Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00130/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20th November 2019	**On 28th January 2020**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

MOHAMED ALI NASSIR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms B Jones, Counsel instructed by Polpitiya & Co Solicitors
For the Respondent: Mr T Lindsay, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal ("F*t*T") Judge Pooler ("the judge") promulgated on 12th June 2019.

2. The appellant is a national of Somalia. He arrived in the United Kingdom in December 2005 with a family reunion visa and, upon arrival, was granted indefinite leave to remain. In October 2013 the applicant applied for naturalisation, but the

application was refused on 6th February 2014 due to his character and criminal history. The appellant continued offending and on 16th January 2015 he was convicted at Kingston upon Thames Crown Court for possession of a Class A drug (Heroin) with intent to supply, possession of a Class A drug (Crack cocaine) with intent to supply, and Affray. He was sentenced to a total of 36 months imprisonment. On 21st September 2016, the appellant was convicted of battery at Central London Magistrates Court and was sentenced to 12 months imprisonment. He has one further conviction. On 19th December 2017 he was convicted at West London Magistrates Court for using threatening/abusive words or behaviour, or disorderly behaviour likely to cause harassment/alarm or distress. He was fined £100.

3. Following consideration of representations made on behalf of the appellant, on 24th August 2018, the respondent made a deportation decision under s32(5) of the UK Borders Act 2007 on the grounds that the appellant is a foreign national who has been convicted in the UK of an offence and has been sentenced to a period of imprisonment of at least 12 months. The respondent concluded that the exceptions set out in s33 of the Act do not apply, and the appellant's deportation was considered to be conducive to the public good.

4. The respondent also certified the matter under s.72(2) of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') on the basis that the appellant had been convicted of a particularly serious crime and constitutes a danger to the community of the United Kingdom. The respondent claimed that the consequence of this decision is that the appellant's refugee status no longer prevents his return to Somalia in light of Article 33(2) of the Refugee Convention.

5. The appellant's appeal was dismissed by First-tier Tribunal Judge Pooler for reasons set out in a decision promulgated on 12th June 2019. The appellant claims that at [27], the judge found the appellant remains at risk of persecution on return to Mogadishu as a member of a minority clan. It is said that the finding at [27] should have been determinative of the appellant's appeal on Article 3 grounds, but the judge

erroneously determined the Article 3 claim solely on the basis of whether the appellant is likely to be destitute and forced to live in an IDP camp. The appellant claims the judge failed to have regard to the fact that the appellant is a member of a minority clan and the clan-based violence and persecution that the appellant would be exposed to, in determining the Article 3 appeal.

6. Permission to appeal was granted by Upper Tribunal Judge Kamara on 8th August 2019. She observed: "*... It is arguable, given the unchallenged evidence that the appellant and his mother were recognised as refugees on the basis of their minority clan status, that the judge ought to have considered this matter to be relevant in assessing the appellant's Article 3 claim.*".

The decision of FtT Judge Pooler

7. At paragraph [11] of his decision, the Judge notes that although there was no documentary evidence in relation to the basis upon which the appellant had been granted asylum, the respondent did not dispute the evidence of the appellant and his mother that he was a member of the minority Reer Hamar – Bandhabo clan.

8. It was uncontroversial that the appellant has been convicted of a particularly serious crime. For reasons set out at paragraph [19], the judge concluded at [20], the appellant has not rebutted the statutory presumption in s72(2) of the 2002 Act and his asylum appeal must be dismissed.

9. The judge went on to consider the respondent's decision to revoke refugee status upon making the s.72(2) certification, under the heading 'Cessation'. The judge referred to the Country Guidance set out in MOJ & Ors (Return to Mogadishu) Somalia CG [2014] UKUT 00442 (IAC), and other background material that was before the Tribunal. The judge concluded, at [27] as follows:

> "It is for the respondent to prove that there has been a significant and non-temporary change in the circumstances in Somalia and particularly in Mogadishu, the city from which the appellant came. Although the country guidance indicated that there would not be a real risk to a returnee by reason of clan-based violence in Mogadishu, the evidence before me of continuing discrimination and human rights abuses, which in some circumstances may

> amount to persecution, persuades me that the respondent has not discharged the burden which rests on him."

