



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/02720/2018

THE IMMIGRATION ACTS

Heard at Field House
On 11 December 2020

Decision sent to parties on:
On 20 January 2021

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**A W (SOMALIA)
[ANONYMITY ORDER MADE]**

Respondent

Representation:

For the appellant: Mr Toby Lindsay, a Senior Home Office Presenting Officer
For the respondent: Mr Vijay Jagadesham, Counsel instructed by TRP Solicitors

DECISION AND REASONS

Anonymity order

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) The Tribunal has ORDERED that no one shall publish or reveal the name or address of A W who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of him or of any member of his family in connection with these proceedings.

Any failure to comply with this direction could give rise to contempt of court proceedings.

Decision and reasons

1. The Secretary of State appeals with permission from the decision of the First-tier Tribunal allowing on human rights grounds the claimant's appeal against her decision on 7 February 2018 to refuse him refugee status under the 1951 Convention, humanitarian protection, or leave to remain in the United Kingdom on human rights grounds and to make an automatic deportation order pursuant to section 32 of the UK Borders Act 2007.
2. The claimant is a citizen of Somalia. He is a practising Muslim.
3. The First-tier Tribunal upheld a section 72 certificate regarding the claimant's protection claim. The claimant has not challenged the dismissal of his protection claim and the respondent's challenge therefore sounds only in human rights.

Background

4. The claimant was born in 1971, and is of mixed Bajuni and Benadiri/Ashraf clan membership. He speaks Kibajuni, and some Somali. He grew up in a farm in the Lower Shabelle region of Somalia, a coastal area immediately south of Mogadishu. His sister is married to an interpreter who is a member of the Darod majority clan.
5. The claimant's father was killed in Somalia in an explosion at the factory where he worked; the claimant and his mother and two sisters then moved first to Kismayo, then to a refugee camp in Kenya, where his older sister met her husband, who was working there as an interpreter. The claimant's mother has died in the Kenyan refugee camp. The younger sister also married in Somalia, but the marriage failed and she still lives in a refugee camp in Kenya.
6. The First-tier Judge accepted that the claimant was able, through his brother-in-law, to sell his mother's family land and raise money to travel to the United Kingdom.
7. The claimant left Somalia, on his account, in 1996 or 1997, travelling to the Republic of Ireland, where he unsuccessfully claimed asylum. In November 2000, he came to the United Kingdom, and was removed to the Republic of Ireland.
8. The claimant came back to the United Kingdom in January 2004, and again claimed asylum. The claim was refused. The claimant had, and exercised, a full in-country right of appeal. The First-tier Judge refused the claim, the claimant appealed to the Upper Tribunal and following remittal to the First-tier Tribunal, the Secretary of State withdrew her decision.
9. After coming to the United Kingdom, the claimant accrued 8 convictions for 13 offences committed over a period of six years between 2003 and 2008, for offences of robbery, intention to pervert the course of justice, and rape. The last conviction, which is the index offence for the purpose of the Secretary of State's decision, was for two offences of rape, on different women, one on 21 January 2007 (in which he used a knife) and the second on 4 April 2008. Both are extremely serious offences.

10. The claimant was sentenced to 7 years and 108 days' imprisonment on 12 January 2009. He remains in immigration detention. While at HMP Stafford, he was not able always to behave appropriately: on several occasions after January 2017, he was placed in segregation, his attitude and behaviour being aggressive and unacceptable. His last adjudication was in March 2018. In prison, he completed a sex offender programme. Arrangements for an anger management course through Resolve were abortive, though the course will be available to him in the community if he is released.
11. The OASys report dated 27 September 2018 assessed him as presenting a high risk of serious harm to members of the public in the community, high to known adults, and medium to staff. In custody, he was assessed as a medium risk to both staff and other prisoners.
12. The claimant has long-standing mental health issues, diagnosed in 2015, which have improved to some extent during his imprisonment with medication and counselling: he has schizophreniform psychosis, a history of depression, alcohol dependence syndrome, and chronic post-traumatic stress disorder, including severe anxiety, sleep difficulties and panic attacks.

