Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/08692/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 8 July 2019	**On 12 July 2019**

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

IG
[Anonymity direction made]

Claimant

Representation:
For the claimant: No attendance or representation
For the appellant: Mr I Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge Clark promulgated 24.10.18, allowing on article 3 grounds the claimant's appeal against the decisions of the Secretary of State to refuse his humanitarian protection and human rights claims, and to deport him from the UK.

Relevant Background and Immigration History

2. The claimant is a citizen of Somalia, with date of birth of 6.6.75. He was raised in Mogadishu with his parents and seven siblings, members of the minority Madhibaan clan. It was alleged that the dominant Hawiye clan caused problems for the family and that in 1991 the USC militia shot and killed the claimant's brother and cousin, and raped one of his sisters. He entered the UK in March 1993 at the age of 17 fleeing the civil war in Somali. His protection claim was refused but in line with his sister he was granted exceptional leave to remain on successive occasions until he was granted Indefinite Leave to Remain in March 2001.

3. In October 2009, following his conviction for arson, he was sentenced to 6 years' imprisonment. A previous conviction in 2005 was for criminal damage. Subsequently, in August 2015 he was convicted of affray and racially aggravated threatening, abusive or insulting words or behaviour and sentenced to 24 months' imprisonment. He continued in immigration detention until released on bail in November 2017.

The Relevant Appeal History

4. In August 2006, the Secretary of State made a deportation order and his protection and human rights claims were refused and certified under s72 and paragraph 339D of the Rules respectively in June 2012. On 24.8.17 his protection and human rights claims were again refused. It was against this last decision that the claimant appealed to the First-tier Tribunal. Judge Clark allowed the appeal on the basis that to return the claimant to Mogadishu would be in breach of his rights under articles 2 and 3 ECHR.

5. Relying on MOJ and others (Somalia) CG [2014] UKUT 00442, (Somalia CG), the Secretary of State challenged the decision, in particular the judge's conclusions on return to Mogadishu in the claimant's favour. In summary, the judge accepted the evidence of the claimant and his witnesses that there were no family ties in Mogadishu to which he could turn for assistance. Considerable reliance was placed by the judge on the 2017 report of Mary Harper as to difficulties the claimant would allegedly face on the bases of his Madhibaan clan membership, said to be a particularly despised minority group, which it was said would limit his access to clan support in obtaining accommodation and employment. The judge also accepted Ms Harper's opinion that if the claimant's atheistic beliefs became known in Mogadishu, he would be at substantial risk of being killed. Ms Harper also asserted that Al Shabaab remained a threat to the claimant in Mogadishu.

6. First-tier Tribunal Judge Foudy granted permission to appeal on 13.11.18, on the basis that it was arguable that the First-tier Tribunal had erred in the approach to the expert witness and failed to apply the Country Guidance of MOJ as to risk on return.

7. The matter then came before the Upper Tribunal panel comprising Mrs Justice Farley and Upper Tribunal Judge King, whose decision of 13.3.19 found error of law in the failure of the First-tier Tribunal to engage with MOJ in relation to the risk on return

to Mogadishu from Al Shabaab, his clan membership, and his atheism. The panel noted that Ms Harper's opinions on these issues have been the subject of heavy criticism in AAW (Expert evidence – weight) [2015] UKUT 673 (IAC), where they were found to be factually unsupported and inconsistent with MOJ. The panel set the decision aside, indicating that it would be remade in the Upper Tribunal "with a particular focus upon the circumstances to be faced by the claimant upon return and whether they engage Articles 3 or present very significant obstacles to return so as to engage article 8." The panel also noted at [38] that there had been no challenge to the credibility of the claimant or his witnesses and noted that, "for the most part there has been a reliance upon judicial authority and expert reports, focused on the issue of safety of return." No findings were preserved but the panel saw "little reason why evidence that was presented before the tribunal as noted in the determination could not be adopted in a subsequent decision."

