Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00141/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 09 April 2019	**On 07 August 2019**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

A H
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
Anonymity should have been granted at an earlier stage of the proceedings because the case involves protection issues. I find that it is appropriate to make an order. 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 any member of his family. This direction applies both to the appellant and to the respondent.

Representation:
For the appellant: Mr M. Mohzam of Optimus Law
For the respondent: Mr S. Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appealed the respondent's decision dated 26 October 2017 entitled "Decision to refuse a protection and human rights claim". The decision included a decision to "revoke refugee status" on the ground that the appellant ceased to be a refugee with reference to paragraph 338A and 339A of the immigration rules and Article 1C(5) of the Refugee Convention. Although the respondent concluded that the appellant ceased to be a refugee he also certified the protection claim under section 72 of the Nationality, Immigration and Asylum Act 2002 ("the NIAA 2002"). The provision is said to reflect Article 33(2) of the Refugee Convention, which permits expulsion of a refugee who has been convicted of a particularly serious crime and who constitutes a danger to the community of the host country.

2. The decision relating to the protection and human rights claim was made in the context of a contemporaneous decision to make an automatic deportation order under section 32 of the UK Borders Act 2007 following the appellant's conviction for serious criminal offences.

3. First-tier Tribunal Judge E.M.M. Smith ("the judge") dismissed the appeal in a decision promulgated on 21 August 2018. He was not satisfied that the appellant had rebutted the presumption that he was a danger to the community for the purpose of section 72(6) of the NIAA 2002. The effect of sections 72(9)-(10) obliged him to dismiss the appeal in so far as it relied on the ground that revocation of protection status would breach the United Kingdom's obligations under the Refugee Convention.

4. The judge went on to consider whether the decision to refuse the human rights claim was unlawful with reference to the respondent's policy contained in paragraph 398 of the immigration rules and section 117C(6) of the NIAA 2002. He concluded that there were no 'very compelling circumstances' to outweigh the public interest in deportation of a person who had been sentenced to a period of at least four years' imprisonment.

5. The judge went on to consider whether the appellant would be at risk on return to Somalia with reference to the country guidance decision in *MOJ (Return to Mogadishu) Somalia* CG [2014] UKUT 00442. The judge said that he took into account what was said in the expert report prepared by Markus Hoene but concluded that he was bound by the country guidance decision. There was nothing in the expert report that "went beyond the country guidance decision". He found that the appellant's father and brother could provide support from the UK and that there was some evidence to indicate that the appellant could speak Somali. He concluded:

> "Having considered the all of the evidence before me and factoring in whether the appellant would be at risk if returned to Somalia I am satisfied that his deportation is justified and proportionate."

6. The appellant appeals the First-tier Tribunal decision on the following grounds:

   (i) The First-tier Tribunal failed to make findings as to whether the appellant's refugee status ceased with reference to Article 1C(5) of the Refugee Convention following the Upper Tribunal decision in *Essa (Revocation of protection status appeals)* [2018] UKUT 00244 referred.

   (ii) The judge failed to give adequate reasons to explain why he concluded that the appellant failed to rebut the presumption that he constituted a danger to the community for the purpose of section 72 of the NIAA 2002.

   (iii) The judge failed to take into account relevant factors identified in *MOJ (Somalia)* and failed to give adequate reasons for placing little weight on the expert report in assessing whether the appellant would be at risk on return to Somalia.

   (iv) The judge failed to conduct a proper assessment of Article 8.

Decision and reasons

First ground – failure to make findings relating to cessation

7. In relation to the first ground, following the Upper Tribunal decision in *Essa*, the appellant argues that the judge failed to make any findings in relation to the issue of whether the appellant's refugee status had ceased for the purpose of Article 1C(5) of the Refugee Convention.

8. The legal framework underpinning the decision in *Essa* is complicated and requires some explanation. The Upper Tribunal sought to explain the difficulties arising from the wording contained in the immigration rules and section 84(3)(a) of the NIAA 2002, which provides the ground of appeal against a decision to revoke protection status in the following terms.