10. At paragraphs [29] to [36], the judge addressed the appellant's Article 3 claim. The Judge refers to the decision in MOJ. The judge accepted the evidence given by the appellant and his mother that they have no relatives who remain in Mogadishu. At paragraph [31], the Judge said:

> "In these circumstances, the country guidance in *MOJ* indicates that there must be a careful assessment of all the circumstances. Relevant considerations are listed in paragraph (ix). My attention was not drawn by either representative to evidence of the circumstances of the appellant's family in Mogadishu before they left Somalia. All that can be said is that they were minority clan members. I accept that the appellant has no relatives in Mogadishu on whom he may call. As the member of a minority clan, any clan membership would be of very limited assistance to him. The appellant was aged 16 when he entered the UK and will have limited personal recollection of his time in Somalia."

11. The judge accepted the unchallenged evidence that the appellant's parents have been dependent in the UK on state benefits. He accepted they would be unable to make any significant contribution towards the appellant's living expenses in Somalia. The judge noted that in MOJ, the Tribunal made it clear that Somalia, and Mogadishu in particular, were enjoying a period of economic upturn. At paragraphs [35] and [36], the judge concluded:

> "35. In evidence the appellant said that he had previously been employed in the UK, both in a business which refilled printer ink cartridges and in a retail establishment. He said that in prison he had taken courses including, painting and other areas.
>
> 36. Against the background evidence of economic improvements in Mogadishu, I find that the appellant has failed to persuade me that he would be unable to obtain employment such that he could maintain himself and remain in accommodation of his own rather than having to resort to an IDP camp. He began the hearing by using the services of a Somali interpreter, illustrating that he retained the ability to speak the Somali language. His appeal by reference to Article 3 was not put on any other basis and so falls to be dismissed, issues of risk having previously been considered by reference to the asylum appeal."

12. The judge then addressed the appellant's Article 8 claim at paragraphs [37] to [49] of the decision. The judge noted the appellant does not rely upon his relationship with his child's mother. The judge found that it would be unduly harsh for the child to live in Somalia but was not persuaded that it would be unduly harsh for the child to

remain in the UK without the appellant. At paragraphs [48] to [49], the Judge concluded as follows:

> "48. As I have recorded above the appellant has not proved that he would be at real risk of destitution in Somalia. As for his private life, its nature and extent are unclear except insofar as it encompasses his relationships with his immediate family. He was not in education or employment at the time of the hearing. There is no evidence of other relationships which might properly be considered under the heading of private life.
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> 49. I take account of these matters and have regard to the cumulative effect. Against them must be balanced the public interest in the deportation of a foreign criminal. This is a weighty consideration, not least because the appellant's three-year sentence was significant. Weighing these matters in the balance I am satisfied that the public interest in deportation outweighs the matters on which the appellant relies, and that the decision was and remains proportionate. The appeal on Article 8 grounds must therefore also fail.

The appeal before me

13. In summary, the sole ground of appeal is that the FtT judge materially erred in his assessment of the risk that the appellant will be subjected to upon return. It is said the appellant will be subjected to treatment in violation of the Article 3 prohibition against torture, due to the effects of inter-clan militia violence on him, as a member of a minority clan.

14. The appellant claims the judge found, at [27], the appellant remains at risk of persecution on return to Mogadishu as a member of a minority clan. It is said that that conclusion should be determinative, in the appellant's favour, of his Article 3 claim. The appellant claims the judge erred in determining the Article 3 claim solely on the basis of whether the appellant is likely to be destitute and forced to live in an IDP camp, and in his belief that the Article 3 claim was not put on any other basis. The appellant had claimed that it was his personal characteristics that placed him at risk over and above the risk of destitution in an IDP camp.

