Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00036/2017

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Decision & Reasons Promulgated**
On Monday 5 March 2018	**On Friday 16 March 2018**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

HASSAN [F]

Respondent

Representation:
For the Appellant: Mr S Kotas, Senior Home Office Presenting Officer
For the Respondent: The Respondent appeared in person

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity order was not made by the First-tier Tribunal. Although the appeal concerns the revocation of protection, the Respondent does not contend that he is at risk on account of his identification on return. I do not consider it necessary or appropriate to make an anonymity order in this case.

DECISION AND REASONS

Background

1. This is an appeal by the Secretary of State for the Home Department. For ease of reference, though, I refer to the parties as they were before the First-tier Tribunal.

2. The Respondent appeals against a decision of First-Tier Tribunal Judge Colvin promulgated on 24 November 2017 ("the Decision") allowing the Appellant's appeal against the Secretary of State's decision dated 8 February 2016 making a deportation order against the Appellant and her decision dated 24 February 2017 refusing a protection and human rights claim and revoking the Appellant's protection status.

3. As an appeal under the provisions of section 82 Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") post-dating the amendments made by the Immigration Act 2014, strictly it is only the second of those decisions which is under appeal and the grounds available to the Appellant are also thereby limited (although it does not appear that the Judge necessarily appreciated that in finding that the appeal against the deportation order should also be allowed).

4. The Appellant is a national of Somalia now aged thirty-six years. He came to the UK aged twenty-two years in March 2003. He was granted status as a recognised refugee in May 2003 based on the fact that he is a member of a minority clan. His wife and three children joined him here in March 2006 with family reunion visas. The couple had a further child in the UK. The Appellant remains married although now estranged from his wife. He has a good relationship with his wife and remains in contact with his children. All are now British citizens.

5. Since coming to the UK, the Appellant has formed a new relationship with a Swedish national and he now has three children with her. They have lived together since 2014 (although some doubt may be cast on the present position by the statement of Kevin Holland to which I refer below).

6. The Appellant also has two further children from other relationships with two separate British citizens. Those children live with their mothers but the Appellant retains contact with those children.

7. In May 2012, the Appellant was convicted of conspiracy to defraud and sentenced to thirty months in prison. The offence involved buying cheap Ryanair tickets from a person who obtained them with credit cards obtained by fraud (although the record of the offence as contained within the Decision may understate the level of the Appellant's involvement if one looks at the sentencing remarks). The Appellant used the tickets to visit his partner then in Sweden. He was also charged with contempt of court for failing to give evidence at a trial as he said he had been threatened but he was released after fourteen days having disclosed the threats to the police and Judge.

8. It is expressly stated at [9] of the Decision that the Appellant has not offended further although it is not clear whether that was based on direct evidence or an assumption based on an omission of evidence in that regard. Whatever the position, that statement is inaccurate as, on 10 January 2018, the Appellant pleaded guilty to an offence of being knowingly concerned in the evasion of a prohibition or restriction on the importation of Class C drugs. The Appellant says that the drug was Khat and was for his personal use. According to the statement of the NCA Investigation Officer, Kevin Holland, however, the Appellant played a significant role in the offence. The Appellant has yet to be sentenced as his co-defendants have still to be tried, having entered not guilty pleas. That trial is due to take place in June 2018. I will deal with this offence further when considering the Respondent's additional grounds.

9. The Respondent issued the Appellant with a deportation order and decision to revoke protection status in October 2014. The Appellant's appeal was allowed to the extent of requiring the Respondent to reconsider the decisions in accordance also with The Immigration (European Economic Area) Regulations 2006. The reconsideration led to the decision(s) now under appeal.

10. The Judge allowed the appeal on this occasion, making the following findings. First, she refused to uphold the certificate issued under section 72 of the 2002 Act ("section 72") on the basis that she did not consider that the Appellant continues to be a danger to the public ([23]). Second, she found that the Appellant remains in need of international protection under the Refugee Convention in relation to Somalia ([29]). She therefore refused to uphold the decision revoking protection status. Finally, she said she was satisfied that the Appellant's removal would breach the Refugee Convention and Article 3 ECHR ([30]). Although she indicated that she was satisfied that there would be very significant obstacles to the Appellant's integration in Somalia for essentially the same reasons as she found the Appellant to be at risk on return ([32]), she declined to make findings about the Article 8 family life issues ([34]).

