Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00153/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 08 October 2019	**On 24 October 2019**

Before

THE HONOURABLE MR JUSTICE WARBY
UPPER TRIBUNAL JUDGE CANAVAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

A O
(ANONYMITY DIRECTION MADE)

Respondent

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 find that it is appropriate to continue the order. We make clear that the order is not made to protect the respondent's reputation following his conviction for criminal offences. Unless and until a tribunal or court directs otherwise, the respondent 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 respondent and the appellant.

Representation:
For the appellant: Ms S. Cunha, Senior Home Office Presenting Officer
For the respondent: Mr P. Georget, instructed by Stirling Ackroyd Legal

DECISION AND REASONS

1. For the sake of continuity, we shall refer to the parties as they were before the First-tier Tribunal although technically the Secretary of State is the appellant before the Upper Tribunal.

2. The appellant (AO) appealed the Secretary of State's decision dated 05 September 2018 to revoke protection status and to refuse a human rights claim. The decision was made in the context of deportation proceedings. A deportation order was signed on 04 September 2018.

3. First-tier Tribunal Judge A.A. Wilson ("the judge") dismissed the appeal on Refugee Convention grounds but allowed the appeal on human rights grounds, in a decision promulgated on 08 May 2019.

4. After having considered the evidence and the country guidance decision in *MOJ (returns to Mogadishu) Somalia* CG [2014] UKUT 00442 the judge concluded that the appellant's refugee status had not ceased [7-15]. The Secretary of State asserted that the appellant was a person who, having been convicted of a particularly serious crime, constituted a danger to the community for the purpose of section 72 of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002"). Section 72 NIAA 2002 is said to reflect 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*. The effect of section 72 is that the judge was required to consider whether the appellant had rebutted the presumption that he was a danger to the community. The judge concluded that the appellant had failed to rebut the presumption [16-17]. Section 72(10) then required him to dismiss the appeal in so far as it relied on grounds relating to the Refugee Convention, and he did so.

5. The judge went on to consider whether the appellant's removal would be unlawful under section 6 of the Human Rights Act 1998 ("HRA 1998"). He made clear that the burden of proof lay on the appellant to show that his removal would give rise to a real risk of serious harm under Article 3 of the European Convention [19]. He went on to repeat many of the same factors that he had already considered in relation to risk on return to Mogadishu, when addressing the appellant's refugee status. He concluded that the appellant's removal would give rise to a real risk of serious harm under Article 3 [20-22]. He went on to find that removal would also amount to a breach of Article 8 of the European Convention. This was for largely the same reasons he had already given for finding real risk of a breach of Article 3 [26].

6. The Secretary of State appealed the First-tier Tribunal decision. The original grounds were diffuse and unparticularised. At the hearing, Ms Cunha formulated them into the following three points.

(i) The First-tier Tribunal failed to apply the country guidance decision in *MOJ* properly, failed to give adequate weight to the fact that the appellant could apply for initial support from the Facilitated Returns Programme, understood some Swahili, and was fit and able to work.

(ii) The second point was vague and was not clarified adequately at the hearing. As we understood the submission, the Secretary of State makes a general assertion that the First-tier Tribunal failed to follow the approach outlined in *SSHD v MA (Somalia)* [2018] EWCA Civ 994 and *SSHD v MS (Somalia)* [2019] EWCA Civ 1345. It was not open to the judge to find that unacceptable living conditions falling below humanitarian standards amounted to a breach of Article 3.

(iii) If the First-tier Tribunal erred in the Article 3 assessment, it follows that the assessment under Article 8 was also flawed.

Decision and reasons

7. At the outset, we observe that the Secretary of State's grounds of appeal were poorly pleaded. It is difficult for the Upper Tribunal to assess the case put forward by a party, or for the other party to respond, if the grounds of appeal do not identify the alleged errors in a clear and logical manner. In this case, the Secretary of State argued additional points in the skeleton argument, which were not contained in the grounds of appeal, without applying for or obtaining permission to argue those points.

8. The appeal to the judge was dismissed with reference to the Refugee Convention. The Secretary of State's grounds appeared to focus on the First-tier Tribunal's findings relating to Articles 3 and 8 of the European Convention.

9. The original grounds of appeal appeared nonetheless to criticise the judge for his approach to the cessation of refugee status. The grounds stated that the correct approach regarding cessation of refugee status was set out by the Court of Appeal in *MA (Somalia)* and quoted the decision, but no argument, or none that was coherent, was developed in relation to cessation.