8. Following a transfer order the matter came before me sitting in the Upper Tribunal on 26.4.19.At the outset of that hearing, Mr MacKenzie renewed the application for adjournment which had been made in the representative's letter of 23.4.19 and refused by the Upper Tribunal on the basis that there was no explanation as to why the application had not been made earlier and the view that there was sufficient evidence before the tribunal in the public domain by way of country reports and the current country guidance, as well as the evidence of the claimant, to allow a just determination of the issues arising. I noted from the letter of 23.4.19 that the claimant's representatives sought to obtain further country expert evidence, perhaps to address the criticisms made of Ms Harper. However, Mr MacKenzie's renewed application for adjournment was made on a rather different basis, that there needed to be up to date medical evidence as to the claimant's mental health and his vulnerability on return. Whilst the report of Dr Thomas is dated 2018, is based on a now rather dated assessment from 2017.

9. For the Secretary of State, Mr Jarvis supported the adjournment request, also noting that the medical evidence was dated, and fairly indicating that he intended to rely on the absence of absence of any up to date mental health evidence preventing or inhibiting the claimant's integration on return. I was not impressed by the additional argument of Mr MacKenzie that because the claimant had been awarded some £67,500 in damages that medical evidence was needed as to his ability to handle that money and avoid exploitation on return. However, I was just persuaded that up to date mental health evidence was relevant to the circumstances of the claimant's return and his ability to survive and integrate in Mogadishu. Given that Mr Jarvis would have relied on the absence of such evidence adds weight to the probative value of such evidence.

10. In the circumstances and somewhat reluctantly, given the length of time the resolution of this appeal has been outstanding, I granted the adjournment request, making absolutely clear that the adjournment was solely for the purpose of obtaining a further or addendum report from Dr Thomas and not a licence to reformulate the claimant's case by further country expert evidence. In that regard, I note that in preliminary discussions, Mr MacKenzie indicated that in light of the findings

preserved and the views of the Upper Tribunal panel, he did not anticipate there would need to be any further oral evidence and that the appeal would proceed by way of the written report(s) of Dr Thomas and the existing documentary evidence, together with submissions. He did not pursue the adjournment request to obtain further expert evidence from Ms Harper, heavily criticised in Mr Jarvis' skeleton argument.

11. For clarity, Mr MacKenzie also accepted that the arguments formerly advanced on Al Shabaab, Atheism, or clan membership were no longer viable and confirmed that the remaining issues turn on the claimant's personal and mental health circumstances on return to Mogadishu and the article 3 risk, or alternatively the article 8 very significant obstacles argument issue.

The Continuation Hearing

12. The appeal came back before me for remaking on 8.7.19. However, not only has the claimant failed to serve any additional medical evidence, but there was no attendance by or on behalf of the claimant. No correspondence has been received from his representatives. In the circumstances, the interpreter was released.

13. Mr Jarvis informed me that he had the previous week chased the solicitors for the outstanding medical report only to be told that they no longer acted for the claimant. Information was also provided that the claimant has been arrested on a number of occasions in the intervening period, latterly in June 2019. Mr Jarvis was unable to assist with the outcome or the claimant's whereabouts. It may be that he is effectively absent without leave.

14. In the circumstances, and being satisfied that the claimant and his legal representatives were properly notified of the hearing date, I concluded that it was just and proper to proceed with the remaking of the appeal decision in the claimant's absence. Mr Jarvis made brief submissions in line with his previously submitted skeleton argument and I reserved the decision.

