



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: RP/00061/2017

THE IMMIGRATION ACTS

**Heard Columbus House, Newport
On 10 December 2018**

**Decision & Reasons
Promulgated
On 31 December 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE L J MURRAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

**E A M
(ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Mr Howells, Home Office Presenting Officer
For the Respondent: Mr Holmes, Counsel

DECISION AND REASONS

1. I refer to the Appellant as the Secretary of State and the Respondent as the Claimant in this decision. The Claimant is a national of Somalia. He entered the United Kingdom on 15 March 2006 and claimed asylum on the basis that he was a member of a minority clan. He was granted refugee status on 12 February 2007 after succeeding an appeal against the Secretary of State's decision. On 8 May 2013 he was convicted of sexual assault and sentenced to 2 years

imprisonment. He was served with a notice of liability to deportation. On 24 June 2014 the Claimant was issued with a notification of intention to cease his refugee status. On 10 August 2016 the Secretary of State made a decision to make a deportation order and wrote to the Claimant to inform him of the intention to cease his refugee status. On 2 May 2017 the Secretary of State made a decision to refuse a protection and human rights claim. In a separate letter of the same date the Secretary of State ceased his refugee status concluding that he would no longer be at real risk of persecution on return to Somalia on account of his clan membership.

2. The Claimant appealed against this decision to the First-tier Tribunal and his appeal was allowed by First-tier Tribunal Judge Robertson. The Secretary of State sought permission to appeal against that decision and permission was granted by First-tier Tribunal Judge Lambert on the grounds that it was unclear whether the appeal was allowed on the basis that internal flight was unduly harsh, despite the fact that Mogadishu was the Claimant's home area and the decision did not indicate whether the appeal was allowed on asylum or humanitarian protection grounds.

The Grounds

3. The grounds are lengthy and I summarise them briefly here. Ground 1 asserts that the First-tier Tribunal, in concluding that the Secretary of State had not demonstrated a durable change in Somalia, failed to apply the case of **SSHD v MA (Somalia) [2018]** EWCA Civ 994. It is asserted that the First-tier tribunal did not conduct an individualised assessment and examine the circumstances in the Claimant's home area before considering the question of internal relocation. The Secretary of State intended to return the Claimant to Mogadishu, his home area, and it is submitted that internal flight was not relevant. It is asserted that the First-tier Tribunal failed to engage with the fact that there were no clan militias in Mogadishu, and no clan violence even for minority clan members as held in **MOJ and Ors (Return to Mogadishu) Somalia CG** [2014] UKUT0042. The Secretary of State further contends that **MS (Art 1 C (5) Mogadishu** [2018] UKUT 196 is wrong in law and incompatible with the conclusions of the Court of Appeal in **MA (Somalia)**. The Secretary of State submits that if the availability of internal relocation is sufficient to prevent a person from acquiring refugee status then (on an application of the principle in **MA (Somali)**) must also be sufficient to justify the cessation of such status (provided the change which has rendered this is durable). It is submitted that the First-tier Tribunal erred in determining the issue of cessation and persecution which was solely limited to clan membership. Similarly, a lack of support and severe destitution leading to the Claimant residing in an IDP camp did not amount to a protection claim or entitlement refugee status. It may however,

amount to a breach of Article 3 and humanitarian protection subject to the submissions in ground two.