10. When it came to the challenge to the First-tier Tribunal's findings relating to Article 3, nothing of significance was said in the grounds until [9], where it was merely stated that the Court of Appeal in *SSHD v Said* [2016] Imm AR 1084, found that there was no violation of Article 3 by reason only of a person being returned to a country which for economic reasons cannot provide him with basic living standards. Beyond that bare statement, no reasons were given as to why the First-tier Tribunal might have erred.

11. The Secretary of State's skeleton argument, under the heading "Submissions: Article 3", attempted to put forward further arguments as follows:

> "Despite '*SSHD vs MA (Somalia)*' having been promulgated long before the FTTJ's consideration under Art 3, having upheld the s72 certificate, the FTTJ fails to direct themselves to this at **Para 9/10** when considering the case law of MS (Article 1C(5) – Mogadishu) Somalia [2018 UKUT 00196 (IAC) and AMA (Article 1C(5) – proviso – internal relocation) Somalia [2019] UKUT 00011 (IAC), or when considering relevant matters at **Para 21/22** (it is assumed reference here to CG case of 'MHA' should be read as 'MOJ'?). The finding that the Appellant would be forced to live in an IDP camp (and would 'perceived' to be a westerner in them) itself being undermined by errors identified above as to the FTTJ's assessment of 'MOJ'.
>
> This error is of material significance given the recent authority of Secretary of State for the Home Department v MS (Somalia) [2019] EWCA Civ 1345 where the Court of Appeal clearly found the approach MS (Art 1C(5) – Mogadishu) Somalia [2018] UKUT 00196 (IAC) to be flawed and the comments in AMA (Article 1C(5) – proviso – internal relocation) Somalia [2019] UKUT 000011 (IAC) to be too generalised …
>
> [*MS (Somalia)* quoted]
>
> The FTTJ therefore fell into material error, in light of the above guidance, in their approach at **Para 52-54** (which somewhat surprisingly fall between para 10 and 11), and **Para 20-22**." (sic)

12. These incoherent arguments referred to authorities that consider the proper approach to internal relocation in the context of cessation of refugee status. They have nothing to do with the correct approach to Article 3. Nor were any arguments relating to the second point developed in any clear or meaningful way in oral submissions.

13. In so far as the authorities of *MA (Somalia)* and *MS (Somalia)* have been cited, we note that they deal with the approach to cessation, which is not the subject of the appeal before the Upper Tribunal. It is now well established that the assessment of cessation of status is a 'mirror image' of a decision determining refugee status albeit cessation must involve a restrictive approach and includes the additional consideration of whether any change in circumstances is of a significant and non-temporary nature such that the circumstances giving rise to the fear of persecution no longer exist and there is no other reason to fear persecution.

14. The decision in *MS (Somalia)* is of little relevance to the assessment of Article 3 of European Convention which, in the context of this case, is focussed solely on the conditions in the proposed place of removal i.e. Mogadishu. *MS (Somalia)* reiterated that a court should follow the 'mirror image' approach endorsed in *MA (Somalia)*, which could include consideration of whether there was a safe area to which the person could internally relocate. The test of whether it would be 'reasonable' to expect a person to stay in another area of the country for the purpose of the Refugee Convention can include consideration of humanitarian conditions: see [28] *Said*. Given that Mogadishu would be the appellant's place of internal relocation it was open to the judge to consider the humanitarian conditions he might face there.

15. The Court of Appeal decision in *Said* is more relevant to the argument we think the Secretary of State was attempting to make. It focussed more directly on the proper

approach to Article 3 in relation to humanitarian conditions. The court noted the 'fork in the road' between the Strasbourg jurisprudence in *D v UK* (1997) 24 EHRR 423 and *MSS v Belgium & Greece* 53 EHRR 28 and emphasised the distinction made by the Strasbourg court in *Sufi and Elmi v UK* 54 EHRR 209 at [282].

> "282. If the dire humanitarian conditions in Somalia were solely or even predominantly attributable to poverty or to the State's lack of resources to deal with a naturally occurring phenomenon, such as a drought, the test in *N. v. the United Kingdom* may well have been considered to be the appropriate one. However, it is clear that while drought has contributed to the humanitarian crisis, that crisis is predominantly due to the direct and indirect actions of the parties to the conflict. The reports indicate that all parties to the conflict have employed indiscriminate methods of warfare in densely populated urban areas with no regard to the safety of the civilian population (see paragraphs 82, 123, 127, 132, 137, 139-140 and 160, above). This fact alone has resulted in widespread displacement and the breakdown of social, political and economic infrastructures. Moreover, the situation has been greatly exacerbated by al-Shabaab's refusal to permit international aid agencies to operate in the areas under its control, despite the fact that between a third and a half of all Somalis are living in a situation of serious deprivation (see paragraphs 125, 131, 169, 187 and 193, above)."

