Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/00616/2020

THE IMMIGRATION ACTS

Heard at Field House
On 24 June 2021

Decision & Reasons Promulgated
On 12 August 2021

Before

UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DDA
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr T Lindsay, Senior Home Office Presenting Officer
For the Respondent: Mr M Aslam, Counsel, instructed by Aden & Co Solicitors

DECISION AND REASONS

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the respondent is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their 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.

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1. This is a re-making of DDA's appeal under Articles 3 and 8 ECHR. The re-making is required following my error of law decision dated 11 March 2021 which set aside the decision dated 6 April 2020 of First-tier Tribunal Judge Flynn.

2. For the purposes of this decision, I refer to DDA as the appellant and to the Secretary of State for the Home Department as the respondent, reflecting their positions before the First-tier Tribunal.

3. DDA is a citizen of Somalia born in 1962. He came to the UK on 12 May 1998 and applied for asylum two days later. That claim was refused on 27 June 2000 but he was granted limited leave to enter until 27 June 2004. The appellant applied for indefinite leave to remain (ILR) on 10 June 2004 and on the same day made a further application for asylum.

4. The appellant's application was refused on 16 February 2007, the respondent finding that he was excluded from the protection of the Refugee Convention by operation of Article 1F(a). The basis of the application of Article 1F(a) was that the appellant had been a high-ranking army officer in the Siad Barre regime and failed to show that he was not directly involved in the widespread and serious human rights abuses committed by the regime.

5. The appellant appealed against the decision of 16 February 2007 but his appeal was refused by a First-tier Tribunal panel in a decision issued on 17 August 2007. The First-tier Tribunal found that the appellant should be excluded from the protection of the Refugee Convention on the basis of Article 1F(a); see paragraphs 95 and 99 of the decision of 17 August 2007. It was not accepted that he was from a minority clan. The Tribunal concluded that the appellant had not shown that he qualified for leave under Article 3 or Article 8 ECHR. The appellant became appeal rights exhausted on 12 November 2007.

6. The appellant made further submissions on 13 January 2016. In a decision dated 10 January 2020 the respondent found that the further submissions did not show that the appellant was entitled to leave under Articles 3 or 8 of the European Convention on Human Rights (ECHR). The appellant appealed that decision and First-tier Tribunal Flynn allowed his appeal in the decision dated 6 April 2020.

7. The respondent appealed against the decision of the First-tier Tribunal and was granted permission by the First-tier Tribunal on 3 June 2020. As above, after a hearing on 22 February 2021, in a decision issued on 11 March 2021 I found an error of law and set aside the decision of the First-tier Tribunal to be re-made in the Upper Tribunal.

8. The parties were in agreement that the re-making of the appeal was limited to the question of whether the appellant is entitled to leave under Articles 3 or 8 of the ECHR.

9. There was also agreement that the findings of the First-tier Tribunal on the appellant's profile are extant; see paragraphs 26 and 27 of the error of law decision dated 1 March 2021.

10. The settled profile of the appellant is therefore as follows. He has been in the UK for 23 years, having left Somalia in 1998. He has no family or contacts there. He is from a minority clan. He would not be likely to obtain meaningful support from his clan members. He receives practical support and pocket money from friends in the UK but if he returned to Somalia he would not have sufficient support to meet his daily needs; see paragraphs 44 and 45 of the First-tier Tribunal decision. He would be likely to have to live in an Internally Displaced Person (IDP) camp in extremely poor conditions; see paragraph 42 and 49 of the First-tier Tribunal decision.

11. Further, the appellant has been diagnosed with chronic Hepatitis B and latent tuberculosis. He also has a back injury. He has been unable to work in the UK for some years as a result of these conditions. Concerning his diagnosis of chronic Hepatitis B and latent tuberculosis, in a letter dated 27 October 2015, Dr MacJannette of the KS Medical Centre indicated that:

> "Mr A was referred to the Gastroenterology department at Ealing Hospital in November 2010 with blood tests having shown evidence of hepatitis B infection.
> Having had initial blood tests and an upper GI endoscopy in 2013, he was referred on to Professor Ash, Infectious Diseases Specialist at Ealing Hospital, with a working diagnosis of chronic hepatitis B with high viral replication.
> Following on from this, Mr A has been reviewed on a number of occasions by the Gastroenterology service with blood tests to monitor his hepatitis B viral count and screen for the emergence of liver cancer, and ultrasound scans, which have so far shown a degree of fatty liver. He was counselled regarding alcohol when first assessed by the service and at the last review on 6th July, he had been abstinent from alcohol. As of December 2014, his liver function blood tests were normal and hepatitis B viral load 140.000- reflecting a reduction in his viral load.
> To date, Mr A has not been given any specific antiviral treatment for his hepatitis but is being actively monitored to gauge the status of his illness.
> It is difficult to offer an accurate idea of the prognosis of his chronic hepatitis B infection. Whilst it is likely that he will remain well and not require any treatment, there is a possibility that the disease may become more active and that he may at some stage require antiviral treatment – hence the importance of periodic monitoring of blood tests and Gastroenterology follow up. His ultrasound scan did not show any evidence of cirrhosis (scarring) and this is a positive sign as far as chronic viral hepatitis is concerned.
> Nevertheless he remains at a much higher risk of hepatocellular cancer compared to someone without the condition and it is for this reason that ongoing surveillance is important.
> I am unaware of what facilities exist in other countries, and specifically, Somalia, for specialist monitoring/treatment of his conditions, however I would of course urge that if there is any risk to a break in continuity of his monitoring, it would be best that he remains in the UK in order to pursue this."

12. In a further letter dated 4 December 2019, Dr MacJannette states:

"i) Mr A has chronic Hepatitis B and latent tuberculosis, for which he had been on treatment with rifampicin 600mg daily as of January 2019 with only one further month of treatment to complete at this time. He is under periodic review with the Ealing Hospital infectious diseases clinic in regard to his chronic Hepatitis B. My understanding is that his Hepatitis B is a chronic infection for which he will require long term follow up and monitoring, potentially also treatment, should his condition deteriorate.

ii) Continuity of follow up is of course extremely important in order to detect any changes at an early stage to be able to intervene effectively. Hepatitis B infection increases risk of liver scarring or cirrhosis which could significantly impact quality of life and even survival, and can also ultimately give risk to hepatocellular carcinoma i.e. liver cancer, with even more adverse consequences.

iii) Mr A was seen last month and described sleeplessness and worry in relation to his asylum status. It is likely that removal from the UK would have a detrimental impact on his mental and potentially physical health in this regard, especially in terms of anxiety symptoms."

13. Also, the First-tier Tribunal accepted the evidence of the country expert, Professor M I Aguilar on the availability of medical treatment in Somalia. The First-tier Tribunal accepted that the medical treatment the appellant would need for the rest of his life was not available in Somalia even if he could pay for it; see paragraphs 36, 45 and 47 of the First-tier Tribunal decision. Those paragraphs also indicated that the testing regime he required could only be obtained in liaison with private hospitals outside Somalia, for example, in Nairobi. Given his profile as a minority clan member with no family or contacts in Somalia, as someone with no financial support and who could not work because of his medical conditions, the appellant would not be able to pay for treatment.

14. The respondent did not challenge opinion of Dr Aguilar on medical treatment or other issues addressed in his report before the First-tier Tribunal or before me. That was an understandable approach where the expert's views were consistent with the country materials on Somalia, including the conclusions in the country guidance case of MOJ & Ors (Return to Mogadishu) Somalia CG [2014] UKUT 00442 (IAC). Relevant to the circumstances of this appellant, the head note to MOJ sets out:

(vii) A person returning to Mogadishu after a period of absence will look to his nuclear family, if he has one living in the city, for assistance in re-establishing himself and securing a livelihood. Although a returnee may also seek assistance from his clan members who are not close relatives, such help is only likely to be forthcoming for majority clan members, as minority clans may have little to offer.

(viii) The significance of clan membership in Mogadishu has changed. Clans now provide, potentially, social support mechanisms and assist with access to livelihoods, performing less of a protection function than previously. There are no clan militias in Mogadishu, no clan violence, and no clan based discriminatory treatment, even for minority clan members.

(ix) *If it is accepted that a person facing a return to Mogadishu after a period of absence has no nuclear family or close relatives in the city to assist him in re-establishing himself on return, there will need to be a careful assessment of all of the circumstances. These considerations will include, but are not limited to:*

- *circumstances in Mogadishu before departure;*
- *length of absence from Mogadishu;*
- *family or clan associations to call upon in Mogadishu;*
- *access to financial resources;*
- *prospects of securing a livelihood, whether that be employment or self employment;*
- *availability of remittances from abroad;*
- *means of support during the time spent in the United Kingdom;*
- *why his ability to fund the journey to the West no longer enables an appellant to secure financial support on return.*

(x) *Put another way, it will be for the person facing return to explain why he would not be able to access the economic opportunities that have been produced by the economic boom, especially as there is evidence to the effect that returnees are taking jobs at the expense of those who have never been away.*

(xi) *It will, therefore, 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.*

