Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00150/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 March 2019	**On 11 April 2019**

Before

LORD UIST
(SITTING AS AN UPPER TRIBUNAL JUDGE)
UPPER TRIBUNAL JUDGE CANAVAN

Between

A A
(ANONYMITY DIRECTION MADE)

Appellant/Respondent

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent/Appellant

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

Anonymity was granted at an earlier stage of the proceedings because the case involves protection issues. We make clear that anonymity was not granted to protect the appellant's reputation following his conviction for criminal offences. However, it is appropriate to continue the 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/respondent: Mr D. Sellwood instructed by Wilson Solicitors
For the respondent/appellant: Mr C. Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Both parties have been granted permission to appeal to the Upper Tribunal. For the sake of clarity, we will continue to refer to them as they were before the First-tier Tribunal.

2. The appellant (Mr A) appealed the Secretary of State's decision dated 22 June 2017 to revoke refugee status with reference to Article 1C(5) of the Refugee Convention (cessation), to certify the protection claim with reference to section 72 of the Nationality, Immigration and Asylum Act 2002 ("the NIAA 2002") (refoulement) and to refuse a human rights claim in the context of deportation proceedings.

3. First-tier Tribunal Judge Callow ("the judge") dismissed the appeal on Refugee Convention grounds. He began by considering the certificate made under section 72 NIAA 2002 and noted that the provision was intended to reflect Article 33(2) of the Refugee Convention. He outlined the relevant legal principles [16-21] and considered whether the appellant had rebutted the presumption that he was a danger to the community with reference to the evidence [22]. He concluded that the appellant failed to rebut the presumption and that section 72 applied [23] in the following terms:

> "22. In his submissions Mr Sellwood accepted that the appellant had been convicted of a serious crime, but whether it was particularly serious in all the circumstances was another matter. My analysis of all the facts is that the presumption has not been rebutted by the evidence in this appeal. The circumstances of the robbery resulting in the sentence of four years was outlined in the sentencing remarks forming part of the respondent's bundle. The appellant was found, with three others, to have hit the victim during which comparatively trivial items were stolen. The victim was not seriously injured. Notwithstanding these facts, given the maximum penalty of five years that could have been imposed, I believe that the appellant has been convicted of a particularly serious crime. The OASys assessment identified the appellant as posing a low-risk of serious harm in the community in respect of children, known adults and staff, and a medium risk to the public. In her clinical psychology report Dr Boucher, at the request of the appellant's solicitors, reported that the appellant presented with symptoms of anxiety and depression and difficulties with PTSD wherein he would benefit from individual weekly psychotherapy. Given negative thoughts about being deported to Somalia, including the belief that it would be the end of his life, it was envisaged that he would experience a deterioration in his psychological well-being and mental health. As to the risk of re-offending, it was the doctor's opinion that the appellant was at

> the time of her report at a moderate to high risk of future violence and of general non-violent re-offending in the future. Previous violent offences included the use of instruments (bottle, sand bags), sustained violent attacks and acts of violence where there were a group of perpetrators. Any future violence had the potential to inflict significant psychological and physical injuries. His previous victims had included members of the general public that he did not know and therefore future risk scenarios would include a risk of violence to the general public. So far as 'danger to the community' is concerned, it has been established that the danger is real and there is a real risk of repetition.
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> 23. In all the circumstances s.72(1) of the Act applies. The consequence is that the appellant is excluded from protection on the basis that Article 33(2) recited above applies to him. As a result, the Convention does not prevent his removal from the UK."

4. Still under the heading of "Section 72 consideration", the judge went on:

> "24. However, it remains to determine whether the revocation of protection status breached obligations either under the Convention or based on an entitlement to humanitarian protection and whether removal would breach obligations under Articles 3 and 8 of the ECHR.
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> 25. After lengthy consideration I am of the opinion that the appellant has given truthful evidence. In broad terms his immigration history and background have been established on a balance of probabilities. It has been established that the appellant has been living in the UK for over 23 Years since his arrival at the age of seven. Prompted by his own unacceptable and criminal conduct, his education ended abruptly at 14. Since then a life of crime has dominated his lifestyle. Save for one-time random help to his mother and a cousin, he has never had full-time employment and has no basic qualifications to apply for any particular job. As to Mogadishu, this is indeed a foreign city to him. He has no nuclear or extended family there. Given his lack of knowledge of clan life in Somalia, any prospect of engaging with his clan was very limited in his circumstances. He simply does not have the profile and resources to access opportunities produced from the economic boom in Mogadishu. Even if he were to receive some limited financial support from family in the UK, his relocation in Mogadishu with no real formal links to the city given that he left there 23 years ago at the age of seven, there would be a real risk of no alternative in makeshift accommodation within an IDP camp."