> '84(3) An appeal under section 82(1)(c) (revocation of protection status) must be brought on one or more of the following grounds—
>
> (a) that the decision to revoke the appellant's status breaches the United Kingdom's obligations under the Refugee Convention;'

9. Section 84(3)(a) is not founded on whether removal of the person would breach the United Kingdom's obligations under the Refugee Convention but solely on whether the revocation of such status would breach the Refugee Convention. In contrast, the wording of the ground of appeal against a decision to refuse a protection claim focuses on whether removal would breach the United Kingdom's obligations under the Refugee Convention.

> '84(1) An appeal under section 82(1)(a) (refusal of protection claim) must be brought on one or more of the following grounds—
>
> (a) that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention;'

10. To understand why the wording of section 84(3)(a) could be problematic one has to understand the difference between refugee status recognised under the Refugee Convention ('Convention status') and refugee status as defined by the Qualification Directive (2004/83/EC) ('European refugee status'). It is also important to understand the difference between the way the Refugee Convention and the Directive deal with cessation of status and with those who have committed particularly serious crimes who pose a danger to the community in the host state.

Refugee Convention	**Qualification Directive**
A person has 'refugee status' as soon as they meet the definition contained in Article 1A(2) of the Refugee Convention.	'Refugee status' means recognition by a Member State of a third country national or stateless person as a refugee (Article 2(d)).
A grant of leave to remain as a refugee is a <u>declaratory</u> act recognising the existing 'Convention status'.	'European refugee status' is <u>granted</u> by a Member State to a third country national or stateless person who qualifies as a refugee in accordance with the Directive (Article 13).
'Convention status' ceases in the limited number of circumstances identified in Article 1C of the Refugee Convention whether or not the Secretary of State refuses to renew leave to remain as a refugee or curtails existing leave.	'European refugee status' ceases in the circumstances identified in Article 11, which are broadly consistent with Article 1C of the Refugee Convention. The effect is 'European refugee status' can be revoked, ended or the state can refuse to renew status (Article 14(1)).
A core principle of the Refugee Convention is that no contracting state shall expel or return (*refoule*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened (Article 33(1)). The exception to the prohibition on *refoulement* is when there are	The Directive also recognises that a Member State can take action against a refugee who is a danger to the security of the country or who, having been convicted of a particularly serious crime, constitutes a danger to the community of the host Member State (Article 14(4)). In contrast to

reasonable grounds for regarding the refugee as a danger to the security of the country in which they are, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country (Article 33(2)).	the Refugee Convention, the Directive does not make provision for the lawful removal of a person with 'European refugee status', but for the status to be revoked, ended or to refuse to renew refugee status granted by the Member State.
If a person is a danger to the community the person still has 'Convention status' but can lawfully be expelled or removed from the host state without breaching obligations under the Refugee Convention.	'European refugee status' comes to an end where there is cessation or the person constitutes a danger to the community of the Member State.

11. One of the crucial differences between the Refugee Convention and the Directive is that there is no provision for the revocation of refugee status under the Refugee Convention. 'Convention status' either ceases because of the circumstances surrounding the claim (Article 1C) or the host state is permitted to remove a refugee if they constitute a danger to the community of the host state (Article 33(2)). In contrast, the mechanism under the Directive is for 'European refugee status' granted by the Member State to be revoked in both circumstances. The effect is that 'European refugee status' comes to an end and the person may become liable to removal.

12. In the case of cessation, the practical difference between 'Convention status' and 'European refugee status' is negligible. In both circumstances, the status under either provision comes to an end if the cessation criteria apply.

13. The differences are more pronounced in relation to removal of a person who poses a danger to the community of the host state. A person may retain 'Convention status' even if 'European refugee status' is revoked with reference to paragraph 338A and 339AC of the immigration rules and comes to an end.