First-tier Tribunal decision

13. The First-tier Judge accepted that the claimant's father was Bajuni and his mother Benadiri, and that his home area was Marka in the lower Shabelle area, south of Mogadishu. He accepted that the claimant had been displaced from Marka to Kismayo with his mother and sister when he was 17, that he travelled on to the United Kingdom after his sister's husband helped him by selling the maternal family land, and that his mother and sister remained in a refugee camp in Kenya, where his mother died.
14. The judge accepted that the claimant now had no family members in Somalia, his only living relative being his sister in the Kenyan refugee camp, and that the claimant knows nobody in Mogadishu and has never lived there.
15. The First-tier Judge reviewed the mental health evidence carefully and at length, at [48]-[71] of the decision. He concluded that:

"78. It was while he was in prison in 2015 that the [claimant] was invited to attend a PTSD group due to his symptoms, and there was a strong underlying assumption at this point that his symptoms were the result of his experiences in the civil war in Somalia. That in my view was an unwarranted assumption and it has been adopted by Dr Sen and Dr Davies, without any real assessment by them of the cause of his symptoms.

79. But whatever the cause of his current mental health conditions, I have to accept that the [claimant] suffers from schizophreniform psychosis with depression, high levels of anxiety, sleep difficulties and panic attacks. He has auditory hallucinations. His symptoms have improved markedly over the last 18-24 months in a better prison environment and with the support of medication and therapy.

80. Schizophreniform psychosis is not the same as schizophrenia and the [claimant's] distressing symptoms of auditory hallucinations and nightmares have not persisted in his current detention environment. I am not satisfied that they will persist in the community, should he be able to continue to get the medication he requires and not be exposed to violent and stressful situations. "

16. The First-tier Judge found that the claimant would be returned, not to Marka but to Mogadishu, but rejected the assertion that the claimant presented a real risk of suicide at the point of removal. His sister in Kenya provided a high degree of emotional support in regular telephone calls between them, which had not been considered in the experts' reports. The claimant had been able to work in the United Kingdom and sent money to his sister when he could: she was not in a position to assist him financially on return.
17. The judge accepted the evidence of Dr Markus Hoehne, the country expert, that the understanding and treatment of mental health issues in Somalia is 'extremely poor' and that those with apparent mental health problems are often stigmatised, considered 'possessed', and subjected to inhuman and degrading treatment within society and in their families such as stoning and chaining, particularly if they become aggressive. The prison records show that the claimant has a history of becoming aggressive when under pressure.
18. The judge held that:

"89. I accept on the background evidence that Al Shabaab are present and active in the lower Shabelle region and that the [claimant] as a minority Bajuni/Benadiri clan member who is westernised to a degree after spending so many years in Europe, and who suffers from psychological difficulties, will not be able to avoid the adverse attention of Al Shabaab and he will be at real risk of violence in his home area, such as to amount to a real risk of being killed or subjected to inhuman or degrading treatment. He does have an internal relocation option to Mogadishu and he will be returned to that city from the United Kingdom. The CPINs suggest that there is an area of Mogadishu where the Bajuni can live peacefully and also suggests that the Benadiri are doing reasonably well there."

19. He applied the country guidance in *MOJ & Others (Return to Mogadishu)* CG Somalia [2014] UKUT 442 (IAC) and held that the claimant was likely to end up in an internally displaced persons camp because he was a man of mixed minority clan ethnicity, had no contacts or family in Mogadishu and was a vulnerable individual. In particular, the judge found that:

"91. ...

(e) without financial, practical and medical support, his mental health conditions will more probably than not worsen, and he will not be able to find and keep employment and secure the necessities of life;

(f) his mental health difficulties including his auditory psychosis will more probably than not worsen and he will then be exposed to being shunned, and/or

subjected to treatment that is in itself a breach of Article 3 [ECHR] (including chaining).

