Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/08504/2017**

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision Promulgated**
On 5th October 2018	**On 16th October 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

MOHAMED [J]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant:	Mr S Winter, advocate, instructed by Peter G Farrell, solicitors
For the Respondent:	Mr A Govan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Handley promulgated on 20/02/2018, which dismissed the Appellant's appeal on all grounds.

Background

3. The Appellant was born on 10/10/1996 and is a national of Somalia. The appellant claimed asylum of 5 February 2013. That application was refused but because of the appellant's age, he was granted leave to remain as an unaccompanied asylum seeking child until 9 April 2014. His application for further leave to remain was refused on 5 March 2015. His appeal against that decision was dismissed on 2 October 2015; his appeal rights were exhausted on 18 April 2016. The appellant then submitted further representations on 11 July 2016 which the respondent refused on 13 July 2016.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Handley ("the Judge") dismissed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 19 March 2018 Judge Grimmett gave permission to appeal stating

> 1. The appellant seeks permission to appeal, in time, against a decision of First-tier Tribunal Judge Handley promulgated on 20 February 2018 to dismiss his appeal against the decision of the respondent on 13 July 2016 to refuse his protection claim.
>
> 2. It is arguable that the Judge erred in referring to the incorrect country guidance set out to paragraph 2 in light of the findings of the first Immigration Judge that the appellant could not return to Mogadishu. It is also arguable that the Judge erred in doubting matters in the experts report which were not challenged by the respondent.

The Hearing

5. (a) For the appellant, Mr Winter moved the grounds of appeal. He told me that the Judge makes two principal errors. The first was to consider the wrong country guidance case. The second error related to his treatment of the expert reports.

(b) Mr Winter told me that the undisputed facts in this case are that the appellant comes from Afgoye and is a member of the Ashraf clan. He told me that the correct country guidance to consider is AMM and others (conflict; humanitarian crisis; returnees; FGM) Somalia CG [2011] UKUT 00445 (IAC) because the appellant would not be returning to Mogadishu. Instead the Judge took guidance from MOJ & Ors (Return to Mogadishu) Somalia CG [2014] UKUT 00442 (IAC). Relying on AMM, Mr Winter told me that the appellant cannot return to an area controlled by Al Shabaab and that not only is the appellant at risk in his home area, he is also at risk if travelling to his home area from Mogadishu. Mr Winter told me that the Judge's

findings at [35] and [37] are unsafe because the Judge has not taken any guidance from AMM.

(c) Mr Winter told me that there are three reports from the appellant's expert, Dr Joseph Mullen. Two of those reports appear in the first inventory of productions for the appellant. The third report has been prepared for this hearing. The Judge considered the two reports which were before the First-tier Tribunal between [31] and [37] of the decision. At [35] the Judge sets out his reasons for placing little weight on the reports. Mr Winter told me the Judge's approach to the expert evidence was flawed.

(d) Turning to the third ground of appeal, Mr Winter told me that because the Judge took guidance from the wrong country guidance case & because the Judge has not properly engaged with the expert evidence, the Judge's findings in relation to the press-gang recruitment methods of Al Shabaab were not safe. He urged me to allow the appeal and set the decision aside.

6.(a) For the respondent, Mr Govan told me that the decision does not contain a material error of law. He accepted that the Judge has referred to the wrong country guidance case, but told me that that did not fatally undermine the Judge's decision. He told me that the Judge had come to the correct conclusion so that any error could not be material.

(b) Mr Govan took me to [32] to [36] of the decision and told me that there is nothing wrong with the Judge's treatment of the expert reports. He told me that the challenge amounts to a challenge to the weight the Judge has given a source of evidence and told me that it is for the Judge (alone) to apportion weight to evidence. He told me that the Judge gives adequate reasons for the weight that he attributed to the expert's report. He took me through the CPIN report (2017) and told me that the Judge's findings are supported by background materials.

(c) Mr Govan asked me to dismiss the appeal and allow the decision to stand.

Error of Law

7. At [38] and [40] of the decision the Judge clearly relies on MOJ and others. It is common ground that the appellant is a member of the Ashraf clan from Afgoye. The respondent accepts that the Judge should have taken guidance from AMM

8. In R and Others v SSHD (2005) EWCA civ 982 the Court of Appeal endorsed Practice Direction 18.4 which states that any failure to follow a clear, apparently applicable country guidance case or to show why it does not apply to the case in question is likely to be regarded as a ground for review or appeal on a point of law. The Court of Appeal said that it represented a failure to take a material matter into account.