16. The court in *Said* went on to consider the findings made by the Upper Tribunal in *MOJ* relating to the humanitarian conditions in Mogadishu and concluded that the findings made at [407] and [408] of *MOJ* were likely to have been connected to the issue of internal relocation and could not amount to a finding that the poor humanitarian conditions breached Article 3 "(save in extreme cases)" [26][28]. The court then considered what the Upper Tribunal said about the conditions for Internally Displaced Persons (IDPs). At [30] of *Said*, the court recognised that some of the Upper Tribunal's analysis touched on concerns relating to violence in IDP camps, which would be more relevant to an *MSS* Article 3 analysis, but other aspects of the evidence relating to destitution would be more relevant to the *D* approach. The conflation of the two approaches meant that there was no clear finding that the conditions in an IDP camp breached Article 3 *per se*. Indeed, the Upper Tribunal made clear that each case will fall to be decided on its own facts. The Court of Appeal concluded:

> "31. I entirely accept that some of the observations made in the course of the discussion of IDP camps may be taken to suggest that if a returning Somali national can show that he is likely to end up having to establish himself in an IDP camp, that would be sufficient to engage the protection of article 3. Yet such a stark proposition of cause and effect would be inconsistent with the article 3 jurisprudence of the Strasbourg Court and binding authority of the domestic courts. In my judgment the position is accurately stated in para 422. That draws a proper distinction between humanitarian protection and article 3 and recognises that the individual circumstances of the person concerned must be considered. An appeal to article 3 which suggests that the person concerned would face impoverished conditions of living on removal to Somalia should, as the Strasbourg Court indicated in *Sufi and Elmi* at para 292, be viewed by reference to the test in the *N case.* **Impoverished conditions which were the direct result of violent activities may be viewed differently as would cases where the risk suggested is of direct violence itself.**" [emphasis added]

17. In so far as *MA (Somalia)* considered what was said in *Said* it did not take the issue any further. In our assessment the highest *Said* goes is to state that the findings in *MOJ* did not amount to a finding that the conditions in IDP camps in Mogadishu in themselves amount to a breach of Article 3. The Court of Appeal did not find that Article 3 could never be engaged in such circumstances, but properly concluded that it would depend on the individual circumstances of the case and whether any of the principles in *MSS* and *Sufi and Elmi* applied. Whether the judge erred in relation to his assessment of Article 3 will depend on the nature of his findings on the facts of this case.

18. The respondent's first and third points stand or fall together. In assessing the risk on return to Mogadishu the judge was obliged to consider the country guidance decision in *MOJ*. He undertook that task. He did so as part of his consideration of whether the appellant's refugee status had ceased [15] and when he turned to consider Article 3 [20-22]. The process of assessing the factual circumstances is the same, whether it is undertaken in the context of the Refugee Convention or for the purposes of the European Convention. The judge set out the contents of the headnote to *MOJ* in full, and clearly had regard to the guidance [8]. He made close reference to various paragraphs of the headnote in *MOJ* and took into account the factors that the Upper Tribunal suggested might be relevant [15].

19. At [19], the judge turned to consider Article 3. It is not arguable, as Ms Cunha suggested, that the judge indirectly placed the burden on the Secretary of State in relation to Article 3. He correctly identified that the burden was on the Secretary of State in relation to the issue of cessation [15], and he correctly identified that the burden was on the appellant in relation to Article 3 [19]. At [20], he set out similar factors to the ones he had already considered. He took into account the fact that the appellant spoke English and understood some Swahili. He noted that the appellant did not speak or understand Somali. He was satisfied that the appellant, who came to the UK when he was only one year old, did not have any ties to Somalia. Nor did he have any cultural connections or a network of social or clan ties that he could fall back on to assist him to adapt to life in Somalia. Those findings were open to him on the evidence.

