Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: RP/00024/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11th January 2018	**On 08th February 2018**

Before

UPPER TRIBUNAL JUDGE CRAIG
DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR ATASI OSMAN SAID
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr T Melvin, Home Office Presenting Officer
For the Respondent: Mr A Sesay, Counsel instructed by Duncan Lewis & Co Solicitors

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge O'Malley promulgated on 28th September 2017 in which he allowed Mr Said's protection and human rights appeal. Given that this is the Secretary of State's appeal, for the purposes of clarity, in referring to the parties in this decision I shall refer to the Secretary of State as 'the Secretary of State' and Mr Said who was the Appellant before the First-tier Tribunal, will be referred to as 'the Claimant'.

Factual background

2. The Claimant is a citizen of Somalia who was born on 15th September 1996. He left Somalia at the age of 8 and came to the UK with his brother in December 2004, when he was aged 9. At the date of the hearing before Judge O'Malley, he was 20 years old. Between being granted asylum on 13th May 2005 and the date of the hearing before Judge O'Malley, the Claimant had been convicted of a number of criminal offences which were set out by Judge O'Malley at paragraph [6] of her decision. The convictions were:

   a) a conviction for robbery on 28th January 2011, for which the Claimant received a referral order of six months;

   b) on 12th April 2011, a conviction for robbery with a referral order of six months and £150 fine;

   c) on 5th July 2011, a further conviction for robbery, the Claimant receiving a detention order and training order of eight months;

   d) on 19th August 2011, a conviction for robbery and battery with the Claimant receiving a detention and training order of eight months;

   e) on 3rd January 2012 a conviction of four counts of conspiracy to rob with the Claimant receiving three years' imprisonment;

   f) on 19th August a conviction for connection of possession of class B drug with the Claimant receiving a youth rehabilitation order:

   g) on 10th August, 2015, a conviction on two counts of going equipped for burglary and assault, the Claimant receiving consecutive sentences of seven months and three months in a young offenders' institution.

3. Thereafter in February 2017 the Claimant received a caution for possession of a class A drug.

4. A notice of intention to make a deportation decision was issued on 14th January 2016 and a notice of intention to cease refugee status was served on 13th April 2016. On 27th January 2017 the Respondent made a decision to deport and a decision to revoke the Claimant's refugee status.

The decision of First-tier Tribunal Judge O'Malley

5. In her decision Judge O'Malley considered the requirements under Article 33 of the Geneva Convention, the exception under Article 33(2) in respect of someone who has been convicted by a final judgment of a particularly serious crime and who constitutes a danger to the community of that country, and also considered the statutory presumption in Section 72 of the Nationality, Immigration and Asylum Act 2002 that:

> "*A person should be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom having been sentenced to a period of at least two years' imprisonment*."

6. However, Jude O'Malley went on to find that the presumption had been rebutted and found that there was no danger of repetition such as to render the Claimant a danger to the community. She went on to make findings in respect of the Claimant's asylum claim. She found that his minority clan membership continued to put him at risk and that therefore he continued to be entitled to asylum. She went on to consider the claim under Article 3 and found that the Claimant would not have access to significant financial resources upon return and that he would not be cushioned by funds from the UK. She was also not satisfied that he had significant prospects of securing a livelihood upon return, as she found that he had no experience of working in the UK. The Claimant was fond to have some qualifications, but no experience in establishing himself in a home or workplace. The Judge also took account of the fact that the Claimant was from a minority clan, which she considered to be a relevant factor in paragraph [88] of her judgment. Judge O'Malley found there was a real possibility that the Claimant could find himself in conditions that fell below acceptable humanitarian standards. She found that he could still rely upon Article 3, even if he was not entitled to refugee protection.

7. Judge O'Malley in making her decision also went on to consider Article 8 of the ECHR and found in effect that the provisions under paragraph 399A of the Immigration Rules were met. She went on to find that the Claimant had been lawfully resident in the UK for the majority of his life at paragraph [92] of her judgment. Judge O'Malley at paragraph [93] found that he was socially integrated into the UK and at paragraph [96] found that there would be very significant difficulties to his integration into the country to which it is proposed the Claimant will be deported, namely Somalia.

<u>The grant of permission to appeal</u>

8. On 20th November 2017 First-tier Tribunal Judge Hollingworth granted the Secretary of State permission to appeal. Judge Hollingworth, having considered the Grounds of Appeal, found that it was arguable that Judge O'Malley had attached insufficient weight to the factors identified in the permission application, appertaining to the question as to whether or not there would be a breach of Article 3. He found it was arguable that the factors in favour of the Claimant securing a livelihood on return had not been given sufficient weight and the factors militating against him securing of a livelihood upon return had been given excessive weight. Judge Hollingworth went on to find it was arguable that Judge O'Malley had unduly discounted the degree of financial support available to the Claimant from the United Kingdom. Judge Hollingworth further found that it was arguable that Judge O'Malley had attached insufficient weight to the Claimant's criminal record when assessing his degree of integration into the UK for the purposes of Article 8.

