Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00006/2017

THE IMMIGRATION ACTS

Heard at North Shields	**Decision & Reasons Promulgated**
On 3rd December 2018	**On 7th December 2018**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

BS
(Anonymity Direction made)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: No appearance or representation
For the Respondent: Mr Diwncyz, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Somalia.

Direction Regarding Anonymity – Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014

2. 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 his family members. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

3. The Appellant with permission, appeals against the decision of the First-tier Tribunal, who in a determination promulgated on the 4th April 2017 allowed his appeal against the decision made on the 19th December 2016.

The background:

4. The Appellant's immigration history is set out within the determination at paragraphs 2-4 and in the decision letter issued by the Secretary of State. It can be summarised briefly as follows. The Appellant entered the United Kingdom with his mother and brother after being issued with settlement visas for family reunion to join his father, a refugee. The Appellant was then aged 16. His father was granted asylum in February 2000.

5. On 30 January 2006 the Appellant's settled status was confirmed.

6. The Appellant has a number of convictions. In 2008 he was convicted of theft and sentenced to a conditional discharge of six months. In April 2010 whilst a juvenile he was convicted of shoplifting and again was sentenced to a conditional discharge of six months and ordered to pay costs. In March 2011 again whilst a juvenile, was convicted of failing to surrender to custody and was sentenced to one day detention.

7. In November 2010 he was convicted of attempted robbery, breach of a conditional discharge of failing to surrender to custody and in March 2011 was sentenced to a total of 16 months imprisonment.

8. In April 2011 he was convicted of affray and sentenced to 6 months imprisonment.

9. As a result of his conviction, on 7 July 2011 he was notified of his liability to automatic deportation and responded to this by returning the accompanying questionnaire. On 11 December 2011 he was served with the reasons for the deportation letter and an order dated 1 December 2011. He lodged an appeal against this decision on 15 December 2011.

10. On 1 March 2012 an immigration judge allowed the appeal and remitted the decision to the Secretary of State to reconsider his claim under the Refugee Convention. There is no copy of that decision in the papers before the Tribunal. It appears that in May 2012, his case was reconsidered and decision was made not to pursue deportation against him on that occasion. However he was served with a warning letter advising him that should he come to the adverse attention of the Secretary of State by way of further offending then the Secretary of State would be obliged to give further consideration as to his deportation.

11. In December 2015 he was convicted of having a blade/Article in a public place and failing to surrender to custody and was sentenced to 4 months imprisonment on 15 February 2016.

12. On 17 March 2016 he was served with a notice of decision to deport dated 14 March 2016 (see M1). This made reference to the Appellant being liable for deportation under section 3 (5) (a) of the 1971 Act; the decision made reference to his convictions and that his deportation was "conducive to the public good". The decision letter set out a one-stop notice under section 120 and stated that there was no right of appeal.

13. On 29 April 2016 the Respondent wrote to the Appellant to inform him of the Respondent's intention to cease his refugee status. This letter was headed "notice of intention to revoke refugee status." This made reference to his immigration history including his circumstances of entry to the United Kingdom under family reunion and considered the issue of return in accordance with the country guidance decision of MOJ and others. The decision made reference to the Secretary of State as satisfied that the cessation of refugee status remained appropriate under paragraph 339A (v). The decision made it plain that at this stage the Secretary of State was "merely reviewing whether you have a continuing entitlement to refugee status". It went on to state "as part of the assessment of your continuing entitlement to refugee status, I am providing you with an opportunity to respond to the points made in this letter."

14. On 18 May 2016 a copy of this letter was forwarded to the UNHCR.

15. On 25 May 2016 the Appellant responded to this notice giving details of his circumstances in the United Kingdom and that if returned to Somalia he would be at risk of harm. The letter referred to general risk and no specific risk of harm was identified.

16. On 14 June 2016 the UNHCR responded to the letter provided by the Secretary of State. In that letter it made reference to country information that post -dated the decision of MOJ and others and specifically made reference to the Secretary of State to interview the Appellant in order to obtain further information on existing grounds as well is to explore whether there are any additional individualised ones that should be considered (see page 4).