5. The judge then concluded that the appellant was excluded from Humanitarian Protection for the same reasons given relating to section 72 [26]. He then went on to consider whether the appellant's removal would breach his rights under Article 3 of the European Convention. Under the heading "Article 3" he considered general case law relating to the application of Article 3 [27-28]. He quoted the findings of the Upper Tribunal in *MOJ & Others (Somalia)* CG [2014] UKUT 00442 earlier in the decision [8] and returned to it when he considered whether the appellant

would face a real risk of Article 3 ill-treatment if returned. At [28(b)] and [29] his findings on Article 3 were as follows:

> "28 ...
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> (b) The country guidance in *MOJ* was limited to the issues of whether those returning or relocating to Mogadishu could succeed in claims for refugee status, humanitarian protection or protection against *refoulement* under Articles 2 or 3 of the ECHR, solely on the basis that they were civilians without adequate protection. The present appellant was excluded from protection or humanitarian protection and the refugee convention because of his serious offending. He could only rely on his Convention rights. Paras 407(h) and 408 of *MOJ* were concerned with the ability of a returning Somali to support himself. While they might have some relevance in considering whether a removal to Somalia would violate Article 3, they could not be a surrogate for an examination of the circumstances to determine whether such a breach would occur. If a Somali national brought himself within the rubric of para 408 of MOJ it did not follow that he had established that removal to Somalia would breach Article 3. Such an approach would be inconsistence (sic) with jurisprudence. The position was accurately stated at para 422 of *MOJ*, which drew a proper distinction between humanitarian protection and Article 3 and recognised that the individual circumstances of the person concerned must be considered. An appeal to Article 3 which suggested that the person concerned would face poverty on removal should be viewed by reference to the test in *N*. Impoverished conditions which were the direct result of violent activities might be viewed differently.
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> 29. On the sensitive facts in this appeal the appellant faces the real risk in the absence of prospects of employment, clan support and the availability of remittances of any value that he would not be able to establish himself in Mogadishu."

6. The judge allowed the appeal under Article 3. He made no findings relating to Article 8 of the European Convention.

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

   (i) The judge erred in considering the maximum sentence for the offence and not the individual circumstances in assessing whether the appellant had been convicted of a 'particularly serious crime' for the purpose of section 72 contrary to the guidance in *IH (s.72: 'Particularly Serious Crime') Eritrea* [2009] UKUAT 00012.

   (ii) The judge failed to make any findings relating to Article 8 of the European Convention.

8. The respondent appeals the First-tier Tribunal decision on the following grounds:

(i) The finding that he would be at risk on return under Article 3 was based on a flawed approach to the country guidance in *MOJ* and a failure to give adequate reasons.

(ii) The judge failed to consider whether the appellant would be able to find employment even if he had no connections in Mogadishu.

Decision and reasons

9. After having considered the submissions made by both parties we have concluded that the First-tier Tribunal decision, although not as rigorous in its analysis as it could have been, and despite weaknesses, did not involve the making of an error of law that would have made any material difference to the outcome of the appeal.

The appellant's first ground – section 72

10. The judge directed himself to the decision in *IH (Eritrea)* [16] and was obliged to consider the structure of the statutory provisions in section 72(2), which gives rise to a rebuttable presumption that a person has been convicted of a particularly serious crime and to constitute a danger to the community 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. The index offence that gave rise to the decision to deport the appellant was a conviction for robbery for which he received a sentence of four years' imprisonment.

11. Neither the grounds, nor Mr Sellwood's oral submissions, particularised how or why the judge's findings might have offended the principles outlined in *IH (Eritrea)*. In fact, more recent and weighty authority on the point is the Court of Appeal decision in *EN (Serbia) v SSHD* [2009] INLR 459 where the court emphasised that section 72 must be read to be compatible with the relevant principles relating to the application of Article 33(2) of the Refugee Convention. This required an opportunity for the person concerned to rebut the presumption that he had committed a 'particularly serious crime' and that he was a 'danger to the community'. In this case, the length of the conviction was itself sufficient to give rise to the statutory presumption and shifted the evidential burden to the appellant to show that he was not convicted of a particularly serious crime or that he was a danger to the community.