(xii) *The evidence indicates clearly that it is not simply those who originate from Mogadishu that may now generally return to live in the city without being subjected to an Article 15(c) risk or facing a real risk of destitution. On the other hand, 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. As indicated by the First-tier Tribunal at paragraphs 41 and 42 of its decision, the humanitarian situation in Somalia, if anything, appears to have deteriorated since MOJ. The Human Rights Watch "World Report 2020: Somalia" issued on 14 January 2020, covering 2019, indicated that the humanitarian crisis in the country continued with increasing, acute food insecurity and increased numbers of IDPs. UNCHR stated in a report entitled "Somalia Humanitarian Response Plan; Humanitarian Programme Cycle 2020", issued in January 2020, that:

> "Somalia is essentially a protection crisis. Armed conflict and insecurity are displacing thousands of people and human rights violations are endangering civilians, forcing many to flee their homes and exposing them to multiple risks.
>
> In recent years, climate-related shocks, mainly drought and flooding, have increased in frequency and intensity, exacerbating humanitarian needs and undermining resilience at the household and community levels. In 2019, just months after we successfully responded to a major drought across Somalia, abnormal *Deyr* rains (October to December season) triggered widespread flooding affecting over half a million people, 370,000 of whom were forced to abandon their homes. Before the floods, 300,000 people had already been displaced by drought and conflict in 2019, adding to the 2.6 million internally displaced people living in 2,000 sites across Somalia. Collectively these shocks left over six million Somalis in need of humanitarian assistance and protection through December 2019 – a 36% increase compared to late 2018. Half of these people were in five regions: Banadir, Bay, Lower Shabelle, Awdal and Hiraan."

The UNHCR report goes on to identify Somalia as "one of the most complex and protracted humanitarian crises in the world" with "over 5 million people in need of humanitarian assistance" and comments that there are "an increasing number of IDPs without prospects for durable solution."

16. The degree of difficulty the appellant will face on return must be assessed against that background. The threshold that he must meet, however, is a very high one, as discussed in SSHD v Said [2016] EWCA Civ 442. In paragraph 15 the Court of Appeal set out the important distinction between a "paradigm" Article 3 cases concerning mistreatment in the country of destination which would arise from "an intentional act which constitutes torture, or inhuman or degrading treatment" and Article 3 medical and destitution cases:

> "Medical cases, and I would add cases where the complaint is that someone returned would be destitute on arrival, do not fall within that paradigm. Laws LJ reviewed the decisions of the Strasbourg Court in the case of *MSS, Sufi and Elmi, SHH and Tarakhel* which, in addition to the medical exception narrowly defined in the *D and N cases*, illuminate the limited circumstances in which it is appropriate to depart from that paradigm in article 3 cases."

17. Lord Justice Burnett (as he then was) went on in paragraphs 16 and 17 of Said to distinguish cases concerning humanitarian conditions which were the responsibility of the country of destination ("*MSS* cases") and those where the" problems on return would result from inadequate social provision and want of resources". In the latter cases, the "approach in the *N* case was the correct one". That was a reference, as in paragraph 15 of Said, to the European Court of Human Rights case of N v UK 47 EHRR 885 which set down that only a very exceptional medical case, where the humanitarian grounds against removal are very compelling could succeed.

18. In paragraph 18 of Said, the Court of Appeal concluded:

> "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*."

19. This distinction also underpinned the clarification provided in paragraphs 20 to 31 of Said on the correct interpretation of comments made in MOJ on those returning to IDP camps in Somalia, paragraphs 31 providing:

> "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."

20. The correct test from "the *D* and *N cases*" was applied to the facts of the applicant in Said in paragraph 19:

> "In my judgment, the circumstances of AS fall far short of being able to satisfy that approach. The highest at which his case can be put is that his PTSD and depression will make it difficult for him integrate back into life in Somalia and have some impact on his ability to work. There is no suggestion that he is precluded from working and much to support the finding that he will be able to do so. It is also clear that, to the extent that it may be necessary, there is every reason to suppose that he will be provided with financial aid by his large and supportive family in the United Kingdom, quite apart from the prospect of some assistance from his clan. There is no evidence to suggest that he will be unable to receive the relatively commonplace medical treatment he currently enjoys if returned to Mogadishu. It is clear that this combination of features is so far removed from the nature of exceptional and compelling circumstances envisaged in the Strasbourg cases as to make it clear that AS's deportation would not breach article 3 of the Convention."

21. It will be obvious from the assessment in Said that DDA's profile is much more proximate to the "exceptional and compelling circumstances" required for there to be a breach of Article 3 ECHR. His medical conditions are enduring, serious, potentially life threatening and prevent him from working. He will have no meaningful financial or other support from the UK and limited assistance from his minority clan members. He will not be able to access the medical treatment he needs in Somalia because he cannot pay for it, even were it available in the country, which it is not.