17. On 5 September 2016 the Appellant made representations by his solicitors in response to the notification to cease refugee status asserting that the Secretary of State had misapplied the country guidance decision.

18. On 19 December 2016 the Secretary of State issued a further decision; it was entitled "decision to refuse a protection and human rights claim". That decision letter set out the Appellant's immigration history including his criminal convictions and the notices that had been sent to him at paragraphs 2 to 22.

19. At paragraphs 23 to 61 the Secretary of State considered the cessation of protection status, and at paragraphs 35 to 37 gave specific consideration to risk of harm as a result of his father's status. It went on to consider the comments made in the UNHCR letter and that in the light of the Appellant's convictions, and being liable to deportation, the Secretary of State was obliged to review his current refugee status before any action is taken regarding deportation (see paragraph 41). The decision in that section concluded that it was not accepted that he would face risk on return or that he would be faced with living circumstances falling below that which is acceptable in humanitarian protection terms.

20. At paragraph 58 of the decision it was considered that for the reasons given and for those set out in the notification of intention to cease refugee status dated 29 April 2016, that his removal from the United Kingdom would not lead to a breach of Articles 2 and 3 of the ECHR or Article 15 (c) of the qualification directive.

21. Articles 2 and 3 were considered at paragraphs 62 and 63 and further consideration was given to the representations of 5 September 2016 by reference to the decision of M OJ and others. The letter at paragraph 68 made it plain that as part of the immigration status review, it was considered that paragraph 339A (v) of the Immigration Rules in Article 1 (C) (5) of the Refugee Convention applied to his case and his refugee status may be ceased, if he can no longer, because of the circumstances in connection with which he had been recognised as a refugee has ceased to exist.

22. At paragraph 69 reference was made to the letter dated 29 April 2016 on the basis that the objective evidence demonstrated that his fear of persecution is no longer applicable on the basis that there had been a fundamental and non-temporary change in Somalia therefore he would no longer continue to be a category of individual who would face treatment amounting to persecution in Somalia. The decision letter concluded at paragraph 73 that in the light of the reasons given, "it is not accepted that the notice of intention to revoke refugee status dated 29 April 2016 was not in accordance with the law". It went on to state paragraph 74 that as he was no longer a refugee, he should now surrender the settlement visa issued to him on 6 January 2015 and the travel document issued on 8 January.

23. Paragraph 77 to 80 made reference to a claim under Article 8.

24. As to his deportation, at paragraph 81 it was stated that his deportation was "conducive to the public good and in the public interest because you are a persistent offender. This is because between 30 October 2008 and the 15th of every 2016 you accumulated eight convictions 10 offences. Therefore, in accordance with paragraph 398 of the immigration rules, the public interest requires your deportation unless exception to deportation applies. The exceptions are set out at paragraph 399 and 399A. The decision letter went on to give consideration to those issues. It concluded

at paragraph 102 that his deportation would not breach the U.K.'s obligations under Article 8 because the public interest in deporting him outweigh the right to private and family life.

25. In a paragraph headed "decision" it set out the following:" as explained above, your protection status has been ceased and your human rights claim has been refused. Therefore, the decision to deport you pursuant to section 5 (1) of the Immigration Act 1971 is maintained.

26. Under the section entitled "Appeal" the letter set out that he had a right of appeal against the decision to refuse the protection of human rights claim under section 82 (1) of the 2002 Act from within the United Kingdom and that any appeal must be made on one or more of the following grounds:

> that his removal from the UK would breach the U.K.'s obligations under the Refugee Convention;
>
> that is removal from the UK would breach the U.K.'s obligations in relation to persons eligible for a grant of humanitarian protection;
>
> that his removal from the United Kingdom would be unlawful under section 6 of the Human Rights Act 1988.

The letter went on to remind him that he had been served with a notice under section 120 of the 2002 Act and that the Secretary of State decided not to certify human rights claim under section 94B of the 2002 Act.