Discussion

Certification and Section 72 of the Nationality, Immigration and Asylum Act 2002

9. We are grateful for the oral submissions made by both legal representatives today, Mr Melvin, Senior Home Office Presenting Officer on behalf of the Secretary of State and Mr Sesay, Counsel on behalf of the Claimant. We have fully taken account of the submissions made both in the Grounds of Appeal and the Rule 24 response and also the oral submissions made by both legal representatives today.

10. Within the Grounds of Appeal the first complaint raised against the decision of First-tier Tribunal Judge O'Malley regards her consideration of Section 72 of the Nationality, Immigration and Asylum Act 2002. Section 72 deals with the question of refoulement and the exclusion of protection under the Refugee Convention for serious criminals. Section 72(1) states:

"*This Section applies for the purpose of construction and application of Article 33(2) of the Refugee Convention (exclusion from protection)*"

and under Section 72(2):

> "*A person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if he is –*
>
> *(a) Convicted in the United Kingdom of an offence, and*
>
> *(b) Sentenced to a period of imprisonment of at least two years*."

Pursuant to Section 72(6), a presumption under subsections (2), (3) or (4) that a person constitutes a danger to the community is rebuttable by that person.

11. Within the Grounds of Appeal it is argued by the Secretary of State that the Claimant's propensity to commit robbery is an offence of such seriousness that the presumption in Section 72(2) is not rebutted. Reliance is placed upon the Court of Appeal authority of **Bulale v SSHD [2008] EWCA Civ 806** in which, at [22] it was stated that:

> "*Protecting members of society from violent crime, at least of a sufficiently serious nature, is clearly a fundamental interest of that society. Mr Bulale by his propensity to commit robbery, threatens that fundamental interest*."

12. Judge O'Malley considered Section 72 and the Secretary of State's certification considered paragraphs [52] and [61] of her judgment. She noted in paragraph [52] how the Secretary of State had decided to issue a certificate in this case and therefore she began by stating that she "*must begin substantive deliberation on the appeal by considering the certificate*". She noted the presumptions in Section 72(2) were rebuttable by evidence, pursuant to Section 72(6) and referred to the Court of Appeal case of EN (Serbia) v Secretary of State for the Home Department [2009] EWCA Civ 630. Judge O'Malley stated that:

> "*It is for the appellant to show either that it was not in fact particularly serious, because of mitigating factors associated with its commission, or that because there is no danger of its repetition, that he does not constitute a danger to the community*."

She stated in paragraph [54] that:

> "*If not rebutted by evidence she would find that even though the appellant is a refugee because he would be at risk on return, his removal to Somalia would nevertheless not be a breach of the Refugee Convention by virtue of the exception to the prohibition on refoulement set out in Article 33(2) of that Convention*."

13. However, when considering that issue Judge O'Malley in paragraph [55] found that the only criminal sentence which supported the statutory presumption was the sentence imposed on 4th May 2012. We remind ourselves that that was a conviction for conspiracy to rob, in respect of which it is said the Claimant received three years' imprisonment. Judge O'Malley stated that:

> "*The evidence concerning the appellant's risk to the community, set out in the reasons for refusal letter is the fact of the conviction for two counts of conspiracy to rob which led to the concurrent sentence of three years' detention. The sentencing remarks clarify that a group of young men agreed to commit the robbery, the spotter was particularly concerned to notice persons who were elderly, female or both, who were withdrawing large sums in cash. In some cases unpleasant injuries were caused and the experience was obviously deeply upsetting and frightening for the victims*."

In making those remarks Judge O'Malley reiterated the sentencing remarks from the sentencing judge.

14. Judge O'Malley noted that the sentencing judge identified the Claimant as being 'the spotter' in the gang. She went on to find at paragraph 56 that "*there had been no attempt to remove the appellant after the conviction because at the time he was only 16 years old*". She went on to find that his criminal activity had been acquisitive and related to drugs and that his most recent contact with the police was a caution in or around February 2017, relating to his personal use of Class A drugs, which she found was an escalation from his previous conviction relating to Class B drugs. She found that there has been no escalation in his acquisitive offences since his conviction in 2012, nor had his has further actions led to sentences which would lead to a statutory presumption that he constitutes a danger to the community. She took into account his age at the date of conviction and stated in paragraph [59] that he appeared before her as being an immature individual and stated "*there is no evidence that he has flouted immigration bail conditions, there are no further convictions and only one caution in the period since release on immigration bail*".