14. Section 72 of the NIAA 2002 is said to reflect the provisions contained in Article 33(2) of the Refugee Convention although it inaccurately describes the effect of the provision as 'exclusion' from Refugee Status rather than framing the provision in terms of permitted *refoulement*. In *EN (Serbia) v SSHD* [2009] EWCA Civ 630 the Court of Appeal emphasised that section 72 must be read to comply with Article 33(2) of the Refugee Convention. It is important to note that section 72 came into force before the Qualification Directive and is expressly intended to reflect the provisions of Article 33(2) of the Refugee Convention and not Article 14(4) of the Directive.

15. The Tribunal is obliged to consider section 72 of the NIAA 2002 where applicable. Section 72(10) was amended to reflect the new appeals provisions. It states that the Tribunal is obliged to dismiss an appeal brought on grounds relating to the Refugee Convention under sections 84(1)(a) and 83(3)(a) of the NIAA 2002 if the presumption that the person constitutes a danger to the community has not been rebutted.

16. In *Essa*, the Upper Tribunal explained why a person might retain 'Convention status' even if 'European refugee status' has been revoked with reference to the immigration rules because a person constitutes a danger to the community of the host state. The Upper Tribunal pointed out the inaccurate transposition of the Directive in the terms of the immigration rules with reference to the earlier decision in *Dang (Refugee – query revocation – Article 3)* [2013] UKUT 00043. In that case the Upper Tribunal discussed the difference between 'Convention status' and 'European refugee status' and concluded:

> "20. The provisions of the Refugee Convention which are that in the circumstances of a case like this, a person remains a refugee but is removable, are apparently inconsistent with those of Article 14(4) of the Qualification Directive and para 339A(x) of the Immigration Rules which provide for revocation of his status. There are three possible ways of dealing with this argument. The first is to say that there is such an inconsistency and that the Qualification Directive takes precedence over the Refugee Convention. The second is the say that there is such an inconsistency and that the Refugee Convention takes precedence over the Qualification Directive and the Immigration Rules. The third is to say that the status revoked under those provisions is different from the individual's status under the Refugee Convention and that there is in fact no inconsistency. The third is the right answer, in our judgment."

17. *Dang* was decided before the changes to Part V of the NIAA 2002 introduced by the Immigration Act 2014 ("the IA 2014"). The Upper Tribunal in *Essa* considered the wording of section 84(3)(a) of the NIAA 2002, which confuses the revocation of protection status (which could only relate to 'European refugee status') with a breach of obligations under the Refugee Convention. The reason why the wording of section 84(3)(a) is problematic is because the mere fact of revocation of 'European refugee status', taken alone, might not necessarily breach obligations under the Refugee Convention.

18. In *Essa*, the Upper Tribunal pointed out that it might make a difference in cases where the Secretary of State certifies the case under section 72 of the NIAA 2002. Because of the differences in the way that Article 33(2) of the Refugee Convention and Article 14(4) of the Directive approach the status of people who constitute a danger to the community of the host state, a person may retain 'Convention status' even though 'European refugee status' has been revoked.

19. Section 84(1)(a) provides for an appeal on the ground that removal in consequence of a decision to refuse a protection claim would breach the United Kingdom's obligations under the Refugee Convention. If the Tribunal finds that the presumption that a person poses a danger to the community has not been rebutted with reference to section 72 removal would not breach the United Kingdom's obligations under the Refugee Convention because Article 33(2) permits expulsion or removal of a refugee with 'Convention status' in those circumstances.

20. In contrast, section 84(3)(a) only provides an appeal on the ground that the revocation of status would breach the United Kingdom's obligations under the Refugee Convention. As the Upper Tribunal in *Essa* pointed out, unless or until a person becomes liable to removal it is possible to retain 'Convention status'. As long as they are not subject to removal action, the revocation of 'European refugee status' is unlikely to breach the United Kingdom's obligations under Refugee Convention save in circumstances where the Secretary of State fails to comply with obligations to grant certain benefits to a refugee under the Convention.

21. In my assessment, the effect of the decision in *Essa* is that, in an appeal brought under section 84(3)(a) NIAA 2002, the First-tier Tribunal was still obliged to make an assessment of whether the appellant ceased to have 'Convention status' for the purpose of Article 1C of the Refugee Convention.