15. Ms Jones submits the appellant's asylum appeal was dismissed because the Judge found that the appellant has not rebutted the statutory presumption is section 72(2). However, she submits the judge found, at [27], the evidence of continuing discrimination and human rights abuses which in some circumstances may amount

to persecution, persuaded him that the respondent has not discharged the burden which rests on him in relation to cessation. She submits, the respondent has not challenged that finding and that finding was relevant to the consideration of the Article 3 claim.

16. Ms Jones submits the appellant's refugee status was granted in the context of the difficulties encountered by the family because they are from a minority clan. She referred to the answers given by the appellant's mother when she was interviewed by the respondent in support of her claim for international protection on 27th April 2004. She had referred to various occasions upon which the family were attacked at home by the militia, who were asking for money and valuables, and during which she was beaten. The attacks had caused her husband and children to leave the area. That was the background to the grant of refugee status.

17. Ms Brown submits the judge accepted the objective material establishes continuing discrimination and human rights abuses, which in some circumstances may amount to persecution. She submits the judge considered the Article 3 claim and at [36], the judge noted that the issues of risk had previously been considered by him, by reference to the asylum appeal. She submits, if the appellant remains a refugee, that must be relevant to the consideration of the Article 3 claim, and the judge has failed to have regard to the risk that was referred to at paragraph [27], regarding continuing discrimination and human rights abuses, in his consideration of the Article 3 claim. She submits, given the unchallenged evidence that the appellant and his mother were recognised as refugees on the basis of their minority clan status, the judge ought to have considered that as relevant, in assessing the Article 3 claim.

18. For the respondent, Mr Lindsay submits it was not in issue that the appellant is from a minority clan. He submits that at paragraph [27], the judge was addressing Article 1C(5) of the Refugee Convention and the question of cessation. That is, whether the appellant can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality.

19. Mr Lindsay accepts that an Article 3 claim was advanced by the appellant before the First-tier Tribunal and was referred to in the skeleton argument relied upon by the appellant. However, he submits, the submissions referred to were directed to the Article 3 risk that the appellant would be exposed to if he lived in an IDP Camp. There is an unchallenged finding by the judge at [36], that the appellant will not have to resort to an IDP Camp, and the Article 3 claim could not succeed.

20. He submits the judge was entitled to have regard to the country guidance decision in MOJ when considering the Article 3 claim and it was not suggested by the appellant or found by the judge, that the country guidance should not be applied. Mr Lindsay submits the background material referred to by the judge confirms that there are clan tensions, and some evidence of minority clans being at a disadvantage and facing some discrimination. However, that background material could not in itself establish an Article 3 claim, or a real risk of a breach of Article 3. At its highest, there was some evidence that members of minority groups are likely to face political, social, economic discrimination and human rights abuses *"which in some circumstances may amount to persecution"*. This serves to demonstrate that an assessment of the individual circumstances is needed. The background material referred to by the judge, at paragraphs [24] to [26] of his decision was not sufficient to justify a departure from the country guidance that there is in general, no Article 3 risk and insufficient to establish a breach of Article 3 on the facts found by the judge following an assessment of the individual characteristics of the appellant.

Discussion

21. The effect of the certification under s72(2) of the 2002 Act and the decision of First-tier Tribunal Judge Poole that the appellant has not rebutted the statutory presumption under s72(2) is that the appellant cannot benefit from the prohibition from expulsion or return, set out in Article 33 of the Refugee Convention, and the Tribunal was obliged to dismiss the appeal in so far as the appellant claimed that removal of the appellant from the UK, or a decision to revoke the appellant's protection status, would breach the UK's obligations under the Refugee Convention.

22. It is convenient to set out the relevant Articles of the Refugee Convention. Article 1C(5) of the Refugee Convention states:

> "C: This Convention shall cease to apply to any person falling under the terms of section A if:
>
> …
>
> (5) He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality …"

23. Article 33 of the Refugee Convention is headed, 'Prohibition of expulsion or return ('refoulement') and states:

> "1. No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.".