20. It was open to the judge to conclude that the appellant's family in the UK were unable to provide any meaningful financial support. The appellant lives with his mother, who suffers from depression with psychotic features. She does not work and is reliant on public funds. Similarly, the evidence given by the appellant's father was that he was unemployed. The appellant said that his father recently gave him £5-£6 to visit his probation officer, but the sum was so insignificant it did not indicate that his father was likely to be able to provide regular remittances to the appellant that would make any meaningful difference to his situation. The judge's finding that the appellant's family was unable to provide remittances was within a range of reasonable responses to the evidence.

21. Although the judge recognised that the appellant had "some preliminary qualifications", he had no demonstrable employment history. His profile suggested that there were not likely to be any "immediate employment opportunities without support" in Mogadishu. The judge was satisfied that the up-to-date evidence relating to the conditions in Mogadishu did not disclose any material change in the circumstances since the country guidance decision. Although the judge's decision refers to "MHA" it is reasonable to infer that this is a typographical error and that the judge was in fact referring to the country guidance in *MOJ* [21].

22. The judge was aware that there is a "rehabilitation allowance on voluntary returns": [21]. Ms Cunha made much of this issue at the hearing, suggesting that this was a potential source of funding which the judge had wrongly left out of account. However, it is difficult to see how the judge could fairly be said to have erred in concluding that there was no evidence to indicate that the appellant would be given such an allowance. The respondent's decision letters include standard information about the Facilitated Return Scheme (FRS), but they make clear that it was only an option "if you are accepted by the scheme". Mr Georget argued that the respondent's policy on the Facilitated Return Scheme (Version 8.0 - 03/10/16) makes clear that it only applies if a person is willing to make a voluntary departure, and in any event, the appellant was ineligible because he was pursuing a protection and human rights claim on appeal. In the absence of any evidence to support the Secretary of State's assertion that the appellant would be granted financial support under the scheme, the judge was clearly entitled to make the finding he did, and the contrary is not reasonably arguable.

23. In any event, the amount provided by the scheme is only a temporary stop gap to assist a person to re-establish themselves on return. The same factors identified by the judge that might act as barriers to the appellant being able to establish a life in Mogadishu would still be apparent after a short period of initial financial support. He does not speak Somali, the main language spoken in Mogadishu, and has no social, cultural or familial connections that might assist him to secure a livelihood.

24. The appellant is a from a minority group that does not have any meaningful connections or influence in Mogadishu. The Country Policy and Information Note on Somalia relating to majority clans and minority groups in south and central Somalia, which was before the First-tier Tribunal, states that the Bajuni live in Kismayo and the surrounding islands [5.4.1]. The report states that even in their home area the local Bajuni population is being exploited by Somali businessmen [5.4.2]. Some Bajunis live in Mogadishu, in an area which includes other coastal groups. However, the district administration is mainly made up of members of a majority clan (Hawiye) [5.4.3]. Although the judge did not specifically refer to the fact that the appellant is Bajuni, it is clear he was aware of the fact and that he had regard to relevant factors that might lead to a person from a minority group being forced into the unacceptable humanitarian conditions of a makeshift IDP camp [2][22].

25. Paragraph (vii) of the headnote in *MOJ* states that a person will need to look to family members for assistance to re-establish himself and to secure a livelihood. The Tribunal noted that a person might also be able to seek assistance from clan members who are not close relatives, but such assistance is unlikely to be forthcoming from minority groups who are more disadvantaged and "may have little to offer". The judge considered the factors outlined at paragraph (ix) of the headnote to *MOJ*, including whether the appellant had any connections to Mogadishu, access to financial resources, employment prospects and the availability of remittances from abroad. Even if the appellant is fit and able to work, the evidence shows that a person must rely on familial or clan connections in order to secure a livelihood. The reason why the appellant did not have those connections was because his family are not from Mogadishu. Even if there is a small Bajuni presence in Mogadishu the country guidance indicates that a minority group would have little to offer in terms of support.

26. Paragraph (xii) of the *MOJ* headnote states that those who do not originate from Mogadishu might be able to relocate to the city without being subject to Article 15(c) risk or risk of destitution. Importantly, however, it goes on to say that relocation to Mogadishu for a person from a minority group 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 and may lead to the real possibility of having to live in conditions that would fall below acceptable humanitarian standards. The appellant's case fell squarely within this aspect of the guidance.

27. The judge found that the appellant would be viewed as an obvious "Westerner", which might place him at increased risk of targeting or robbery. Since the appellant has lived in the UK for most of his life, and has no experience of life in Somalia, it was open to the judge to conclude that he had no knowledge of Somali "street life or other general survival skills within Somalia" [20].