4. Ground 2 asserts that the First-tier Tribunal's conclusion that the Claimant is likely to find himself living in makeshift accommodation in an IDP camp is flawed because it is inconsistent with the approach in **MOJ**. The factors weighing in favour of the Claimant's ability to return to Mogadishu included previous residence until the age of eight, an ability to speak some Somali and being fluent in Arabic, (which it is said the First-tier Tribunal disregarded), having obtain some skills and qualifications and being a healthy young male. It was incumbent on the Claimant to demonstrate why he could not take advantage of the economic boom and the First-tier Tribunal erred in failing to make findings in respect of this material consideration. The First-tier Tribunal noted the Claimant's ability to access the employment market stating that he was in theory well-placed to find work given that he spoke English and had some work history. The Secretary of State submitted that the First-tier Tribunal misunderstood the influence and need of clan membership and that the Claimant did not need the assistance of clan membership to obtain employment. In respect of remittances the First-tier tribunal Judge found that the Claimant's family were not in a position to support him but no reasons were given for reaching this conclusion. It was not disputed that the Claimant resided with and was supported by his cousin and whilst this family member may not have been able to support him entirely (although that had not been determined), some remittances to use funds in the Somalia economy, coupled with an ability to work could conceivably avoid the Claimant's forced residence in an IDP camp. It is submitted that the First-tier Tribunal's findings are insufficient and that the inadequacy of reasoning is repeated in relation to the Claimant's claim to have a grandmother and aunt in Somalia when he applied for voluntary return funds. Finally, it is submitted that in **Said v SSHD** [2016] EWCA Civ 442 the Court found that there was no violation of Article 3 by reason only of the person being return to a country which for economic reasons could not provide him with basic living standards.

The Rule 24 Response

5. The Claimant responds in relation to Ground 1 that the finding that the Secretary of State had not met the burden of showing that there was a durable change in the country conditions in Somalia was properly open to the Judge given that the Judge made a finding that the change was not durable; the Judge took into account the Claimant's personal circumstances and the Judge was bound to come to the conclusion that she did in the light of the approach mandated in **MA (Art 1 C (5) Mogadishu) Somalia** [2018] UKUT 00196. It is asserted that the Judge dealt with the issue of clan membership; did

not treat minority clan status as determinative; took an individualised approach and that minority clan membership was still relevant.

6. In relation to Ground 2 the findings in relation to humanitarian protection were legitimate findings and properly open to the Judge given the Claimant's absence from Somalia. It is submitted that the circumstances that faced the Claimant upon return to Somalia were a direct consequence of his having to flee in the past due to the risks attendant on him. It is submitted that the grounds lodged by the Secretary of State are in essence an attempt to reargue the merits of the appeal.

The Hearing

7. The appeal therefore came before the Upper Tribunal in order to determine whether there was an error of law in the decision of Judge Robertson and if so whether to set that decision aside.
8. I heard submissions from both representatives. Mr Howells submitted that the First-tier Tribunal Judge misdirected herself in finding that the Claimant remained entitled to the protection of the Refugee Convention and gave weight to the fact that the Secretary of State had not invoked the cessation procedure in respect of all refugees from Somalia. That was irrelevant. The appeal related to the Claimant and the issue was whether it was appropriate to cease his status. In these paragraphs the Judge appeared to have given weight to the Upper Tribunal decision in **MS (Somalia)** promulgated on 22 March 2018 which was not compatible with the later Court of Appeal decision in **MA (Somalia)** handed down on 2 May 2018. In the leading Judgment Aden LJ at paragraph 2 concluded that a cessation decision is the mirror image of a refugee decision and the relevant question is whether there is a significant and non-temporary change of circumstances. The Judge had not applied that principle in paragraphs 18-21.
9. **MOJ** was promulgated in 2014 and was lead country guidance and the Judge appeared to have been dismissive in paragraph 21. In **MOJ** (ii) the Upper Tribunal held that an ordinary civilian would not face a risk of harm and (iii) that there was a durable change as Al Shabab had withdrawn from Mogadishu. The Judge had given inadequate reasons for finding that the Claimant was entitled to the protection of the Convention and misdirected herself having had no regard to **MA (Somalia)**. The case of **MS** involved a Somalia national who hailed from Kismayo and was to be returned to Mogadishu. The Claimant hailed from Mogadishu, the capital city. The Secretary of State had appealed **MS**. If the test for cessation mirrored that attaching to a grant, the availability of state protection or internal relocation may be sufficient to justify a cessation, provided that there had been a durable change.