24. The judge found, at [27], the respondent has not established that there has been a significant and non-temporary change in the circumstances in Somalia and particularly in Mogadishu. Ms Brown submits the conclusion that the appellant continues to have a well-founded fear of persecution if he is returned to Somalia, that is not challenged by the respondent, is determinative of the consideration of the appellant's Article 3 claim.

25. I do not accept that submission. In Dang (Refugee — query revocation — article 3) [2013] UKUT 00043, the Upper Tribunal emphatically rejected the argument relied upon by Ms Brown. The Upper Tribunal said:

> "4. [*Counsel for Dang*] did not refer us to any authority for the proposition that, for as long as an individual has refugee status, there is a presumption that his or her removal would be a breach of article 3 . We reject this proposition, which we consider is simply wrong. The extracts we quote below from decided cases of the European Court of Human Rights (to which we were not referred) settle the issue so clearly that no further discussion is required on our part."

26. The Upper Tribunal referred to Saadi v. Italy [2008] ECHR 179 (Case No: 377201/06) and Sufi & Elmi v. United Kingdom [2011] ECHR 1045, in support of the proposition that a Tribunal or Court considering the matter looks at the Article 3 risk prospectively at the date of the proceedings, and not by reference to the historical position, although the historical position may be relevant. At paragraph [42], the Upper Tribunal said:

> "However, where an individual was recognised [as] a refugee at some point in the past, the past may be relevant in shedding light on the current situation and the prospective article 3 risk but it remains the case that the question whether there is a risk of article 3 ill-treatment must be answered at the date of the proceedings before the court and is forward looking."

27. The burden was on the respondent to establish changes of a significant and non-temporary nature, such that the appellant's fear of persecution could no longer be regarded as well-founded. I accept, as Mr Lindsay submits, paragraph [27] of the decision of the First-tier Tribunal is concerned with Article 1C(5) of the Refugee Convention and 'cessation'. Having found, at [27], that the respondent has not established that there has been a significant and non-temporary change in the circumstances in Somalia, the judge was required to consider whether the appellant's deportation will infringe his rights under the ECHR and in particular, Article 2, 3 and 8.

28. The Article 3 claim was addressed, as Mr Lindsay accepts, by the appellant in the skeleton argument that was before the First-tier Tribunal. At paragraph 14(d) of the skeleton argument, the Article 3 issue was summarised as follows:

> "Article 3 ECHR which applies regardless of the issues under the convention. This will require consideration not just of the general country conditions in Mogadishu on the objective evidence today, but of the particular features of the appellant's case and the reality for him if sent there. It will require consideration of these issues both in a "*paradigm*" sense (i.e. a risk of harm caused by state or nonstate actors) and in a wider sense, applying the principles in *GS* and *Said.*"

29. The appellant elaborated at paragraphs [37] and [38], and at [39], set out four submissions:

> "(a) First, returning the appellant to Mogadishu is reasonably likely to result in his being destitute and accommodated in an IDP camp.

> (b) Second, the conditions he would suffer in an IDP camp are sufficiently connected to acts or omissions by individuals or group actors (including the Somali state) that he is not required to meet and *"elevated threshold"* in order to make good his claim; and
>
> (c) Third, in any event, the Appellant's individual characteristics – including that he has no connections at all to Mogadishu, is effectively a British man in his late twenties in all but nationality law, does not speak the language like a native of Mogadishu and is unlikely in practice to be able to establish membership of even a minority clan – amount cumulatively to *"exceptional circumstances"* which do meet that elevated threshold. It would not be the *mere* destitution and poverty suffered generally by the Somali population.
>
> (d) Fourth, those characteristics equally give rise to a real risk that the appellant will be targeted and subjected to prohibited treatment on return to an IDP camp in a *"paradigm"* sense, in particular of kidnap and ransom, but also to indiscriminate terrorist violence.".