22. I was also referred to the guidance of the Supreme Court in AM (Zimbabwe) v SSHD [2020] UKSC 17 on the correct approach to an Article 3 ECHR medical case following the decision of the European Court of Human Rights in Paposhvili v Belgium [2017] Imm AR 867. The Supreme Court said this in paragraph 22:

> "22. Following a careful analysis of the decision in the *D* case and of its own decision in the *N* case, the Grand Chamber in the *Paposhvili* case expressed the view in para 182 that the approach hitherto adopted should be "clarified". The Convention is a living instrument and when, however appropriately, the ECtHR charts its growth, it may generate confusion for it to claim to be providing only clarification. The court proceeded as follows:
>
> > "183. The Court considers that the 'other very exceptional cases' within the meaning of the judgment in *N v The United Kingdom* (para 43) which may raise an issue under article 3 should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy. The Court points out that these situations correspond to a high threshold for the application of article 3 of the Convention in cases concerning the removal of aliens suffering from serious illness."
>
> This important exposition will require study in paras 27 to 31 below; but, again, it is hard to think that it is encompassed by the reference in the *N* case to "other very exceptional cases" because any application of the criterion in the quoted passage would be likely to have led to a contrary conclusion in the *N* case itself. It is also convenient at this stage to address the words "although not at imminent risk of dying" in the first long sentence of the paragraph. As was agreed by counsel, the words refer to the imminent risk of death in the returning state. So the Grand Chamber was thereby explaining that, in cases of resistance to return by reference to ill-health, article 3 might extend to a situation other than that exemplified by the *D* case, cited in para 14 above, in which there was an imminent risk of death in the returning state."

23. In paragraph 34 of AM (Zimbabwe) the Supreme Court accepted that the approach in paragraph 183 of Paposhvili went beyond mere clarification of the test in N v UK and should be adopted. The Supreme Court cautioned in paragraph 32, however, that the threshold remains high:

> "The threshold, set out in para 23(a) above, is for the applicant to adduce evidence "capable of demonstrating that there are substantial grounds for believing" that article 3 would be violated. It may make formidable intellectual demands on decision-makers who conclude that the evidence does not establish "substantial grounds" to have to proceed to consider whether nevertheless it is "capable of demonstrating" them. But, irrespective of the perhaps unnecessary complexity of the test, let no one imagine that it represents an undemanding threshold for an applicant to cross."

24. This guidance from the higher courts on the correct approach to Article 3 ECHR medical and destitution cases has to be applied to the particular circumstances of the appellant in this case. As before, the appellant has not lived in Somalia for 23 years. He has no relatives or contacts there. He is from a minority clan and his clan will have little or no support to offer him. He will have no financial support. He has no prospect of securing a livelihood given his health and lack of contacts and support. The accepted facts are that he will be returning to a situation of destitution in Somalia, living either in an IDP camp or other similarly deprived conditions, described by the country expert as "dire". This is in the context of a country situation of a significant and worsening humanitarian crisis. This is also a case where the deprivation is contributed to by a medical condition for which the appellant requires life-long medical treatment which he will not be able to obtain. His chronic Hepatitis B and latent tuberculosis places him at a "much higher risk of hepatocellular cancer". Ongoing medical treatment is stated to be "extremely important" to maintain his "quality of life and even survival". He cannot pay for that medical treatment as he will be destitute. Even if funds were available, the medical treatment he requires is not available in Somalia and would require liaison with medical facilities outside of the country.

25. It is my conclusion that the appellant's circumstances on return to Somalia when considered in their entirety would amount to a breach of Article 3 given the degree of destitution he will face compounded by his medical condition and medical needs which cannot be met. This is not because the extension of the Article 3 medical test from Paposhvili, approved in AM Zimbabwe is necessarily sufficient for the appellant's medical condition alone to meet the Article 3 threshold or solely because he will be forced to live in an IDP camp or similar destitute circumstances on return to Somalia but because of the combination of these aspects of his case and his overall profile assessed against the country conditions.

26. It is also my conclusion that where the appellant meets this elevated threshold, notwithstanding his inability to meet the Immigration Rules on suitability grounds and his 23 year residence in the UK being precarious throughout, the appellant has shown that his removal would be sufficiently disproportionate so as to amount to a breach of Article 8 ECHR.

Decision

27. The appeal is allowed under Article 3 and Article 8 ECHR.

Signed: *S Pitt* Date: 2 August 2021

Upper Tribunal Judge Pitt