28. Whether minority group status might be a factor that could direct a case down the *MSS* route of assessment was not considered by the Court of Appeal in *Said* or *MA (Somalia)*. It is not clear whether the judge was referred to the decision in *Said*. The First-tier Tribunal decision does not make any clear distinction between the two paths that could be taken with reference to the Strasbourg case law. However, what is clear is that the judge found that a number of factors distinguished the appellant's circumstances from those of the average returnee with previous experience of life in Somalia who may still have connections there. It is also clear that he considered factors that were relevant to the approach taken in *MSS* and *Sufi and Elmi*. At [22] he noted that the IDP camps arose due to large scale conflict and the displacement of minority populations, and due to the lack of any effective government.

29. The evidence indicated that this was a case that was appropriate for assessment under the *MSS* route. The Secretary of State's own report on majority clans and minority groups in south and central Somalia dated January 2019 accepted that minority group members in Mogadishu without support networks, skills or

education, and who have no real prospect of securing access to a livelihood are generally likely to face difficult living conditions that amount to serious harm [2.4.13].

30. Although the Tribunal in *MOJ* did not find that membership of a minority group, taken alone, gave rise to a real risk of serious harm, the evidence before the First-tier Tribunal continued to show that minority groups are more likely to face political, social, economic and judicial discrimination and human rights abuses [2.4.19]. Other evidence showed that minority groups make up a disproportionate part of the population of the informal settlements in Mogadishu and are more likely to have been displaced by conflict [5.1.2]. Minority groups are still disproportionately subjected to killings, torture, rape, kidnapping for ransom and looting. Many minority communities continue to live in "deep poverty and to suffer from numerous forms of discrimination and exclusion" [5.1.4]. The same report included evidence to show that members of minority groups are potentially more vulnerable to criminal acts such as robbery [5.1.6]. The security forces were generally ineffective and lacked sufficient resources. Security forces abused civilians and often failed to prevent or respond to societal violence [7.2.1]. Most people in IDP camps come from minority communities. A significant proportion felt threatened within the camps by criminals and the police. The camps are not secure from "government-affiliated militia, which despise the minority clans" [8.1.3].

31. The evidence before the First-tier Tribunal in the present case indicated that the conditions the appellant would face in Mogadishu do not arise from the usual kind of poverty or deprivation. The evidence made clear that minority groups are more likely to face such deprivation, are more likely to be physically attacked in IDP camps and that government-affiliated groups are likely to be involved in abuses within the camps. As a member of a minority group and someone who is likely to be identified as a 'Westerner' the appellant would also be at greater risk of attack for the purpose of robbery. Although the situation in Mogadishu has changed to some extent since the decision in *Sufi & Elmi*, the evidence shows that minority groups are disproportionately more likely to be the subject of deprivation and human rights abuses. Some of those abuses are carried out with the active support or acquiescence of the state. In such circumstances, the evidence before the First-tier Tribunal clearly pointed to the kind of circumstances that engaged the *MSS* route of assessment.

32. The judge was required to evaluate whether there was a real risk that the appellant would face conditions that were sufficiently serious to amount to a breach of Article 3. It was open to him to take into account the fact that the appellant would be a stranger to Somalia, that he only spoke English and understood some Swahili, that he has no familial or clan connections that would assist him to establish himself in Mogadishu, that there was no evidence to show that he would receive funds under the Facilitated Returns Scheme or that his family were able to afford remittances. It was also open to him to take into account the fact that the IDP camps largely comprise of minority populations where people are forced to live in conditions that fall below acceptable humanitarian standards.

33. We bear in mind the recent comments of the Court of Appeal in *UT (Sri Lanka) v SSHD* [2019] EWCA Civ 1095. Although the decision might have benefited from a better structure, and could have been more clearly expressed in places, it is apparent that the judge considered factors that were relevant to a proper assessment of Article 3, and that his overall conclusion was within a range of reasonable responses to the evidence. The Secretary of State's arguments consist largely of the repetition of general submissions made to the First-tier Tribunal. They fail to disclose any errors of law that would have made a material difference to the outcome of the decision.

34. We agree that the judge's findings relating to Article 8 are rather confused and lack structure, but the judge was entitled to rely on his findings relating to Article 3. Even if there is an error in the judge's approach to Article 8, it would have made no material difference to the outcome of the appeal brought on human rights grounds.

35. We conclude that the First-tier Tribunal decision relating to the human rights claim did not involve the making of a material error 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 21 October 2019

Upper Tribunal Judge Canavan