9. It is now accepted that the Judge took guidance from the wrong country guidance case. That is a material error of law. I set the decision aside.

Analysis

10. The accepted facts in this case are that the appellant is a member of the Ashraf clan and comes from the Afgoye region. In January 2016 the Upper Tribunal found that the First-tier Tribunal determination made in October 2015 dismissing the appellant's appeal should be upheld. That decision found that the appellant had not come to the attention of Al Shabaab and that the appellant's account of forced recruitment to Al Shabaab and then desertion from Al Shabaab is a fabrication.

11. In October 2015 the First-tier tribunal judge found that the appellant could safely return to Afgoye.

12. In AMM and others (conflict; humanitarian crisis; returnees; FGM) Somalia CG [2011] UKUT 00445 (IAC) the Tribunal held that (i) Outside Mogadishu, the fighting in southern and central Somalia is both sporadic and localised and is not such as to place every civilian in that part of the country at real risk of Article 15(c) harm. In individual cases, it will be necessary to establish where a person comes from and what the background information says is the present position in that place. If fighting is going on, that will have to be taken into account in deciding whether Article 15(c) is applicable. There is, likewise, no generalised current risk of Article 3 harm as a result of armed conflict; (ii) In general, a returnee with no recent experience of living in Somalia will be at real risk of being subjected to treatment proscribed by Article 3 in an Al-Shabab controlled area. "No recent experience" means that the person concerned left Somalia before the rise of Al-Shabab in 2008. Even if a person has such experience, however, he or she will still be returning from the United Kingdom, with all that is likely to entail, so far as Al-Shabab perceptions are concerned, but he or she will be less likely to be readily identifiable as a returnee. Even if he or she were to be so identified, the evidence may point to the person having struck up some form of accommodation with Al-Shabab, whilst living under their rule. On the other hand, although having family in the Al-Shabab area of return may alleviate the risk, the rotating nature of Al-Shabab leadership and the fact that punishments are meted out in apparent disregard of local sensibilities mean that, in general, it cannot be said that the presence of family is likely to mean the risk ceases to be a real one; (iii) Al-Shabab's reasons for imposing its requirements and restrictions, such as regarding manner of dress and spending of leisure time, are religious and those who transgress are regarded as demonstrating that they remain in a state of kufr (apostasy). The same is true of those returnees who are identified as coming from the West. Accordingly, those at real risk of such Article 3 ill-treatment from Al-Shabab will in general be refugees, since the persecutory harm is likely to be inflicted on the basis of imputed religious opinion; (iv) Although those with recent experience of living under Al-Shabab may be able to "play the game", in the sense of conforming with Al-Shabab's requirements and avoiding suspicion of apostasy, the extreme nature of the consequences facing anyone who might wish to refuse to

conform (despite an ability to do so) is such as to attract the principle in RT (Zimbabwe). The result is that such people will also in general be at real risk of persecution by Al-Shabab for a Refugee Convention reason; (v) The same considerations apply to those who are reasonably likely to have to pass through Al-Shabab areas; (vi) on the assumption that Al-Shabab's likely behaviour towards those who transgress its rules is as found in this determination, the position is as "extreme" as the factual basis in RT (Zimbabwe) [2010] EWCA Civ 1285. In the light of RT, a person from an Al-Shabab area who can show they do not genuinely adhere to Al-Shabab's ethos will have a good claim to Refugee Convention protection, once outside Somalia (subject to internal relocation and exclusion clause issues), regardless of whether the person could and would "play the game", by adhering to Al-Shabab's rules. As can be seen from a comparison with Sufi & Elmi, the effect of RT is, accordingly, to take the Refugee Convention beyond the comparable ambit of Article 3 ECHR protection. (vii) or someone at real risk in a home area in southern or central Somalia, an internal relocation alternative to Mogadishu is in general unlikely to be available, given the risk of indiscriminate violence in the city, together with the present humanitarian situation. Relocation to an IDP camp in the Afgoye Corridor will, as a general matter, likewise be unreasonable, unless there is evidence that the person concerned would be able to achieve the lifestyle of those better-off inhabitants of the Afgoye Corridor settlements; (viii) Internal relocation to an area controlled by Al-Shabab is not feasible for a person who has had no history of living under Al-Shabab in that area (and is in general unlikely to be a reasonable proposition for someone who has had such a history - see above). Internal relocation to an area not controlled by Al-Shabab is in general unlikely to be an option, if the place of proposed relocation is stricken by famine or near famine; (ix) Within the context of these findings, family and/or clan connections may have an important part to play in determining the reasonableness of a proposed place of relocation. The importance of these connections is likely to grow, as the nature of the present humanitarian crisis diminishes and if Al-Shabab continues to lose territory; (x) Travel by land across southern and central Somalia to a home area or proposed place of relocation is an issue that falls to be addressed in the course of determining claims to international protection. Such travel may well, in general, pose real risks of serious harm, not only from Al-Shabab checkpoints but also as a result of the present famine conditions. Women travelling without male friends or relatives are in general likely to face a real risk of sexual violence.