<u>The appeal before the First-tier Tribunal:</u>

27. The Appellant exercised his right to appeal that decision and the appeal came before the First-tier Tribunal on the 27th March 2017. In summary the judge considered that there was little factual issue of substance (paragraph 16). As to the issue of revocation of protection, he applied the decision in M OJ and others and reach the conclusion at paragraph 18 that this demonstrated a durable change in Mogadishu, that clan membership had changed and there were no clan militias and no clan violence in Mogadishu and no clan-based discriminatory treatment even for a minority clan member. He concluded that on the evidence of the Appellant, read with the decision in MOJ and others, that he was satisfied that there was such alteration of the circumstances in Somalia that the Appellant no longer had a well-founded fear of persecution for a Convention reason on return to Somalia.

28. The judge went on to consider humanitarian or subsidiary protection again applying the decision M OJ and others. Having done so he reached the overall conclusion that the Appellant would reasonably likely face destitution and to encounter conditions that, on the guidance, would fall below acceptable humanitarian standards (paragraph 24). At paragraph 25 his conclusion was that in the light of his findings, the Appellant was entitled to protection under Article 3 or in the alternative, humanitarian protection. He went on to state "in respect of the latter the Appellant might well be thought to face individualised factors of risk given the

recognisability of his father. It is not, however, in view of the finding made, necessary to address this issue further."

29. Under the heading "human rights protection" the judge also concluded that it was unnecessary to address alternative relief under Article 8 but briefly summarised the provisions of paragraph 398(b) and 399A of the Immigration Rules and allowed the appeal under Article 8 "were it necessary to go that far."

30. Both parties sought permission to appeal that decision and the grounds are set out in the papers. In relation to the application made by the Secretary of State Immigration Judge Grimmett granted permission to appeal on the 26th April 2017 in the following terms:

"It is arguable that the judge erred in concluding that the Appellant would be at risk of, inter-alia, destitution if returned when M OJ held that there was no clan-based discriminatory treatment even for minorities and that those returning may have an advantage in seeking employment on return."

31. The Appellant also applied for permission to appeal and Immigration Judge Landes granted permission as follows:

> "although the judge allowed the Appellant's appeal, he did not allow it on asylum grounds and it is contended that the judge erred in that respect. The grounds are arguable. The judge appears to have considered that there was a basis for considering that the Appellant would be at risk as the son of his father [25], but thought it unnecessary for him to continue to consider the risk. It is arguable that the judge should have at least considered whether the Appellant's risk on return would be partly as a result of his membership of a PSG and thereupon he should qualify for asylum. The issue of whether the judge should have considered it at this stage when he considered revocation of protection [18) is less clear; although the Appellant's father had claimed asylum on the basis of his profession he was not, according to the refusal letter, granted asylum on that basis but on the basis of his minority clan status."

32. Thus the appeal came before the Upper Tribunal. In a determination promulgated on 5 September 2017 I gave my decision in relation to the appeal brought by the Secretary of State and the appeal brought by the Appellant. For the reasons that I gave in that judgement I was not satisfied that the Respondents grounds as pleaded and argued were made out and found that there was no error of law demonstrated in the decision of the judge as asserted in the Secretary of State's grounds. The grounds only referred to the decision of MOJ (as cited) and the findings in this regard. In those circumstances it was not necessary to consider the grounds whereby it is asserted that he failed to consider Article 8 correctly as it was immaterial in the light of my conclusion that the judge's decision to allow the appeal on Article 3 grounds was open to him. It is not necessary for me to repeat the reasons I gave as they are set out in that decision.

33. However the reasons also set out in that decision I reached the conclusion that the Appellant's grounds were made out (the cross-appeal). The decision letter considered the factual claim raised by the Appellant to be at risk of harm due to his father's status as a comedian (I refer to the decision letter at paragraphs 35-37).