12. Mr Sellwood argued that the judge erred because, in considering whether the appellant had been convicted of a particularly serious crime he relied upon the upper limit of the sentence that could have been imposed to underpin his finding. When [22] of the decision is read as a whole, clearly this is not the case. The judge used the upper five-year sentence as a comparator to illustrate why the sentence of four years' imprisonment was sufficiently serious on the scale of offences. In any event, we were not referred to any evidence that would have rebutted the statutory

presumption that a sentence of two years' imprisonment is sufficient to show that the appellant committed a particularly serious crime. It was open to the judge to conclude that an offence of this nature, a street robbery with violence, was particularly serious given the length of the sentence.

13. There is no challenge to the judge's assessment that the appellant posed a danger to the community. His findings were well within a range of reasonable responses to the risk assessments, which showed that the appellant was assessed to be a medium risk to the public and that there was a "moderate to high risk of future violence and of general non-violent re-offending in the future".

14. We note that the judge went on, under this heading, to say that he needed to determine whether revocation of protection status breached obligations under the Refugee Convention or in relation to his entitlement to Humanitarian Protection. His subsequent findings at [25] did not entail an evaluation of the evidence he set out earlier in the decision, and did not specifically engage with the relevant legal test relating to cessation under Article 1C(5) of the Refugee Convention, which would have required some analysis as to whether the appellant was still at risk on grounds of his clan membership. Neither party sought to challenge any failures in relation to the findings that appeared to relate (albeit unclearly) to the issue of cessation.

15. Having provided sustainable reasons for finding that section 72 applied the judge was obliged by operation of statute to dismiss the appeal in so far as it related to Refugee Convention grounds. Even if he made no clear findings relating to cessation, the overall outcome of the Refugee Convention appeal would have been the same.

The respondent's ground – Article 3

16. To maintain a logical structure, we turn to the arguments put forward by the respondent relating to the judge's findings in relation to Article 3. If his findings under the heading "Article 3" were viewed in isolation, we would have no hesitation in finding that they were inadequate. Paragraphs [27-28] outlined general case law and made no findings on the facts of the case. Paragraph [29] amounts to nothing more than a bare statement that the appellant faced an Article 3 risk because he would not be able to establish himself in Mogadishu without any analysis of the evidence and without giving reasons why he came to that conclusion.

17. The respondent argues that the judge failed to consider the findings made in *MOJ* adequately. The Upper Tribunal considered evidence to show that those returning from the West may have an advantage in seeking employment in Mogadishu because they are likely to be better educated and considered more attractive as employees [351]. The fact that a person has had a long period of absence from the city and had no experience of living there as an adult were not sufficient factors, in themselves, to make the prospect of return unreasonable or unacceptable. The judge failed to consider whether financial assistance from the Facilitated Returns Scheme

might be sufficient to support the appellant while he established himself in Mogadishu. There was no reason why he could not seek unskilled employment in Mogadishu.

18. We observe that the grounds, as drafted, set out submissions that amount to disagreements with the decision rather than particularising any material errors of law. At the hearing, Mr Avery's submission focused on the inadequacy of the judge's findings. We agree that the findings made under the heading "Article 3", if taken alone, are inadequate. We have considered whether the judge's conclusion nevertheless is sustainable if his findings are read as a whole.

19. It seems clear that the judge had in mind the findings in *MOJ* because he quoted the full headnote at [8]. The relevant parts of the headnote that the judge appeared to base his findings on are:

> "(vii) A person returning to Mogadishu after a period of absence will look to his nuclear family, if he has one living in the city, for assistance in re-establishing himself and securing a livelihood. 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.
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> …
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> (ix) 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:
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> - Circumstances in Mogadishu before departure;
> - Length of absence from 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 and appellant to secure financial support on return.
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> …
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> (xi) It will, therefore, only be those with no clan or family support who will not be in receipt of remittances from abroad and who have no real prospect of securing access to a livelihood on return who will face the prospect of living in circumstances falling below that which is acceptable in humanitarian protection terms.

(xii) The evidence indicates clearly that it is not simply those who originate from Mogadishu that may now generally return to live in the city without being subjected to an Article 15(c) risk or facing a real risk of destitution. On the other hand, 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."

20. Mr Sellwood pointed out that, at [13-14] of the decision, the judge summarised the appellant's case and the main aspects of the evidence he relied upon, which included an expert report by Dr Hammond relating to the conditions the appellant might face if returned to Mogadishu. This indicates that the judge was aware of the evidence before him but there is no analysis of the evidence elsewhere in the decision. The only findings that touch on the issue were those made at [25] quoted above. What is said at [25], again, largely consists of bare findings without any real explanation as to how and why the judge came to the conclusions he did and on what evidence. That should be the core function of a judicial decision-maker.