15. For the reasons summarised below, I have dismissed the appeal on all grounds.

Relevant Findings of Fact

16. From the First-tier Tribunal decision I adopt the following findings of fact as consistent with the error of law decision:

    (a) For the reasons set out in the decision, the claimant failed to rebut the presumption in s72 of the 2002 Act that he remains a danger to the community. I also note that for similar reasons he has been excluded from humanitarian protection pursuant to paragraph 339D of the Immigration Rules on the basis that there are serious reasons for considering that he has committed a serious crime. It follows that the only live ground of appeal available and relied on is human rights pursuant to articles 2, 3 or 8 ECHR;

(b) There is no article 15(c) risk of indiscriminate violence in Mogadishu and the country background information relied by the claimant does not provide clear and cogent evidence of a change of circumstances since the Somalia CG decision of 2014;

(c) There is no real risk of serious harm from Al Shabaab on return to Mogadishu;

(d) The claimant has consistently maintained that he is a non-proselytising atheist and open about his consumption of alcohol. He has a history of alcohol and drug misuse but is not receiving any formal or informal medical or other support for substance misuse;

(e) He came to the UK at age 17, funded by his parents both now deceased;

(f) He is a member of the minority Madhibaan clan, which may limit his access to clan support for accommodation and employment;

(g) He has mental health issues. Dr Thomas concluded that he is suffering from significant symptoms of psychiatric disorder (moderate to severe major depressive disorder with additional traits of borderline personality or emotionally unstable personality disorder) consequent on the experience of cumulatively traumatic life events including, mental and physical abuse from his father and witnessing dead bodies and people being shot during the civil war. She stated, "if returned to Somalia in his current psychiatric condition, as a vulnerable adult with a history of reported abuse and trauma which appears psychiatrically credible/consistent and significant psychiatric disorder, I also consider that (the claimant) will also be vulnerable to further abuse and/or exploitation and that his ability to seek protection in response to any threats or risk will be highly impoverished due to his considerable lack of trust in Somali authority figures and his degree of psychiatric illness and traumatisation." The judge accepted that returning him to Somalia may cause intense retraumatisation and self-destructive behaviours, of which he has a history. He was said to be in need of sustained period psychological treatment as well as NHS drug and alcohol support services. With treatment he would recover within 2-3 years. However, the report is rather old and there is no evidence that he is on any medication or that he has sought or received the other treatment recommended and has certainly had no counselling since 2017;

(h) Despite his mental health difficulties, the claimant stated that he is willing to work but has not worked in the UK since 2008, apart from in prison. However, he worked in the restaurant industry and as a forklift truck driver for 6 years;

(i) He has a sister in the UK but no family contact in Somalia, being estranged from cousins there, so that he can count on no local family support on return. His sister Layla does what she can to support him in the UK, allowing him to stay with her on a temporary basis but as she is a single mother in a one-bedroom flat she would be unable to provide financial assistance to him in Somalia;

(j) He has two children in the UK but is estranged from their mother since their separation in 2008 and he has no contact with the children.

17. It is not necessary for me to address the s72 and 339D exclusions from asylum and humanitarian protection as the First-tier Tribunal found the claimant failed to rebut the presumptions.

18. It is not necessary for me to address in any details the issues of clan membership, atheism, or risk from Al Shabaab on return to Mogadishu. These claims were specifically abandoned on the claimant's behalf at the last hearing and, in light of the criticism of her evidence in the error of law decision, Mr Mackenzie was no longer relying on Dr Harper's report or that of Dr Aguilar as to the safety on return of Mogadishu. As explained in the error of law decision, the Somalia CG held that the evidence does not establish that 'ordinary civilians' including diaspora returnees are targeted by anyone, including on the basis of minority clan membership, including by Al Shabaab, and the judge was found to be in error to prefer the evidence of Ms Harper to the country guidance. As stated above, there is no article 15(c) risk and the Al Shabaab withdrawal from Mogadishu is complete. It has also been pointed out in the Somalia CG that there have been remarkable changes in Somalia with an economic boom and there was no reliable evidence that the Madhibaan people would be disadvantaged in finding accommodation or employment. In fact, returnees from the diaspora have a greater chance of finding work than those in the native population.