    (i) *Cessation* - If the Secretary of State has decided to revoke 'European refugee status' with reference to paragraph 339A of the immigration rules because he considers that the cessation provisions apply, an assessment should be made of that core issue for the purpose of 'Convention status' as well as whether revocation of 'European refugee status' is lawful.

    (ii) *Danger to the community* - If the Secretary of State has decided to revoke refugee status because the person constitutes a danger to the community with reference to paragraph 339AC, as assessment of whether refugee status has ceased is still necessary in order to ascertain whether an appellant retains 'Convention status' and remains entitled to certain benefits under the Convention pending removal.

22. If a person, in fact, ceases to have 'Convention status' and could be removed in safety then technically Article 33(2) becomes irrelevant. Yet section 72 NIAA 2002 still obliges the Tribunal to consider the certificate. This further anomaly serves to highlight the inaccurate way in which the immigration rules, section 84(3)(a) and section 72 have been drafted and amended.

23. What I understand the Upper Tribunal in *Essa* to be saying is that, even if a person continues to have 'Convention status' a finding that he has failed to rebut the presumption that he constitutes a danger to the community would oblige the Tribunal to dismiss an appeal brought under

section 84(3)(a) NIAA 2002. If the person constitutes a danger to the community any subsequent removal in consequence of the decision to revoke 'European refugee status' would not breach the United Kingdom's obligations under the Refugee Convention because Article 33(2) would permit removal of a person with 'Convention status' in any event.

24. In this case the reason why the Secretary of State decided to revoke the appellant's 'European refugee status' was because he considered that the appellant ceased to be a refugee. I find that the judge erred in failing to make any findings in relation to the issue of whether the appellant's 'Convention status' ceased and therefore whether he continued to be entitled to the associated benefits of the Refugee Convention pending removal.

Second ground – failure to give adequate reasons relating to section 72 certificate

25. On 06 May 2015 the appellant was convicted and sentenced to 16 weeks' imprisonment for possessing an offensive weapon in a public place. On 28 July 2015 he was sentenced for a series of offences. He was convicted of two robberies with violence that took place on the evening of 02 May 2015. For the first count he was sentenced to a period of 45 months' imprisonment. For the second count he was sentenced to a period of 40 months' imprisonment to run concurrent with the sentence for the first count. In relation to three burglaries committed while the appellant was on bail for the robbery offences, the appellant was sentenced to 12 months' imprisonment in relation to each count to run concurrent with one another, but to run consecutive to the sentences for robbery. The aggregate sentence for the two sets of offences was 57 months' imprisonment.

26. There is no doubt that these were serious offences involving robberies with violence and burglary of public buildings including a school and a healthcare centre. Under section 72(6) the burden shifted to the appellant to rebut the presumption that he constituted a danger to the community. Mr Mohzam accepted that there was little more than the appellant's statement as evidence to support his claim that he did not constitute a danger to the community. There was no OASys assessment or other independent evidence of rehabilitation. It was open to the judge to assess the reliability of the appellant as a witness, having heard him give evidence at the hearing. It is clear from his findings that he was not impressed by the appellant's attitude at the hearing. He noted that the appellant's own evidence was that he was placed in segregation for a week while in prison for fighting. Unlike his brother, who the judge found to be "an intelligent and sensible young man", the judge made the following finding based on the appellant's background and his assessment of him as a witness at the hearing.

> "37. I have taken into account all the evidence but I am satisfied that this appellant's history rightly portrays him as a violent man who is a danger to society. His conduct during this

> hearing emphasised that this appellant is prepared to use inappropriate conduct as and when it suits him and his period in custody has done little to diminish that. I am satisfied that if circumstances prevailed he would again use violence."