92. The country guidance indicates that conditions in the IDP camps are such as to amount to inhuman or degrading treatment and such as to exacerbate the [claimant's] mental health difficulties. Even if the [claimant] does manage to secure mental health treatment, including medication, the symptoms that he has displayed when unwell would leave him exposed, if he has a recurrence of his auditory psychosis, to being treated in an inhumane [sic] manner. I rely on the report of [Dr Markus] Hoehne in reaching this conclusion (see paragraph 29 above).

93. given his mental health difficulties, his ethnicity, the length of his absence from Somalia, his lack of family or other support in Somalia, I find that this [claimant] will face a real risk of a breach of Article 3 in Mogadishu. Given this finding, I do not need further to consider his appeal on Article 8 [ECHR] grounds. "

20. The appeal was allowed on human rights grounds. The Secretary of State appealed to the Upper Tribunal.

Permission to appeal

21. The Secretary of State advanced three grounds of appeal: first, that the First-tier Judge had erred in fact in assessing the risk of persecution due to the claimant's ethnicity. The Secretary of State contended that the First-tier Judge had failed to have regard to her January 2019 CPIN *Somalia: majority clans and minority groups in south and central Somalia* at 5.4.3 and 5.5.4; second, that the judge erred in law in relying on *MOJ (Somalia)*, a 2014 decision, since the claimant had worked in both the Republic of Ireland and the United Kingdom and would be able to find employment if returned to Somalia: see *Secretary of State for the Home Department v Said* [2016] EWCA Civ 442, *SB (refugee revocation; IDP camps) Somalia* [2019] UKUT 00358 (IAC); and *Secretary of State for the Home Department v MA (Somalia)* [2018] EWCA Civ 994 at [63]. All of these decisions go to the economic situation on return and the likelihood of destitution.
22. Permission to appeal was granted by Designated Judge McClure, who considered that:

"Whilst the judge was entitled to conclude that the [claimant] had mental health difficulties, the [claimant] had managed to work, both in the United Kingdom and Ireland, for significant periods of time. In assessing whether or not the [claimant] could support himself in Mogadishu, in the light of the [claimant's] ability to work the information in the CPIN was clearly relevant. Similarly, the paragraph cited from the case law [in the grounds of appeal] deal with the prospects of an individual on being returned to Mogadishu."

Rule 24 Reply

23. Mr Jagadeshram settled a Rule 24 reply on behalf of the claimant. He observed that none of the factual findings about chaining and stoning had been challenged by the

Secretary of State, nor the finding that the claimant has significant mental health issues.

24. The First-tier Judge had accepted, expressly, the evidence of Dr Hoehne that mental healthcare was extremely poor in Somalia and that those with mental health issues, particularly those who are aggressive, were often stigmatised, considered 'possessed', and subjected to inhuman and degrading treatment within both society and families, including stoning and chaining. The claimant had a history of becoming aggressive at times when he was under pressure. There was no challenge to the finding of fact at [91(f)] and [92] quoted above. The basis of the judge's decision stood unchallenged and should be upheld.
25. The Secretary of State had not challenged the finding by the First-tier Judge that the claimant was at risk of mistreatment from Al Shabaab in his home area and he had taken into account the CPIN: see [89]. The basis of the First-tier Judge's decision was that there was more to the claimant's risk than merely ending up in an internally displaced persons camp, because of the treatment he was likely to receive as a result of his mental health difficulties: see [91(e)].
26. The caselaw relied upon by the Secretary of State was not relevant to the particular facts of this appeal. The grounds of appeal were no more than a disagreement with certain immaterial matters in the decision and an attempt to reargue the case.
27. The submissions at [14] in Mr Jagadesham's grounds regarding the trafficking issue are not relevant to the grounds of appeal or to the basis of the First-tier Tribunal's decision.
28. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