34. I also found that it was plain that there was evidence placed before the First-tier Tribunal to advance this specific head of risk. There was a short witness statement of the Appellant dated 30 January 2017; paragraph 8 bundle B and in the supplementary bundle a fuller witness statement dated the 23 February 2017 along with evidence of Internet searches and further evidence in bundle F. The grounds also refer to some objective material which was relied upon in support of present risk of harm referable to others in similar situations. In addition the skeleton argument at paragraph 15-16 placed reliance on this issue of risk.

35. Looking at the determination itself, the judge made reference to this evidence in passing at paragraph 7 and at paragraph 9 and made reference to his vulnerability as a returnee as the identified son of a well-known figure in Somali culture. The judge also recognised at paragraph 25 that the "Appellant may well be thought to face an individual risk given the recognisability of his father", but considered it is not however in view of the finding made, necessary to address this issue further."

36. It was plain from reading paragraph 18 that the judge did not find the Appellant to be at risk of persecution for a Convention reason and therefore a refugee on account of his clan membership. It was further plain that he allowed the appeal on Article 3/humanitarian protection grounds and referred to the risk arising to the Appellant from his father's status as an "individual factor of risk" as relevant to humanitarian protection but not relevant on a freestanding issue of risk under the Refugee Convention. Consequently he had made no findings of fact on the evidence and importantly made no analysis of whether there was present risk of harm or the nature of any such risk or whether it would be for a Convention reason.

37. I therefore considered that there was an issue raised on the factual circumstances of the Appellant and one which had not been considered by the judge when reaching his overall decision. I was therefore satisfied that there was an error of law in the judge's determination in this regard although as I have set out in the preceding paragraphs, I found no error in the determination as asserted by the Secretary of State. Consequently I did not set aside the judge's findings of fact or his decision on Article 3 and humanitarian protection. I have not been asked to revisit this issue.

38. However, as Appellant sought for the issue relating to whether he should be granted refugee status, based on the issue of risk as identified above, to be determined and there were no findings of fact or analysis of the evidence relating to such a risk made by the judge, this issue required further consideration by way of an oral hearing before the Tribunal.

39. I therefore issued directions for the decision to be re-made by the Upper Tribunal. In particular, I directed that the Appellant's solicitors should ensure that a fresh bundle of documentation was provided for the hearing which contained the relevant material to the issue that needed to be decided. As I indicated previously to the parties before me, the papers did not appear to be complete.

40. Since I made that decision the case has been listed for a resumed hearing. At one hearing the Appellant's solicitor appeared without the Appellant and it was unclear as to whether he had been informed of the correct date. The appeal was therefore adjourned. Following this the Appellant solicitors came off the record and when the appeal was listed further, no Somali interpreter could be found for the hearing. It also appears that administratively the appeal was adjourned because it was not possible to obtain a Somali interpreter.

41. The Appellant did not attend the hearing on the last date it was listed and enquiries were undertaken by Mr Diwnycz as to his current address. The Appellant has not attended the hearing again and I am informed that the Appellant has not been complying with any conditions as to his residence. I therefore satisfied that I should hear this appeal in his absence and on the basis of the documents provided.

42. The purposes of the appeal I have taken into account the documentation that has previously been provided on behalf of the Appellant which is contained in a number of bundles. There is also the previous skeleton argument provided by his Counsel to which I have had regard.

43. On behalf of the Secretary of State Mr Diwncyz relies upon a written response prepared by his colleague Mr McVeety dated 8 February 2018.

44. The basis of the Appellant's claim is that he would be at risk in Somalia because his father has the profile of a famous comedian. It is further asserted that he has appeared in programmes in the United Kingdom which are broadcast to Somalia (see decision of the FTTJ at paragraph 7).

45. There is little evidence before this Tribunal as to the nature of any such risk. The Appellant has not appeared before the Tribunal to provide any oral evidence and the written evidence that has been produced on his behalf provides little or no detail. The evidence in his witness statement dated 12 January 2017 stated that he would be at risk because "my father is a well known person; he is a famous comedian." It is asserted that he is known all over Somalia and that if he is returned there he would be targeted on account of his father's profile.