19. The judge found that on return the claimant would have no access to financial resources and no possibility of remittances from abroad. However, I take account of the fact that he has received a very significant sum in compensation approaching £70,000, which obviates the need for any remittances or financial assistance on return. He is also entitled to the enforced returns financial package of £750. With such a sum he can find accommodation and live comfortably for a significant period and, if necessary, pay for any medical or mental health treatment he is in need of. With such a sum he will not need to find employment and there will be no urgency in him doing so, at least for some years. It follows that there is no real risk of the claimant being destitute or being forced to live in an IDP camp.

20. It was previously argued on the claimant's behalf that with his mental health difficulties he would find challenges in managing his money and would be vulnerable to exploitation. Given the limited mental health evidence and the absence of any updated evidence I have to proceed on the basis that there has been no further medical report of any kind and that the claimant is not currently in receipt of any treatment or medication, nor has he been since at least 2017. An adjournment was granted for the purpose of obtaining updated mental health evidence but none has been forthcoming and there is very little before the tribunal relevant to his present ability to survive and integrate in Mogadishu. I take the claimant's case on this issue at the highest I can consistent with the limitations of the evidence and in particular take account of and do not underestimate a potential traumatising effect on being returned to Mogadishu given his experiences and treatment. I accept that this may make integration the more difficult, especially when he has no family there to turn to.

21. I also bear in mind that the Somalia CG suggested at (xii) of the Guidance that "relocation in Mogadishu for a person of a minority clan with no former links to the city, no access to funds and no other form of clan, family or social support is unlikely to be realistic as, in the absence of means to establish a home and some form of ongoing financial support there will be a real risk of having no alternative but to live in makeshift accommodation within an IDP camp where there is a real possibility of having to live in conditions that will fall below acceptable humanitarian standards." However, as explained below, subsequent and binding jurisprudence casts doubt as to what issue this part of the Country Guidance relates.

22. As the Court of Appeal held in Said [2016] EWCA Civ 442, a case involving a claimant with similar mental health issues (though I accept that each case must turn on its own facts), whether or not feared deprivation is contributed to by a mental condition, the person liable to deportation must show circumstances which bring him within the N and D threshold cases. The argument was that his mental health issues will make it difficult for him to integrate in Somalia and have an impact on the ability to find work and survive economically. However, that claimant could expect financial support and there was no suggestion that he would be unable to receive the relatively commonplace medical treatment he enjoyed in the UK on return to Mogadishu. The Court of Appeal rejected the argument that a finding that a returnee might through economic deprivation end up in an IDP camp was sufficient to cross the article 3 threshold. The Court of Appeal considered that paragraph 407(h) of the Somali CG could only relate to internal relocation and does not "chime" with article 15(b) which has been held to equate to article 3 ECHR, as the fact that a person might be returned to very deprived living conditions, could not (save in extreme cases) lead to a conclusion that removal would violate article 3, which has to meet the approach in N and D. The Court of Appeal suggested that the Upper Tribunal in the Somali CG had conflated "acceptable humanitarian standards" with article 3 and this part of the country guidance was inconsistent with Strasbourg jurisprudence. The situation might be different where the risk arises through conflict or direct violence itself, or the conditions are imposed or the direct responsibility or the direct act of the state of return.

23. The point was more recently put more starkly by Lady Justice Arden in MA (Somalia) [2018] EWCA Civ 994, where the Court of Appeal held that there is no violation of Article 3 by reason only of the absence of humanitarian living standards on return. "Article 3 is not normally violated by sending a refugee back to his country of origin where there is a risk that his living conditions will fall below humanitarian standards."