10. With regard to Ground 2 the Judge misdirected herself on the law in considering the Claimant's prospective return to Mogadishu. The Judge failed to apply all of the considerations in **MOJ**. At paragraph 26, the Judge said that in theory he would be well-placed to find work but found that he was from a minority clan and the inference was that it would hinder his prospects of acquiring employment. The Judge erred in linking the ability to find employment with his clan membership. Having found that he was well-placed to find employment, Judge should have found he had a reasonable prospect of acquiring living conditions not below those acceptable.
11. Mr Holmes submitted that the decision was impugned by submissions that were carefully put but not in a way that was put before the First-Tier Tribunal. The Secretary of State was now saying that no reasonable Judge could make this decision. Permission was granted on the basis that Judge had not appreciated that it was the Claimant's home area but the Judge repeatedly noted that he was from Mogadishu. The main thrust was what is said to be a conflict between **MS** and **MA (Somalia)** which dealt with two separate considerations. There was no conflict because they addressed different points. The Tribunal ought to be cautious before stretching the reasoning in **MA (Somalia)**. The facts of this case were relatively unusual as he had been absent for over 20 years. Given the lack of family support the Claimant ticked each and every box and that was relevant because return was to a small area. He had no family there and the issue of clan links was important. **MOJ** made clear that minority clans could not provide support and this was relevant to the persecution issue because the persecution of minority clans remained so in the rest of the country. If he could not survive in Mogadishu he may be forced to move elsewhere. The Judge held that the Secretary of State had not met the burden. That ought to dispose of the submissions of the Secretary of State.
12. The grounds seemed to be saying that it was not open to the Judge to consider Art 3 in the context of this case. This was wrong. Article 3 was pleaded. The Court of Appeal tackled question of whether the breach of Article 3 was caused by ongoing violence and crisis. The Article 3 breaches came about as a result of failure of state and Somalia remained in a state of war. It was open to the Judge to allow the appeal under Article 3/humanitarian protection. The Judge was entitled to accept evidence of family members, he was from a minority clan and the findings were open to the Judge and made in the context of his being credible.
13. Both parties asked for the matter to be remitted if there were an error. Further, given there was no challenge to the findings on the s72 certificate those findings should stand.

Discussion

14. It does not appear that the First-tier Tribunal Judge was referred to **MA (Somalia)**. The Court of Appeal considered the following issues that are relevant to this appeal:
- (1) the test to be applied by the state which recognised a person as a refugee ("the recognising state") when determining whether (or that) a refugee's status can be ended ("a "cessation decision") under the Qualification Directive;
 - (2) whether a cessation decision can be made without also considering the question whether the refugee's rights under Article 3 of the European Convention on Human Rights ("the Convention") would be violated if he were to be returned to his country of origin;
 - (3) whether Article 3 would be violated if a person to be returned is at risk of being subjected to living standards which fall below humanitarian standards in his country of origin.
15. The Court held in the light of the submissions they had heard in relation to C-175/08, C-176/08, C-178/08, C0179/08, **Aydin Salahadin Abdulla, Kamil Hasan, Ahmed Adem, Hamrin Mosa Rashi & Dier Jamal v Bundesrepublik Deutschland**, 2 March 2010 at paragraph 2 that:
- “(1) A cessation decision is the mirror image of a decision determining refugee status. By that I mean that the grounds for cessation do not go beyond verifying whether the grounds for recognition of refugee status continue to exist. Thus, the relevant question is whether there has been a significant and non-temporary change in circumstances so that the circumstances which caused the person to be a refugee have ceased to apply and there is no other basis on which he would be held to be a refugee. The recognising state does not in addition have to be satisfied that the country of origin has a system of government or an effective legal system for protecting basic human rights, though the absence of such systems may of course lead to the conclusion that a significant and non-temporary change in circumstances has not occurred.”
16. The First-tier Tribunal Judge found at paragraph 21 that the Secretary of State had not discharged the burden of proof and the Claimant remained entitled to the protection of the Refugee Convention. The reasons for this conclusion are to be found at paragraphs 18 to 22 of the decision and were that although there were no clan militias in Mogadishu, no clan violence and no clan based discriminatory treatment even for minority clans, minority groups outside Mogadishu were likely to face political, social, economic and judicial discrimination and human rights abuses which may amount to persecution.
17. According to **MS (Article 1C (5) Mogadishu)** the Secretary of State is not entitled to cease a person's refugee status pursuant to Article

1C (5) of the Refugee Convention solely on the basis of a change of circumstances in one part of the country of proposed return. The Judge further reasoned at paragraphs 20 and 21 as follows:

“20. The Respondent has accepted at para 9 of the refusal letter that those returning to areas outside of Mogadishu may face a real risk of harm if they have no recent experience of living in Somalia, and persecution by Al-Shabaab because of actual or imputed religious or political opinion. It was submitted that the Appellant could return to Mogadishu. But it was found in **MS** that there should be no pre-condition that the refugee has to return to specific safe parts of the country in order to be free from persecution.