46. There is a further witness statement dated 23 February in which he stated again that his father was a famous comedian and that his behaviour would be considered to be "un- Islamic". It makes reference to his father having to leave Somalia because of this but also that he had not continued his comedy since 2003 due to medical reasons. It is further asserted that the

Appellant had not referred to this in 2012 because he was under stress at the time.

47. There is a witness statement provided by the Appellant's father confirming he has not been a comedian since 2003. There is no information concerning the nature of the comedy or the content of any such broadcasts in the witness statement.

48. Other evidence that has been provided on the Appellant's behalf relates to Internet research undertaken which shows that his father has been a comedian in Somalia (refer to the screenshots and the you tube information). It therefore shows some information available online.

49. However whilst the Secretary of State accepts that the Appellant's father was a comedian in Somalia it has not been demonstrated or properly evidenced that his profile would cause any risk of harm to this Appellant. Contrary to the Appellant's evidence, his father claimed asylum in 1991 on the basis that he was a member of the theatre company but it was refused in 1992. In 1999 an application was made to upgrade his leave to full refugee status but that was not based on any risk due to previous or current activities as a comedian but on the basis of his clan membership. It is therefore not the position that he was granted refugee status because of his activities as a comedian which is what the Appellant has stated in his witness statement.

50. On the Appellant's own evidence, his father has not broadcast his comedy since 2003 although it appears from the screenshots that past comedy has been rebroadcast. However in any event the evidence does not demonstrate the nature of the comedy is such that it would be reasonably likely to cause this Appellant to be at risk. The interview record makes reference to the following "anyone listening to him speaking will find him comic," it then refers to a joke that he told "recalling stopping a lorry to ask the driver the time." There is no evidence that his comedy has any political content or any un-Islamic content or that he is perceived in any such light. As Mr Diwncyz submits there is no evidence in the form of a DVD or even a transcript of any interviews that have taken place to demonstrate the content of his comedy. The you tube documents and screensavers also do not assist in this regard.

51. Similarly there is no evidence as to why he was awarded the distinction of entertainer of the year given his last performances. Again there is no information or any evidence to demonstrate the content and nature of any previous or later broadcasts.

52. It is for the Appellant to evidence the factual basis of his claim that his connection to his father would place him at risk. He has not done so.

53. Whilst the skeleton argument previously provided makes reference to the Upper Tribunal's decision in MSM (journalists: political opinion: risk) Somalia [2015] (and see the decision of the Court of Appeal in that case

reported [2016) EWCA Civ 715, it does not assist the Appellant. There is no evidence before the Tribunal that the Appellant's father's profile can anyway be compared with the position of MSM and his factual background as a journalist. Whilst it is suggested that he is a "media worker" there is no evidence before this Tribunal to show the content of any of the comedy to demonstrate that it will be viewed as a form of political opinion or in particular would be viewed as "un-Islamic" by Al Shabab or any other group operating in Somalia.

54. There is also no evidence to suggest that the Appellant would necessarily be known as the son of the comedian having left the country when he was 15 years of age.

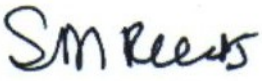
55. The objective material provided is a news report dated 1 August 2012 relating to the murder of Somalia's "most famous comedian". However it is clear from the news article (an online article) that the nature of his comedy was to impersonate Islamic fighters. I accept the submission made by Mr Diwncyz that there is no evidence to demonstrate the Appellant's father is engaged in any similar type of comedy.

56. Therefore having considered the nature of the evidence provided, it has not been demonstrated to the requisite standard that there is a reasonable likelihood that the Appellant (if returned) would be identified either as the son of the famous comedian or that even if he were, that he would be at risk on return as a result of his father's profile. The Appellant has failed to discharge the burden upon him to demonstrate the factual basis necessary to support such a risk of harm. He therefore cannot succeed on that basis.

Decision:

The decision of the First-tier Tribunal to allow the appeal on Article 3 grounds shall stand. I dismiss the Appellant's claim based on Refugee Convention grounds.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. 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. The direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.



Signed Date: 4/12/2018
Upper Tribunal Judge Reeds