29. For the Secretary of State, Mr Lindsay accepted that the grounds of appeal should be treated as limited to Article 3 ECHR, as the appeal had not been allowed on other grounds. there was uncontested evidence regarding the claimant's therapy and medication for his mental health problems.
30. Mr Lindsay acknowledged that there was nothing in the Secretary of State's CPIN which dealt with the conditions for those with mental health difficulties in Somalia. He accepted that stoning and chaining were amount to Article 3 harm but argued that there was no clear finding of a real risk of such harm to this claimant. A fact-sensitive assessment was required, but had not been carried out. Mr Lindsay considered that the judge had conflated Article 15(c) risk with Article 3 ECHR. The *Elgafaji* sliding scale was not applicable.
31. Mr Lindsay accepted that the decision of the Supreme Court in *AM (Zimbabwe) v Secretary of State for the Home Department* [2020] UKSC 17, handed down on 29 April 2020, was material. However, he argued that the test at the time of the First-tier Tribunal's decision was the test in *N v Secretary of State for the Home Department*

(*Terrence Higgins Trust intervening*) [2005] UKHL 31, [2005] 2 AC 296 and the 'deathbed' threshold was not reached in this appeal.

32. He reminded me that in *Said*, the Court of Appeal had held that being in an internally displaced persons camp in Somalia would not, without more, meet the Article 3 test, in contrast to the earlier finding in *MOJ* that it did. It was, he contended, a material error for the First-tier Judge to have relied on *MOJ* when he was bound by the decision of the Court of Appeal in *Said*. Mr Lindsay contended (though he accepted that this was not one of the Secretary of State's pleaded grounds) that applying *AAW (expert evidence - weight) Somalia* [2015] UKUT 673 (IAC) at [55], the Benadiri could provide support to members looking for assistance.
33. Mr Lindsay contended that the First-tier Judge had not properly considered the Article 3 test and noted that the claimant in his Rule 24 reply had not sought to challenge the finding on section 72 certification and the dismissal of his protection claim.
34. Mr Lindsay asked me to allow the Secretary of State's appeal and dismiss the human rights finding in the claimant's favour.
35. For the claimant, Mr Jagadeshm reminded me of all of the unchallenged positive factual findings and the evidence about stoning and chaining of mentally ill persons in Somalia. At page 710 and onwards in the claimant's bundle, there were multiple country materials mentioning this treatment, which the Secretary of State had not sought to rebut.
36. The judge had considered the CPIN: see [89] quoted above. The claimant's mental health issues had begun in 2015 and the employment relied upon was not relevant, given the serious nature of his present symptoms. The Secretary of State's reliance on the CPIN was based on a selective citation and overlooked evidence, for example at 2.4.13 of the report, which dealt with the position of unsupported minority clan members. The evidence that only majority clan members could get medical assistance (see *MOJ (vii)*) had not been rebutted. There was neither an error of law, nor a material error of law in the First-tier Tribunal's decision, which had been open to the judge on the evidence before him.
37. Mr Jagadeshm relied on his Rule 24 reply and asked me to uphold the First-tier Tribunal's decision.

Analysis

38. The Secretary of State asserts in her grounds of appeal that the judge erred by not concluding that the claimant could be expected to find work and some support from one of his minority clans if returned to Mogadishu. His ethnicity would be no problem, she argues, because both his minority clans have 'safe' areas in Mogadishu.

39. The passage relied upon in *AAW* at [55] is not, nor was it intended to be, country guidance: that decision is reported on a procedural point. At [55], the Upper Tribunal said this:

“55. This evidence [summarised above] indicates that, even if some minority clans have little to offer to those of its members looking for assistance, the Benadiri, of which the appellant's clan is a sub-clan, is not in such a position. On the contrary, the economic enterprise of this clan is such that it has created businesses that will inevitably generate employment opportunities and it is not easy to see why this would not be to the appellant's advantage.”

40. However, this decision did not turn on the claimant's ability to obtain employment before his incarceration in 2009, six years before his mental health problems were diagnosed. It must be assessed on the present situation and his health and other characteristics today.

41. The Secretary of State has not challenged the First-tier Judge's findings on the likelihood, which he assessed to the civil standard, not the lower standard appropriate for protection claims, that the claimant would end up in an internally displaced persons camp. It was an error of law to assess to that higher standard, but immaterial, since if the judge were satisfied to the ordinary civil standard that the claimant would end up in an internally displaced persons camp, he would certainly have reached the same conclusion had he applied the lower standard applicable in protection claims.