21. Nevertheless, we note that the respondent has not challenged the factual statements made by the judge regarding the appellant's personal circumstances, which were generally supported by evidence. The respondent challenges the conclusions drawn from those circumstances. The respondent argues that the facts do not bring the appellant within the category of cases that might fall below acceptable humanitarian standards.

22. The appellant entered the UK with his family as a young child in 1995. By 2003 he was granted settlement in the UK. At the date of the First-tier Tribunal hearing he was 30 years old and had spent most of his life in the UK. The appellant left school at 15 years old without qualifications. Despite having permission to do so, he says that he has never worked in the UK. That is not to his credit. Instead, he embarked on a life of criminality, but it also means that he has little work experience to point to if he attempted to look for employment in Mogadishu. Mr Sellwood pointed out that the section of *MOJ* the respondent relies on relates to the opportunities for returnees who are likely to be better educated. It would not apply to this appellant. Given his length of residence in the UK, and the young age he arrived, we find that it was open to the judge to find that Mogadishu was likely to be a "foreign city to him". The appellant's family in the UK were consistent in saying that they had no contact with anyone in Somalia and would be unable to provide him with financial support. Mr Sellwood accepted that the judge did not address the financial assistance available from the Facilitated Returns Scheme. He argued that it would have made no difference to the outcome of the appeal. Any support provided by the

scheme was temporary. The judge's finding that the appellant would struggle to find work and could not rely on family support, in the long term, would have been the same with or without temporary 'stop-gap' funding from the Facilitated Returns Scheme.

23. Although the judge failed to evaluate the expert report, it is not suggested that Dr Hammond was not qualified to give an expert opinion. She is a Reader at the Department of Development Studies at the School of Oriental and African Studies (SOAS) with work experience in the Horn of Africa. The judge noted at [4] that the appellant was recognised as a refugee in 2011 because he was a member of the Sheikhal Logobe clan, which Dr Hammond confirms is a minority clan. Although minority clan membership is no longer likely to give rise to a real risk of serious harm, taken alone, the Upper Tribunal in *MOJ* made clear that it might be a relevant factor in assessing the conditions a person might face in Mogadishu and the availability of support from other clan members: see headnote (vii).

24. We have outlined some problematic aspects of the First-tier Tribunal decision, which was long on recitation of the law and evidence and short on evaluation and detailed reasons for some of the findings. Despite those inadequacies we are satisfied that any criticism regarding lack of rigour and reasoning is not sufficiently serious to be elevated to an error of law.

25. It seems clear that the judge had in mind the factors identified by the Upper Tribunal in *MOJ* and that his findings at [25] were broadly consistent with the country guidance. The judge could and should have conducted an evaluative assessment of the evidence with more detailed reasons, but when the decision is read as a whole, the reasons for his conclusion relating to Article 3 become sufficiently clear: *see MK (Duty to give reasons)* [2013] UKUT 641.

26. The respondent did not challenge the findings relating to the appellant's personal circumstances, only how those circumstances should have been assessed in light of the country guidance. When properly analysed, the respondent's grounds set out why, in his view, the judge should have come to a different conclusion, but do not identify a material error of law. The judge's conclusion on Article 3 was within a range of reasonable responses to the evidence.

The appellant's second ground – Article 8

27. It becomes clear that we need say little about the appellant's second ground of appeal. The ground, as pleaded, did not say how or why the failure to make findings relating to Article 8 would have made any material difference to the decision if the findings on Article 3 are sustainable. The relevant ground of appeal is whether the decision is unlawful under section 6 of the Human Rights Act 1998. The appellant succeeded on that ground in relation to Article 3 and any failure to consider Article 8 would have made no material difference to the outcome of the appeal.

28. In any event, the appellant would have to show 'very compelling reasons' to outweigh the public interest in deportation due to the length of his sentence. Aside from his length of residence and the fact that he has other adult family members living in the UK there was little evidence of any compelling circumstances relating to his life in the UK. The appellant has achieved very little despite the opportunities that life in the UK might have afforded him. The medical evidence was not likely to be sufficiently compelling to outweigh the strong public interest in deportation in a balancing exercise under Article 8. In all likelihood, any decision under Article 8 would have relied on the same factors that were already considered under Article 3.

29. We concluded that the First-tier Tribunal decision did not involve the making of an error on a point of law.

DECISION

The First-tier Tribunal decision did not involve the making of an error on a point of law.

The decision shall stand.

Signed  Date 08 April 2019
Upper Tribunal Judge Canavan