30. It is well established that the nature of the prohibition imposed on states by Article 3 ECHR is absolute, irrespective of the conduct of the individual. At paragraph [21] of his decision, in considering the issue of 'cessation', the judge stated:

> "… Consideration of the evidence relied on by the parties will also inform the Tribunal in relation to the human rights appeal insofar as the appellant relies on Article 3."

31. The judge clearly recognised that his decision as to whether the respondent has established that there has been a significant and non-temporary change in the circumstances in Somalia, would be relevant to, but not determinative of the Article 3 appeal.

32. Contrary to what is said by the appellant, the judge did not simply focus upon whether the appellant faces the prospect of life in an IDP camp on his return. In addressing the appeal on Article 3 grounds, the judge clearly had regard to the appellant's individual characteristics and addressed the matters relied upon by the appellant in the skeleton argument. The judge had noted the appellant had previously been granted asylum on the basis that he was a member of a minority clan. The judge referred to paragraph [420] of the decision in MOJ, in which the Upper Tribunal had recognised that it is likely that those who do find themselves living in inadequate makeshift accommodation in an IDP camp will be experiencing adverse living conditions such as to engage the protection of Article 3. The judge also

referred to paragraphs [421] to [423] of the country guidance. The Upper Tribunal stated, at [422]:

> "The fact that we have rejected the view that there is a real risk of persecution or serious harm or ill treatment to civilian returnees in Mogadishu does not mean that no Somali National can succeed in a refugee or humanitarian protection or article 3 claim. Each claim will fall to be decided on its own facts. As we have observed, there will need to be a careful assessment of all the circumstances of a particular individual."

33. The judge had found, at [27], that although the country guidance indicated that there would not be a real risk to a returnee by reason of clan-based violence in Mogadishu, the evidence of continuing discrimination and human rights abuses *"which in some circumstances may amount to persecution"*, had persuaded the judge that the respondent had not discharged the burden that there has been a significant and non-temporary change in the circumstances in Somalia.

34. The appellant was granted refugee status as a member of a minority clan. The judge accepted, at [30], the evidence of the appellant and his mother that they have no relatives remaining in Mogadishu. The judge noted, at [31], that there must be a careful assessment of all the evidence, and he accepted the appellant has no relatives in Mogadishu on whom he could call. The judge accepted that as a member of a minority clan, any clan membership would be of very limited assistance to the appellant and as the appellant was 16 when he arrived in the UK, he will have limited personal recollection of his time in Somalia. The judge accepted, at [33], the appellant's parents would be unable to make any significant contribution towards the appellant's living expenses in Somalia. The judge however noted the 'economic boom' in Somalia, and in Mogadishu in particular. The judge considered the employment the appellant has previously had in the UK.

35. It was in my judgement open to the Judge, having carefully considered all of the relevant evidence to conclude, at [36], that against the background evidence of economic improvements in Mogadishu, the appellant has failed to persuade the Tribunal that he would be unable to obtain employment such that he could maintain himself and remain in accommodation of his own rather than having to resort to an

IDP camp. The judge noted the appellant has retained the ability to speak the Somali language. Properly read, the reference at paragraph [36], to the Article 3 appeal not being put on any other basis, must in my judgement, be read as, not being put on any other basis than the individual characteristics of the appellant that the judge referred to and addressed.

36. It was in my judgement open to the First-tier Tribunal judge to dismiss the Article 3 claim for the reasons given. Having noted the appellant had been granted refugee status in the past as the member of a minority clan, it was in my judgement open to the Judge to conclude that the historical position does not assist the appellant now, in light of the relevant country guidance, and a consideration of the individual characteristics of the appellant insofar as they are relevant to the assessment of the Article 3 claim.

37. It follows that the appeal before me is dismissed.

Notice of Decision

38. The appeal is dismissed.

Signed Date 14th January 2020

Upper Tribunal Judge Mandalia

TO THE RESPONDENT

FEE AWARD

I have dismissed the appeal and there can be no fee award.

Signed 14th January 2020

Upper Tribunal Judge Mandalia