remittances, the appellant has an uncle who is a businessman and travels regularly to Kenya. The judge found that even

if the appellant's siblings were unable to assist, they are evidently a close family and the judge was satisfied that they would provide assistance to the appellant in the short or long term as they have been doing for their other relatives. The judge also noted, at paragraph [88], the appellant has academic qualifications, functional skills qualifications and experience from his employment in the past. The judge noted the appellant is familiar with the Somali language, and at paragraph [89], accepted that there is a possibility of the appellant securing access to a livelihood in Somalia, albeit qualified. Mr Tufan submits those findings are difficult to reconcile with the judge's conclusion at paragraph [92], that the appellant would be destitute or find himself in an IDP camp. Mr Tufan submits there is no reason why the appellant would not be able to secure a livelihood in Mogadishu in light of the findings made and the evidence of an economic boom in Mogadishu in any event. Mr Tufan submits that evidence of some discrimination is insufficient to establish an Article 3 claim.

16. In reply to the appellant's appeal, Mr Tufan accepts the closing sentence of paragraph [89] of the decision is somewhat confusing and makes little sense, but he submits that the country guidance set out in MOJ & Others demonstrates that there has been a durable and non-temporary change in Somalia particularly insofar as members of minority clans are concerned. He submits the judge carried out an analysis of the evidence, including the views of UNHCR and the opinion expressed by the expert, and reached a decision that was open to her.

Discussion

17. In our judgment the decision of First-tier Tribunal Judge Bart-Stewart is vitiated by material errors of law and must be set aside. We allow the appellant's appeal and the cross appeal by the respondent so that the appropriate course is for the appeal to be reheard with no findings preserved.

18. The judge appears to have considered the evidence that was before the Tribunal at some length. The judge states at paragraph [89] that she was satisfied that the appellant would face the prospect of living in circumstances falling below that which is acceptable in humanitarian protection terms. She concludes; "*Consequently, I find that the Secretary of State is entitled to invoke Article 1C(5) the particular circumstances and deportation would not breach the Refugee Convention".* As Mr Tufan candidly accepts, the ultimate conclusions set out in paragraph [89] make little sense. In our judgment it is entirely unclear what the judge had in mind and the test that she was addressing.

19. The Refugee Convention makes provision for refugee status to end in certain circumstances. Article 1C(5) of the Refugee Convention states:

> "C: This Convention shall cease to apply to any person falling under the terms of section A if:
>
> …
>
> (5) He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality …"

20. In SSHD -v- MA (Somali) Arden LJ made clear that there should be a symmetry between the grant and cessation of refugee status. The proper approach to the 'cessation' decision was held to be:

> "…A cessation decision is the mirror image of a decision determining refugee status. By that I mean that the grounds for cessation do not go beyond verifying whether the grounds for recognition of refugee status continue to exist. Thus, the relevant question is whether there has been a significant and non-temporary change in circumstances so that the circumstances which caused the person to be a refugee have ceased to apply and there is no other basis on which he would be held to be a refugee…."

21. The Court of Appeal held that a State seeking to terminate a person's status as a refugee did not have to investigate whether there would be a violation of Article 3 if the refugee was returned to their country of origin. All that is required, on a proper construction of Abdulla -v- Germany (C-175/08), is for the circumstances leading to the grant of refugee status to

have ceased to exist such that it could be described as 'significant and non-temporary' within the terms of article 11(2) of the Qualification Directive. At paragraph [47] Arden LJ stated:

> "....there is no necessary reason why refugee status should be continued beyond the time when the refugee is subject to the persecution which entitled him to refugee status or any other persecution which would result in him being a refugee, or why he should be entitled to further protection. There should simply be a requirement of symmetry between the grant and cessation of refugee status"