24. On the limited evidence in this case, I find that the claimant fails to establish that by reason of his circumstances including the state of his mental health and the risk of traumatisation by his return that his return to Mogadishu would be a breach of articles 2 or 3. There is no reason why, if he needs it, he cannot obtain mental health treatment on return. The respondent has pointed to primary medical facilities in Mogadishu, should assistance be needed. Even if he has no family connections there and cannot count on financial support from family in the UK or elsewhere, he has

access to very substantial financial support from his own funds which will be more than enough to obtain accommodation without needing to enter an IDP camp. He will also be able to seek work, which he claims he wishes to do. However, even without work his financial means are more than sufficient to keep him for several years to come, given the evidence that simple housing costs between $40-80 per month. Further, it is very difficult to see how a person with accepted mental health issues who has not sought or receive medication or other treatment for mental health issues for some years and with no contemporary medical evidence can demonstrate that to return him will reach the very high threshold of N and D. Even if return is traumatising and there is a risk of vulnerability, exploitation, return to drug and alcohol misuse, or self-harming behaviours, I find that these factors individually or taken together, along with his other personal circumstances, fall far short of reaching the article 3 threshold.

Article 8 Considerations

25. Neither in my opinion are the claimant's circumstances sufficient to demonstrate very significant obstacles to integration sufficient to justify granting him leave to remain on article 8 grounds, either within or without the Rules. I have to bear in mind that because of his sentence of over 4 years imprisonment he is statutorily prohibited from the exceptions to deportation in s117C(4), because s117C(6) provides that the public interest requires the deportation of such a person unless there are very compelling circumstances over and above Exceptions 1 and 2. In considering those exceptions, he may be able to show lawful residence for most of his life, but his criminal history, including before and after the index offence, demonstrates that he is not socially and culturally integrated in the UK. Neither do I accept that with the monies available to him, despite mental health difficulties, that there would be very significant obstacles to his integration. He is not currently in receipt of any medical treatment, claims to no longer abuse alcohol or drugs, and there is no real reason why he cannot seek employment, should he so wish. Similar provisions arise and apply under paragraphs 398 to 399A of the Immigration Rules.

26. On the facts of this case, I am not satisfied that the claimant can demonstrate that he has any family relationship the effect on which his deportation would be unduly harsh. He has no contact with any family members other than his sister. It is not claimed that there is anything more than the normal emotional ties between such adult relatives.

27. In any event, he has to show very compelling circumstances over and above those exceptions. On the evidence and taking the claimant's circumstances at the highest consistent with the limited evidence, and for the reasons elaborated above, I find that he falls very far short of that threshold.

28. In any event, in any proportionality balancing exercise the public interest consideration has to take account that the public interest requires the deportation of a foreign criminal. I also have also to consider the claimant's serious offending history, the unrebutted conclusion that he remains a danger to the community of the UK, and

that he has demonstrated quite graphically that he is not socially and culturally integrated in the UK.

29. I also accept Mr Jarvis' written and oral submissions that article 8 is not a watered-down article 3 route to leave to remain. Effectively, the claimant would be asking the tribunal to allow his appeal on article 8 destitution or medical grounds where it had conspicuously failed under article 3. As held in SL (St Lucia) v SSHD [2018] EWCA Civ 1894, article 8 is not article 3 with merely a lower threshold. "It does not provide some sort of safety net where a medical case fails to satisfy the article 3 criteria… the fact that a person is receiving treatment which is not available in the country of return may be a factor in the proportionality balancing exercise but that factor cannot by itself give rise to a breach of article 8." Even as a factor in a proportionality balancing exercise the evidence is insufficient to sustain an article 8 claim balanced against the very strong public interest which statute requires me to place in the balance.

30. Taking all of the above factors into consideration and for the reasons stated above, I find that the claimant fails to demonstrate that his removal would breach articles 2, 3 or 8 ECHR. He is prohibited from relying on any asylum or humanitarian protection claim and has not been able to demonstrate very compelling circumstances over and above the exceptions to deportation set out in statute and in the Immigration Rules.

Notice of Decision

The appeal is dismissed on all grounds.

Signed *DMW Pickup*

Deputy Upper Tribunal Judge Pickup

Dated

Direction Regarding Anonymity

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 Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

I make no order for costs.

Signed *DMW Pickup*

Deputy Upper Tribunal Judge Pickup

Dated