27. Mr Mohzam argued that the judge should have taken into account the appellant's statement but failed to particularise what aspects of that evidence might have compelled the judge to come to a different conclusion. In the statement the appellant expressed remorse for his actions and said that he was aware of the consequences for the victims of his crimes. He said that he had learned a valuable lesson. He committed the crimes because he was in the wrong company and was ashamed of what he had done. He claimed to be rehabilitated during his time in prison and had undertaken victim awareness and drug awareness courses. He claimed that he had also written letters of apology to the victims. In so far as this evidence went, his expressions of remorse and claims to rehabilitation are common to many people who are faced with the prospect of deportation as a consequence of their actions. It was open to the judge to make his own assessment as to whether those expressions of remorse and contrition were evidence of genuine change. Having heard the appellant give evidence, he did not. The reasons he gave were adequate and were open to him on the evidence.

28. For these reasons I find that there is no error of law in the judge's findings relating to section 72. It was within a range of reasonable responses to the evidence for the judge to conclude that the appellant failed to rebut the presumption that he constitutes a danger to the community. Section 72(10) required him to dismiss the appeal in so far as it related to the ground under section 84(3)(a) relating to the revocation of protection status ('European refugee status').

Third ground – errors relating to Article 3 assessment

29. The third ground seeks to challenge the judge's alternative findings relating to risk on return to Mogadishu under Article 3 of the European Convention. Mr Mohzam mounted a two-pronged attack on the judge's findings. He argued that the judge (i) failed to take into account all relevant considerations for a proper assessment of risk on return, including the appellant's minority clan status as a 'White Somali' from the Reer Hamar minority clan; and (ii) failed to give adequate reasons to explain why he rejected the expert report.

30. The judge quoted the first six points of the headnote in *MOJ (Somalia)*. It is clear that he had the relevant issues outlined in the most recent country guidance in mind. In relation to the expert report the judge stated that he had "taken into account all he states" but concluded that he was "bound by MOJ (Somalia)" and found "nothing of significance in the report that goes beyond MOJ". One is left wondering what aspect of *MOJ (Somalia)* the judge found to be 'binding' given that the country guidance makes clear that each case must be evaluated on the facts.

One is also left wondering why the judge concluded that there was nothing of significance in the expert report such that went beyond the factors identified in *MOJ (Somalia)* when the expert concluded that the appellant would face a higher risk of discrimination, hardship and potential targeting by elements within Mogadishu because of his minority clan status in the context of an increase in security incidents in recent years. In fact, little or no reasons were given to explain why little weight was placed on the report. In assessing some of the factors identified in paragraph (iii) of the headnote in *MOJ (Somalia)* the judge said:

> "46. When factoring in the appellant's ability to speak English, Arabic and as he accepted some Somali the fact that he has been further educated in the UK and has, therefore, considerable skills to accompany him should he return I have assessed whether his return would breach article 3.
>
> 47. It is argued on the appellant's behalf that he has not lived in Somalia since he was 7 and has no connection of family there. The appellant has been supported by his brother who is in employment and whilst he claimed it would be difficult to support this appellant because they hope to have children and move into a larger house I have little doubt that he will support him as will the father. It became clear that to converse with his father, who gave evidence through a Somali interpreter, the appellant understands and speaks Somali."

31. It is clear that the judge considered a number of relevant factors identified in paragraph (iii) of the headnote in *MOJ (Somalia)*. However, some important factors were missing from the assessment. First, having found the appellant's brother to be a credible witness the judge failed to assess whether he could afford to remit the amount required to support the appellant in such a way that he would not fall within the potential situation of destitution and hardship identified by the Upper Tribunal in *MOJ (Somalia)*. His brother's evidence was that he would struggle to do so. No assessment was made as to whether he could afford adequate remittances despite the fact that the expert report set out estimated figures for the minimum cost of living in Mogadishu. His father's evidence was that he could not afford to send remittances because he was on a low income. It appears that this evidence was not taken into account.