22. It is now well established that whilst it is an error of law to fail to follow a country guidance case, unless there is a good reason explicitly stated for not doing so, equally, where a reason for not following a country guidance case is put forward the decision maker is bound to consider it, and a failure to do so would be an error of law. The judge was plainly entitled to have regard to the country guidance set out in MOJ & Others, and in reaching her decision had regard to the opinions set out the expert report of Dr Hoehne. There is no duty on a judge in giving reasons to deal with every argument presented by a party in support of thier case. It is sufficient if what is said in the decision demonstrates the basis on which the judge reached the decision. Here, whatever was in the mind of the judge when reaching her conclusions at paragraph [89], we simply cannot be satisfied that the judge addressed the question that arises when the respondent has made a decision to revoke refugee status, that is, whether there has been a significant and non-temporary change in circumstances so that the circumstances which caused the appellant to be a refugee have ceased to apply, and there is no other basis on which he would be held to be a refugee. The question was not whether the appellant would face the prospect of living in circumstances falling below that which is acceptable in humanitarian protection terms. As Arden LJ confirmed in MA Somalia), humanitarian standards are not the test for a cessation decision.

23. In our judgment, having concluded that the respondent was entitled to revoke the refugee status of the appellant, in reaching her decision to

allow the appeal on Article 3 grounds, the judge again fell into error. The judge found the appellant has been away from Somalia for most of his life and accepted that he has no direct family remaining in Somalia. The judge also accepted that the appellant left Somalia as a child and is unlikely to have any real knowledge of life there. However, the judge also found that the appellant's siblings would provide assistance to the appellant in the short or long term and the appellant has academic qualifications and other skills including experience of paid employment. The judge found the appellant is familiar with the Somali language and that there is at least the possibility of the appellant securing access to a likelihood in Somalia, albeit the judge qualified that finding by saying that is not the same as any real likelihood when he does not have any initial contacts or sources of initial support or accommodation. In the end, the judge considered it likely that the appellant would be destitute or find himself in an IDP camp. The conclusion that the appellant would be destitute is at odds with the finding that the appellant's siblings would provide assistance to the appellant as they have been doing for their other relatives living in Ethiopia.

24. Insofar as the judge reached her decision on the premise that the appellant would find himself in an IDP camp, as the basis for a successful Article 3 claim, in our judgment, she fell into error. The judge acknowledged, at paragraph [77], that the Court of Appeal considered the country guidance at paragraph 407 – 408 of MOJ & Others was the wrong legal test. That is undoubtedly correct. The guidance, as the parties both acknowledge, was disapproved by the Court of Appeal in Said -v- SSHD [2016] EWCA Civ 422 in so far as it purports to establish the circumstances in which removal to Somalia would infringe Article 3. In MS (Somalia), Hamblen LJ stated at paragraph [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."

25. The country guidance in MOJ makes clear that it will be for the person facing return to explain why he would not be able to access the economic opportunities that are being produced by the economic boom in Mogadishu and it will 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.

26. It is well established that the nature of the prohibition imposed on States by Article 3 ECHR is absolute, irrespective of the conduct of the individual. It is however difficult to discern from the reasons set out at paragraphs [91] and [92] any rational basis upon which the judge allowed the Article 3 claim beyond her conclusion that the appellant would be destitute or find himself in an IDP camp. There was no evidence before the FtT that the appellant has no real prospect of securing access to a livelihood. In fact the judge had found, at paragraph [88], that the appellant's siblings would provide assistance to the appellant, and at paragraph [89], that there is at least the possibility of the appellant securing access to a livelihood in Somalia.

27. We are satisfied the decision of the judge is infected by material errors of law. As to the disposal of the appeal, as we allow both the appeals before us, we have decided that it is appropriate to remit this appeal back to the First-tier Tribunal, having considered paragraph 7.2 of the Senior President's Practice Statement of 25th September 2012. In our view, in determining the appeal, the nature and extent of any judicial fact-finding necessary, will be extensive. The parties will be advised of the date of the First-tier Tribunal hearing in due course.

Decision:

The decision of First-tier Tribunal Judge Bart-Stewart promulgated on 15th October 2019 is set aside and matter is remitted for rehearing before the First-tier Tribunal with no findings preserved.

Signed Date 23rd January 2020

The Hon. Lord Uist
and
Upper Tribunal Judge Mandalia