Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/05932/2015

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination issued**
on 4 July 2016	**On 8th July 2016**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HASSAN MAHAMED ELMI
(ANONYMITY DIRECTION NOT MADE)

Respondent

For the Appellant: Mr M Matthews, Senior Home Office Presenting Officer
For the Respondent: Ms L Irvine, Advocate; Drummond Miller, Solicitors

DETERMINATION AND REASONS

1. The parties are as above, but the rest of this determination refers to them as they were in the FtT.

2. The SSHD appeals on three grounds against a determination by FtT Judge J C Grant-Hutchison, allowing the appellant's appeal under article 3 of the ECHR, based on the circumstances he would be likely to face in Somalia.

3. The first ground of appeal arises from paragraph 27 of the decision, where the judge said that there was "… nothing in the appellant's evidence to show that he is a member of a majority clan". The ground states that it was for the appellant to show that he was a member of a minority clan, and that it was reasonable to doubt his assertions, given his use of multiple entities and other deceit. The finding was significant in terms of

country guidance and the question of access to majority clan support. The judge declined to speculate on the appellant's precise clan identity, but that was not the point.

4. Further to this ground, Mr Matthews accepted that the issue of membership of a minority clan was now of lesser significance than it was previously seen to be, in terms of country guidance, but he said it remained relevant to whether the appellant would face conditions which reach the level of article 3, in his particular circumstances. The judge put the matter oddly, because it was not necessary to decide which majority clan membership appellant might have. It was sufficient that he was more likely to be a member of any one of the majority clans. The judge failed to make a clear finding on a relevant issue, of particular significance given her findings on lack of family remittances

5. The second ground of appeal is that the judge erred in finding that the appellant's residence in a camp for displaced persons would result in a breach of article 3, because the background evidence and case law is to the effect that while certain conditions in camps might fall below humanitarian standards, an article 3 breach does not automatically follow. The judge failed to carry out a "qualitative assessment".

6. Mr Matthews submitted that the judge failed to direct herself as to the necessary threshold to be reached to establish an article 3 breach. The evidence about the appellant's medical conditions and benefits he received did not amount to evidence that he would be unable to work in Somalia. In assessing the appellant's prospects in respect of the article 3 threshold the appellant's clan membership was also relevant, so there was an overlap with ground one.

7. Ground three is based on the judge referring to the presenting officer's "inability to suggest what employment the appellant could undertake upon return to Mogadishu". The ground argues that the judge again failed to appreciate that the burden of proof was upon the appellant, and that there was no evidence for the contention that his physical condition preclude him from employment. The judge's assessment was therefore "wholly misguided".

8. Mr Matthews said that the judge had again gone wrong by resolving case on the basis that the burden was on the SSHD, when it was on the appellant.

9. On the whole grounds, Mr Matthews submitted that error was shown such as to require the determination to be set aside. Further findings of fact were required, through rehearing in the first-tier tribunal. Alternatively, the case should be listed for further submissions on the substantive remaking of the decision in the upper tribunal.

10. Miss Irvine submitted on ground one that when the judge "declined to speculate" that was in response to a submission by the Secretary of State,

not a statement of the general burden. Reading her decision as a whole, the judge found the appellant a credible witness. By implication, a positive finding had been made on his claim of minority clan membership. In any event, this point was no longer critical. The essential issue was the level of support the appellant might expect. The findings that he lacked familial, clan or any other support were crucial. He left Somalia at the age of 17 and had no known connection to any family or clan in Somalia, and no links to support him from outside Somalia. He suffers from both physical disability and mental ill-health. If there were any error on the clan identity point, it was immaterial. The judge found that use of multiple identities had not undermined his evidence overall, a finding which was open to her and not affected by any error of law

11. On ground two, Ms Irvin noted that the respondent did not dispute the important finding that the appellant was likely to have to reside in a camp for displaced persons. She did not allow the appeal on the view that having to reside in such a camp automatically meant a breach of article 3. That conclusion was reached on the combination of circumstances mentioned above. The judge was entitled to find that the breach of article 3 was made out.

12. On ground three, Ms Irvine said that the decision was not based on a misunderstanding of where the burden of proof lay. This was simply a point put to the presenting officer as part of the discussion.

13. On the grounds as a whole, Ms Irvine submitted that the tribunal had been entitled to decide as it did, had given adequate reasons, and the decision should stand.

14. I reserved my decision.

15. Reading the determination fairly and as a whole, in my opinion the grounds do not amount to more than a minute search for error on particular points which do not materially affect the overall outcome.

16. On each of the particular points, broadly, I prefer the submissions for the appellant, as summarised above.

17. The judge was correct to observe that there was nothing in the appellant's evidence to show that he was a member of a majority clan. She might reasonably have made a further finding, in line with what she made of the appellant's evidence generally, but the point is (a) of small importance and (b) more likely to have gone in the appellant's favour than against, if the judge had been any more specific.

18. The judge did not fall into the error of concluding that residence in a camp for displaced persons alone would make the appellant's case. The ground overlooks the other findings of difficulties the appellant would face.

19. Ground three takes the judge's observation out of context. It is a record of an exchange with a representative in the ordinary course of discussion about the findings which might reasonably be drawn from the evidence.

20. It is highly unlikely that such an experienced judge would base her decision on a mistaken concept of which party had the burden of proof. I do not find the decision to bear out the suggestion that she did fall into that error.

21. Underlying the grounds I do not find any more than disagreement with findings of fact which were open to the judge and for which a legally adequate explanation is given.

22. The determination of the First-tier Tribunal shall stand.

23. No anonymity direction has been requested or made.

6 July 2016
Upper Tribunal Judge Macleman