15. Judge O'Malley went on at paragraph [60] to find:

> "*I find that the statutory presumption is rebutted, I find that there is no danger of its repetition such as to render the appellant a danger to the community. I do not accept the conclusion in the reasons for refusal letter, 'even a low risk of the repetition of this sort of offence poses an unacceptable risk of danger to the community in the UK' and in*

reaching that conclusion I rely on Mugwaga (s.72 – applying statutory presumptions) Zimbabwe [2011] UKUT 338 (IAC)."

She found that the presumption had been rebutted and the appeal had been wrongly certified.

16. Having listened carefully to the arguments that had been put forward on this issue, we find that the reasoning given by Judge O'Malley regarding whether or not the presumption had been rebutted is inadequate. Her finding at paragraph [59] that "*there are no further convictions and only one caution in the period since release on immigration bail"* has to be considered in light of the fact that his date of release from immigration bail was in June 2016, just eight months before the further caution for possession of Class A drugs in February 2017. However, in that regard, what the judge has seemingly failed to consider is that it was the conviction back in 2012 that had given rise to the statutory presumption. In formulating her reasons on that issue, Judge O'Malley has wholly failed to take account of the convictions subsequent to that, namely the conviction in August 2013 for possession of a class B drug and significantly the conviction in August 2015 for two counts of going equipped for burglary and assault and also thereafter the Claimant having received a caution in February 2017 for possession of a class A drugs.

17. Judge O'Malley found at paragraph [57] of her judgment "*his criminal activity has been acquisitive and related to drugs*" . The fact that he had received a further conviction for possession of class B drugs in August 2013 and a caution for class A drugs in February 2017 are clearly relevant factors in determining whether or not the Claimant still constituted a danger to the community and whether or not the presumption had been rebutted. Drugs can be both highly addictive and expensive. An addiction to drugs may well lead to further criminality to feed any such habit. Judge O'Malley has failed to take his subsequent criminality into account, when determining whether or not the Claimant constitutes a danger to the community.

18. Her findings that he had not flouted immigration bail conditions, and had no further convictions and only one caution in the period since release on immigration bail, just eight months previously fails to consider his entire criminal history and in particular his criminal history since the 2012 conviction.

19. There is also another concern that we have in respect of Judge O'Malley's findings regarding Section 72. In paragraph [60] of her judgment she states "*I do not accept the conclusion in the reasons for refusal letter, 'even a low risk of the repetition of this sort of offence poses an unacceptable risk of danger to the community in the UK'*." What she fails to take account of in that regard is that the more serious the offence, the lesser risk there has to be before one still constitutes a danger to the community. Someone at a low risk of committing murder, for example, may still be someone who is a danger to the community.

20. We therefore do consider that the judge has made a material error of law in regard to the certification question under Section 72 of the Nationality, Immigration and Asylum Act 2002. Although Judge O'Malley went on to consider whether the Claimant was still entitled to refugee status, that consideration was only relevant if

her findings in respect of certification were well founded and adequately explained. They were not.

Consideration of the Article 3 claim

21. It is argued by Mr Sesay on behalf of the Claimant that Judge O'Malley has properly considered the Article 3 claim and looked at it in light of the country guidance case of **MOJ & Others (Return to Mogadishu) Somalia CG [2014] UKUT 00442**. He argues both in his Rule 24 reply and in oral submissions that the judge directed herself correctly and identified that she was bound by the decision in **MOJ**. He argued that the judge did not prefer the findings of UNHCR over **MOJ** and that the findings the judge made were consistent with subparagraphs (vii) and (xii) of the head note in **MOJ**.

22. In respect of **MOJ**, Judge O'Malley noted at paragraphs [82] and [83] that the Respondent relied on **MOJ** in the refusal letter and repeated from the refusal letter "*it is acknowledged that you have been absent from Somalia for a number of years... it is considered that you would have the option to access support from clan members...*". Judge O'Malley went on at paragraph [83] to find:

> "*I prefer the conclusion in **MOJ** that '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'*."

23. She went on to consider the US Report on Somalia from 2016 and found that the Claimant arrived in the UK when he was 9 years old, coming from an area outside of Mogadishu; that he has been out of Somalia for thirteen years and that he was a minority clan member. She went on to find that he would not have access to significant financial resources and that the Claimant had accepted the generosity of his brother who houses and supports the Claimant in the UK. However, she said that the evidence before her did not indicate the Claimant's family had significant resources. She found that his brother was a taxi driver; his mother was not working and his uncle owned a restaurant. She stated she was not persuaded that he would be "*cushioned by funds from the UK on return to Somalia*". Judge O'Malley further found that she was not persuaded that the Claimant had significant prospects of securing a livelihood upon return, as he had no experience of working in the UK and although he had some qualifications, he had no experience in establishing himself in a home or workplace and he is from a minority clan. She found there was a real possibility that "*he will find himself in conditions that will fall below acceptable humanitarian standards*".