13. The appellant falls within the risk categories identified in (ii) (iii) and (vii) of the headnote in AMM. He has been in the UK since 2013. He has lived in the UK between the ages of 16 and 21. The findings of the First-tier Tribunal Judge in October 2015 place the appellant in the category of a person who has not come into contact with Al Shabaab before.

14. The expert report from Dr Mullen is now updated by a supplementary report dated 21 September 2018. He finds there has been a consolidation of Al Shabaab presence in the area surrounding Afgoye. Recent news reports indicate that Al

Shabaab attacked Afgoye in mid-September 2018. Dr Mullen says that the road from Afgoye to Merca is controlled by Al Shabaab.

15. The expert report and the guidance given in AMM indicate that a young man who has spent about 25% of his life in the UK cannot safely return to the Afgoye region.

16. MOJ provides guidance on whether or not the appellant can relocate to Mogadishu.

17. In MOJ& Ors (Return to Mogadishu) Somalia CG [2014] UKUT 00442 (IAC) it was held that(i) The country guidance issues addressed in this determination are not identical to those engaged with by the Tribunal in AMM and others (conflict; humanitarian crisis; returnees; FGM) Somalia CG [2011] UKUT 445 (IAC). Therefore, where country guidance has been given by the Tribunal in AMM in respect of issues not addressed in this determination then the guidance provided by AMM shall continue to have effect; (ii) Generally, a person who is "an ordinary civilian" (i.e. not associated with the security forces; any aspect of government or official administration or any NGO or international organisation) on returning to Mogadishu after a period of absence will face no real risk of persecution or risk of harm such as to require protection under Article 3 of the ECHR or Article 15(c) of the Qualification Directive. In particular, he will not be at real risk simply on account of having lived in a European location for a period of time of being viewed with suspicion either by the authorities as a possible supporter of Al Shabaab or by Al Shabaab as an apostate or someone whose Islamic integrity has been compromised by living in a Western country; (iii) There has been durable change in the sense that the Al Shabaab withdrawal from Mogadishu is complete and there is no real prospect of a re-established presence within the city. That was not the case at the time of the country guidance given by the Tribunal in AMM; (iv) The level of civilian casualties, excluding non-military casualties that clearly fall within Al Shabaab target groups such as politicians, police officers, government officials and those associated with NGOs and international organisations, cannot be precisely established by the statistical evidence which is incomplete and unreliable. However, it is established by the evidence considered as a whole that there has been a reduction in the level of civilian casualties since 2011, largely due to the cessation of confrontational warfare within the city and Al Shabaab's resort to asymmetrical warfare on carefully selected targets. The present level of casualties does not amount to a sufficient risk to ordinary civilians such as to represent an Article 15(c) risk; (v) It is open to an ordinary citizen of Mogadishu to reduce further still his personal exposure to the risk of "collateral damage" in being caught up in an Al Shabaab attack that was not targeted at him by avoiding areas and establishments that are clearly identifiable as likely Al Shabaab targets, and it is not unreasonable for him to do so; (vi) There is no real risk of forced recruitment to Al Shabaab for civilian citizens of Mogadishu, including for recent returnees from the West; (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; (viii) The significance of clan membership in Mogadishu has changed. Clans now provide, potentially, social support mechanisms and assist with access to livelihoods, performing less of a protection function than previously. There are no clan militias in Mogadishu, no clan violence, and no clan based discriminatory treatment, even for minority clan members; (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: (a) circumstances in Mogadishu before departure; (b) length of absence from Mogadishu; (c) family or clan associations to call upon in Mogadishu; (d) access to financial resources; (e) prospects of securing a livelihood, whether that be employment or self employment; (f) availability of remittances from abroad; (g) means of support during the time spent in the United Kingdom; (h) why his ability to fund the journey to the West no longer enables an appellant to secure financial support on return; (x) Put another way, it will be for the person facing return to explain why he would not be able to access the economic opportunities that have been produced by the economic boom, especially as there is evidence to the effect that returnees are taking jobs at the expense of those who have never been away; (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.