42. Similarly, while it is right that the Court of Appeal in *Said* found that conditions in internally displaced persons camps were not now of themselves capable of constituting an Article 3 ECHR breach, as they were in 2014, when *MOJ* was decided, that is not the First-tier Judge's reasoning: the claimant's mental health and behavioural issues are the crux of his decision.

43. There is no challenge to the First-tier Tribunal's findings regarding the claimant's mental health issues, nor his conclusions as to the inhuman and degrading treatment (stoning, chaining and stigmatisation) which a mentally ill person risks in Somalia. This man would be returned with no family support and a known tendency to violence as well as auditory hallucinations when under stress, which is said to be a trigger for chaining in Somalia.

44. The Secretary of State's grounds of appeal are misconceived. They do not engage with the reason the First-tier Judge allowed the appeal, which was the risk to the claimant as a person who has a long-lasting and severe mental health problem, diagnosed in 2015 and only partially addressed by treatment in prison, and the evidence about the treatment of the mentally ill in Somalia. There was no evidence before the judge to indicate that the claimant's mental health at present is such that he could now hold down a job or, without access to sufficient treatment and medication, refrain from behaving in a manner which would see him chained and stoned, and treated as possessed. Mr Lindsay accepts that those are Article 3 ECHR harms, if proved.

45. The claimant's criminal history is a serious and concerning one, although he may have had undiagnosed mental health problems. He got into a fight in Ireland and was stabbed. He committed robbery, attempted to pervert the course of justice, and committed two particularly unpleasant rapes. The Secretary of State has correctly concluded that he is not entitled to the benefit of international protection under the Refugee Convention or humanitarian protection under the Qualification Directive Regulations. The judge agreed, and the claimant has not challenged that.
46. The judge's conclusion is that nevertheless, by reason of his serious mental health problems and the treatment he would receive as a mentally ill person with a tendency to violence, in Somalia, he cannot at present be returned there without a breach by the United Kingdom of its international responsibilities under Article 3 ECHR. That is not an easy conclusion for the judge to have reached, but he did so carefully, cogently, and fairly, with no want of anxious scrutiny of the materials before him.
47. For the avoidance of doubt, I find that the First-tier Judge examined all of the evidence with care, and in particular Dr Hoehne's country report, and the medical evidence of Dr Piyal Sen, Dr Lisa Davies and Dr Karen Bailey (the latter in a joint report in 2019 with Dr Davies). The factual conclusions he drew from that evidence were unarguably open to him and the Secretary of State has not challenged them. There is no inadequacy of reasoning here.
48. The evidence before the First-tier Tribunal, with which the grounds of appeal do not engage, at pages 705-733 of the bundle, amply supports the judge's finding and the conclusion as to risk which he drew from it. I remind myself that, following the decision of the Supreme Court in *AM (Zimbabwe)*, the *Paposhvili* extension of the death bed test must be applied and that if the First-tier Judge erred in failing to apply the *N* test, that has become immaterial, since the Supreme Court has expressly departed from the reasoning in that decision. The *Paposhvili* test, which would be applied if this decision were to be remade today, was cited and relied upon at [22] in *AM (Zimbabwe)* and is 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."
49. On any view, this claimant is a seriously ill person. The evidence, accepted by the judge and not challenged by the Secretary of State, is that there is very poor mental health provision in Somalia, such that 'his mental health difficulties, including his

auditory psychosis, will ... worsen and he will then be exposed to being shunned, and/or subjected to treatment that is in itself a breach of Article 3 (including chaining)'. Being chained or stoned, or both, as Mr Lindsay accepted, is inhuman and degrading treatment, capable of meeting the Article 3 ECHR standard.

50. For all of the above reasons, I find that there is no material error of law in the decision of the First-tier Judge, which I uphold.

DECISION

51. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of no error on a point of law.

I do not set aside the decision but order that it shall stand.

Signed *Judith AJC Gleeson*
Upper Tribunal Judge Gleeson

Date: 22 December 2020