24. However, what she found to be relevant both in terms of the revocation of refugee status and also in respect of her considerations under Article 3, was her finding in paragraph [78] that "*I find that his minority clan status continues to be the factor which puts him at risk of persecution on return to Somalia*". In that regard Judge O'Malley, we find, has failed to consider the judgment of the Upper Tribunal in the country guidance case of **MOJ**, as reflected within the head note at subparagraph (viii) that:

> "*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*."

25. Judge O'Malley's finding in paragraph [78] that "*his minority clan status continues to be the factor which puts him at risk of persecution on return to Somalia*" appears to us to be wholly inconsistent with the judgment of the Upper Tribunal in **MOJ**. She has not explained why she has failed to follow the country guidance case and seemingly has not even taken account of it in reaching those findings.

26. Further, in consideration of the Article 3 issue, **MOJ** is relevant in terms of the fact that under subparagraph (x) of the headnote, as reflected within the Grounds of Appeal it was stated that:

> "*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*."

27. The Upper Tribunal in MOJ went on at subparagraph (x) to say:

> "*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*."

28. Mr Sesay relies upon the findings of the Upper Tribunal in subparagraph (vii) that a person returning to Mogadishu after the period of absence will look to his nuclear family, if he has one, living in the city for assistance in establishing himself in securing a living and that a returnee may also seek assistance from clan members

who are not close relatives, but that such help is only likely to be forthcoming for majority clan members, as minority clans may have little to offer. Although Judge O'Malley makes reference to that subparagraph she has not taken account of all the factors set out in subparagraph (ix). **MOJ** sets out considerations that the Tribunal has to consider. Judge O'Malley has not fully done so. She has considered some of them, but not all. Although it is not said to be an exclusive list of factors, they are nonetheless factors which should be taken into account. She has not, for example, taken account of his ability to fund his journey to the West. Nor has she explained pursuant to subparagraph (x) why the Claimant will not be able to access the economic opportunities produced by the economic boom, especially in terms of returnees taking jobs at the expense of those who have never been away.

29. We therefore find that Judge O'Malley's consideration under Article 3 also contains a material error of law. It cannot be said that she would necessarily have reached the same outcome had such errors not been made.

Article 8

30. Finally, in respect of Article 8, Judge O'Malley dealt with that issue between paragraphs [90] and [98] of her decision. It has now been conceded by Mr Sesay on behalf of the Claimant that Judge O'Malley did err at paragraph [93] of her decision when she found:

> "*I find that he is socially and culturally integrated into the UK, noting his presentation at the hearing and the evidence that his development has been in the UK prison estate which I find may further diminish his cultural ties with Somalia. Whilst his evidence is that he has no command of Somali languages, I do not accept that position. I prefer to accept his evidence that he is with his mother 5 days a week and that her first language is Somali*."

31. Clearly the question as to whether someone is socially and culturally integrated into the UK has to take into consideration a person's criminal convictions within the UK. This Claimant had a whole plethora of criminal convictions, including numerous convictions for both robbery and for drug offences, throughout the period between 2011 and 2017. Nowhere within her consideration as to the extent of his cultural and social integration for the purposes of paragraph 399A of the Immigration Rules does Judge O'Malley take such convictions into account and Mr Sesay now quite properly concedes that the judge was in error in that regard.

32. However, there is a further error that Judge O'Malley has made in her consideration of Article 8. It is this. In respect of paragraph [96] of her judgment she states that:

> "*I remind myself that finding very significant difficulties requires the appellant to pass a significant hurdle, but I am satisfied in this case that he can meet that hurdle and indeed, at his current age and in the circumstances set out for returning minority clan members above, I would find that he has a very strong claim indeed*."

33. The difficulty with that finding, we consider to be, is that again Judge O'Malley erroneously relied upon the Claimant's minority clan membership as, in itself, being the factor that put him at risk upon return, contrary to the judgment in **MOJ.**

34. We therefore do find that the decision of First-tier Tribunal Judge O'Malley does contain material errors of law and we set aside that decision in its entirety.

35. We find that a significant amount of fact-finding will be necessary at any rehearing and that it is appropriate for the case to be remitted back to the First-tier Tribunal, for rehearing before any First-tier Tribunal Judge other than First-tier Tribunal Judge O'Malley.

Notice of Decision

36. The decision of First-tier Tribunal Judge O'Malley does contain material errors of law and is set aside in its entirety. We remit the case back to the First-tier Tribunal for rehearing before any First-tier Tribunal Judge other than First-tier Tribunal Judge O'Malley.

37. No anonymity direction is made in this case, no such direction was made by the First-tier Tribunal Judge and no application for anonymity direction has been made before us.

Signed Date 30th January 2018

RFMcGinty

Deputy Upper Tribunal Judge McGinty