21. In looking more widely and whether any changes in Mogadishu are ‘significant and non-temporary’ I bear in mind that **MOJ** was decided in 2014 and was not a case dealing with cessation of refugee status. Overall I do not find that there has been a “durable” change in Somalia. I am not satisfied on balance that there have been such changes in Somalia. I am not satisfied on balance that there have been such changes in Somalia generally as required to remove the Appellant from the protection of the Refugee convention. The Respondent has not discharged the burden of proof and the Appellant remains entitled to the protection of the convention.”

18. The Claimant was granted refugee status on the basis of his, or his mother’s, membership of a minority clan. The First-tier Tribunal was, following **MA (Somalia)**, required to consider whether the circumstances which formed the basis for granting protection still existed and required protection to be given; whether there was of a change in circumstances such that the Claimant could no longer refuse to accept the protection of the country of origin. In establishing whether there was relevant protection the relevant question is whether the institutions of the state of origin "have taken reasonable steps to prevent persecution and that they therefore operate an effective legal system for investigating and punishing acts of persecution and that the individual will have access to that protection if he ceases to have refugee status". Further, the protection had to be considered on an individualised basis: the recognising state does not have to consider whether the institutions achieve a particular standard for all purposes. The Judge failed to consider whether there was protection put in place against the same risks as those to which he was previously subject.
19. I find that the Secretary of State is correct that in concluding that the Claimant remained entitled to the protection of the Convention the First-tier Tribunal Judge did not conduct an assessment which was the mirror image of a decision determining refugee status. The Judge did not consider whether the circumstances for granting protection still existed and whether the Claimant had a well-founded fear of persecution in his home area of Mogadishu or whether protection was sufficient on an individualised basis. I therefore find that Ground 1 is

made out and that the error was clearly material because had the Judge applied **MA (Somalia)** the outcome may have been different.

20. In relation to Ground 2, the Judge addressed the factors in the headnote (ix) of **MOJ and Ors.** Whilst I find that the Judge's findings at paragraph 24 were open to her on the facts of the case and adequately reasoned I find that in view of the conclusion at paragraph 27 it is unclear on what basis the Judge allowed the appeal. At paragraph 27 the Judge concluded "Return is unrealistic and would be unduly harsh. Accordingly I find that he remains a refugee."
21. At paragraph 21 the Judge found that the Claimant remained entitled to the protection of the Refugee Convention and it is unclear from paragraph 27 whether the Judge was concluding that he was a refugee because of an assessment of the factors in **MOJ** which would clearly be a material error. The application of the test of 'unrealistic' and 'unduly harsh' was also in error because the Claimant was from Mogadishu and therefore internal flight did not arise. I also find that the conclusion that the Claimant's family in the UK were not in a financial position to support him on return at paragraph 25 was unreasoned and reasons were required in circumstances where he lived with his cousin in the UK who provided him with food and shelter (paragraph 9 (v)).
22. The decision of the First-tier Tribunal therefore contained material errors of law and in light of the fact-finding required in accordance with paragraph 7.2 of the Practice Statement I find that the appeal should be remitted to the First-tier Tribunal. With the agreement of the parties the findings in relation to section 72 stand.

Decision

The decision of the First-tier Tribunal contained a material error of law and I set it aside.

I remit this matter for a hearing before a Judge other than Judge Robertson. The findings in relation to section 72 are preserved.

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

Unless and until a Tribunal or court directs otherwise, the Claimant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Claimant and to the Secretary of State. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 20 December 2018

Number: RP/00061/2017

A handwritten signature in black ink, appearing to read 'L J Murray', enclosed within a thin black rectangular border.

Deputy Upper Tribunal Judge L J Murray