18. (vii), (ix) and (xi) of the headnote to MOJ tell me the relocation to Mogadishu is not a viable option for this appellant. The appellant says that only his mother remains in Afgoye and that he has no other relatives. The respondent's position, at its highest, is that both of the appellant's parents are in Afgoye. It is a matter of agreement that the appellant does not come from Mogadishu, that the appellant has no relatives in Mogadishu, and the appellant has not experienced in Mogadishu. The appellant is from a minority clan, so that he has no clan support in Mogadishu.

19. If the appellant returns to Somalia would is most likely is that he will find himself in an IDP camp. The starting point in this case is the findings of fact in the First-tier Tribunal Judge's decision of October 2015. One of those findings was that

internal relocation to Mogadishu would be unreasonable. The undisputed facts of this case, and taking guidance from MOJ, indicate that internal relocation would be unduly harsh.

20. Given these conclusions, I find that the Appellant has discharged the burden of proof to establish that he is a refugee. I come to the conclusion that the Appellant's removal would cause the United Kingdom to be in breach of its obligations under the 2006 Regulations.

21. Therefore, I find that the appellant is a refugee.

Humanitarian protection

22. As I have found the appellant is a refugee I cannot consider whether he qualifies for humanitarian protection.

23. Therefore, I find the appellant is not eligible for humanitarian protection.

Human rights

24. As I have found the appellant has established a well-founded fear of persecution, by analogy I find his claim engages article 3 of the Human Rights Convention because he would face a real risk of torture, inhuman or degrading treatment if he were returned to his country of origin.

Article 8 ECHR

25. There is no evidence placed before me to indicate that the appellant meets the requirements of appendix FM or of paragraph 276ADE(1)(i) to (v) of the immigration rules. I have found that the appellant is a refugee who cannot return to Somalia. By analogy I find that there are insurmountable obstacles to his reintegration in Somalia. The appellant therefore meets the requirements of paragraph 276 ADE(1)(vi) of the rules.

26. The respondent's position is that all article 8 ECHR considerations are embraced by the Immigration Rules. The respondent's decision must therefore be a disproportionate breach of the right to respect for private life. The respondent's own rules indicate that the decision is a disproportionate interference with the right to respect for private life.

27. In Hesham Ali (Iraq) v SSHD [2016] UKSC 60 it was made clear that (even in a deport case) the Rules are not a complete code. Lord Reed at paragraphs 47 to 50 endorsed the structured approach to proportionality (to be found in Razgar) and said "what has now become the established method of analysis can therefore continue to be followed…"

28. Section 117B of the 2002 Act tells me that immigration control is in the public interest. In AM (S 117B) Malawi [2015] UKUT 260 (IAC) the Tribunal held that an

appellant can obtain no positive right to a grant of leave to remain from either s117B (2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources. In Forman (ss 117A-C considerations) [2015] UKUT 00412 (IAC) it was held that the public interest in firm immigration control is not diluted by the consideration that a person pursuing a claim under Article 8 ECHR has at no time been a financial burden on the state or is self-sufficient or is likely to remain so indefinitely. The significance of these factors is that where they are not present the public interest is fortified.

29. I therefore find that this appeal succeeds on article 3 & 8 (Private life) ECHR grounds.

Decision

The decision of the First-tier Tribunal promulgated on 20 February 2018 is tainted by material errors of law. I set it aside.

I substitute my own decision.

The appeal is allowed on asylum grounds.

The appellant is dismissed on Humanitarian Protection grounds.

The appeal is allowed on article 3 & 8 ECHR grounds.

Signed Date 10 October 2018
Deputy Upper Tribunal Judge Doyle