32. More importantly, the judge failed to take into account the appellant's minority clan status anywhere in the assessment. Although the Upper Tribunal in *MOJ (Somalia)* found that minority clan status, in itself, was no longer sufficient to give rise to a well-founded fear of persecution the guidance in the headnote mentions minority clan status as a relevant factor in several places. It is clearly still relevant to an assessment of risk on return even if it is no longer determinative. First, at headnote paragraph (i) the Upper Tribunal in *MOJ (Somalia)* found that assistance from clan members was not likely to be forthcoming from minority clan members because they have little to offer. Second, at (iii) the extent to which a person might be able to call on clan associations was a relevant factor in assessing risk on return. Third, at (vi) the Upper Tribunal

specifically found that the return of a person from a minority clan who does not originate from Mogadishu and who has 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.

33. Given the importance of the issues at stake, it was insufficient for the judge to take into account some but not all the considerations that were relevant to a proper assessment of risk on return under Article 3. The fact that the appellant left Somalia when he was seven years old and has no clan or family links in Mogadishu and is from a minority clan formed an important part of the assessment. Much of the expert's opinion was also based on the differential risks to minority clan members in Mogadishu even if it was no longer sufficient, taken alone, to give rise to a real risk of serious harm. For these reasons I conclude that the judge's failure to give adequate reasons for placing little weight on the expert report and failure to evaluate other relevant considerations amount to errors of law.

Fourth ground – errors relating to the assessment of Article 8

34. The fourth ground as pleaded in the original grounds was general and unparticularised. Mr Mohzam did not develop the ground orally. However, on closer inspection of the judge's findings obvious errors become apparent that cannot be ignored.

35. At [40-41] the judge applied the wrong test under section 117C(6) NIAA 2002. The appellant was <u>not</u> sentenced to over 4 years' imprisonment within the meaning of section 117D(4)(b), which does not include a period of imprisonment only by virtue of consecutive sentences amounting in aggregate to that length of time. In the suite of offences for which he was sentenced on 28 July 2015 the longest sentence was 45 months' imprisonment, which was less than four years' imprisonment. The appellant was eligible to argue that he came within the exceptions to deportation.

36. Although the judge went on to consider Exception 1 (section 117C(4)) and Exception 2 (section 117C(5)) the assessment was made through the lens of the "very compelling circumstances" test over and above the exceptions. Even then, the error was compounded by an inaccurate statement of the test contained in Exception 2 where the judge apparently considered whether there were "very significant obstacles" to the appellant continuing his relationship with his child. No consideration was given to the best interests of the child nor did the judge evaluate the evidence given by the child's mother. No mention is made of the relevant test, which is whether deportation would be "unduly harsh" on the appellant's child. Although I have some doubts as to whether the evidence would have shown that the effect on this child would have been more severe than the usual negative effects of deportation, the appellant and the child were entitled to a proper evaluation of their situation given the serious consequences of deportation.

37. Even if the appellant could not show that deportation would be "unduly harsh" on the child it would form part of an overall assessment over whether there were, in the alternative, "very compelling circumstances" that might outweigh the public interest in deportation. The circumstances the appellant might face in Mogadishu should have been a relevant part of the assessment. Given the flaws in the findings relating on the assessment of risk on return, and the other legal errors identified in the judge's assessment, I conclude that the judge's findings relating to Article 8 are so flawed that they cannot stand.

Conclusion

38. I conclude that the First-tier Tribunal decision involved the making of errors of law and must be set aside. Although I have concluded that the First-tier Tribunal's findings relating to the certificate under section 72 were sustainable, given that findings will need to be made in relation to the issue of cessation first, it is possible that section 72 may not apply. Given that other core areas of the decision relating to the assessment of Article 3 and Article 8 issues also involved the making of errors of law, I conclude that it would be better if the whole decision is set aside so that a fresh decision can be made.

39. I have considered the guidance given in paragraph 7.2 of the Practice Statement dated 25 September 2012. Although the normal course of action would be for the Upper Tribunal to remake the decision even if it involves further fact finding, given the nature and extent of the judicial fact finding that will need to be carried out, and the fact that there has been no judicial determination of the issue of cessation in the First-tier Tribunal as yet, this is a case that is appropriate for remittal.

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

The appeal is remitted to the First-tier Tribunal for a fresh hearing

Signed  Date 01 August 2019
Upper Tribunal Judge Canavan