11. The Respondent's original grounds raise the following issues which I will deal with in detail in the discussion section below:-

    - The Judge fails to identify any Convention reason for the risk which the Appellant claims to face on return or to explain why such a reason arises on her findings;
    - The Judge has misapplied the guidance in MOJ & Ors (Return to Mogadishu) Somalia CG [2014] UKUT 00442 (IAC) ("MOJ");
    - The Judge has failed to consider whether the Appellant should be excluded from humanitarian protection.

12. By an application dated 20 February 2018, the Respondent sought to vary her grounds of appeal to add two further grounds. The first is that the Judge erred in fact in finding that the Appellant is no longer a danger to the public for the purposes of section 72 based on his most recent charge to which he has pleaded guilty. The Judge's finding that the Appellant had not committed further offences is therefore open to doubt, although it is fair to note that neither the Respondent nor the Appellant were aware of the charge at the time of the First-tier Tribunal hearing because, at that time, the Appellant had not been charged.

13. The second ground deals with what is said by the Judge at [22] of the Decision, that she was not required to consider the section 72 certificate as the Appellant has already been recognised as a refugee and continues to have status. It is there said that this issue does not arise. The Respondent contends that this approach is inconsistent with Mugwagwa (s.72 – applying statutory presumptions) Zimbabwe [2011] UKUT 00338 (IAC) ("Mugwagwa").

14. I permitted Mr Kotas to argue those grounds. I agreed that it was appropriate to permit the Respondent to vary her grounds in that regard. Mr Kotas confirmed that those two grounds are in addition to rather than in substitution of the original grounds raised.

15. Permission to appeal was granted on the original grounds by First-tier Tribunal Judge Grant-Hutchison on 11 December 2017 in the following terms (so far as relevant):-

> "…
>
> [2] It is arguable that the Judge has erred in law and has misdirected himself by (a) allowing the Appellant's appeal by finding him to still require protection under the Refugee Convention. The Appellant was originally granted refugee status as the member of a minority clan which is noted by the Judge at paragraph 21 of the Decision & reasons. However the Judge goes on to find at paragraph 29 that the Appellant still qualifies for refugee protection without failing to outline [sic] the Convention reason or, if one is to assume it is for the same reason it was granted, to resolve the obvious conflict between this and the guidance in MOJ & others (Return to Mogadishu) Somalia CG v SSHD [2014] UKUT 00442 (IAC) which found that there is no longer any clan-based violence or discriminatory treatment, even for minority clan members. The Appellant is a healthy adult male who has transferable skills from his time in the UK and financial remittances from his family which will all assist with return; and (b) where at paragraph 24 the Judge quotes MOJ at length and finds at paragraph 27 the evidence presented by the Appellant does not justify departure from it, yet still appears to have misapplied its guidance."

16. The matter comes before me to decide whether the Decision contains a material error of law and, if so, to re-make the decision or remit the appeal for rehearing to the First-Tier Tribunal.

Decision and Reasons

17. It is convenient to consider the Decision in the order of the findings made by the Judge rather than following the way in which the Respondent has framed her grounds. This is because, although certain of those grounds may be made out in principal, it is necessary to consider the extent to which they are material to the overall outcome.

18. Before I turn to consider the substance of the Decision, it is also necessary to say something about the nature of the appeal and the issues which arose for determination. As I have already indicated this was an appeal under the provisions of the 2002 Act post-dating amendment. The Respondent's decision under appeal is termed as both a revocation of refugee status and a decision refusing a protection and human rights claim. As is clear from section 82 of the 2002 Act as amended, a revocation decision is of protection status and therefore encompasses both status as a refugee and as a person entitled to humanitarian protection. The grounds available to the Appellant in relation to revocation are that the Respondent's decision breaches either of the UK's obligations under the Refugee Convention and/or those obligations in relation to a person's eligibility for a grant of humanitarian protection.

19. Since the Respondent's decision was also one refusing protection and human rights claims, the Appellant could also appeal on the basis that the decision breached the same obligations as for revocation but in addition that removal would breach section 6 Human Rights Act 1998 as being contrary to the ECHR (here Article 3 in relation to protection and Article 8 in relation to family and private life). Although not particularised in any detail, the grounds of appeal lodged by the Appellant's then solicitors raise all of those issues.

20. The issues for the Judge to determine, therefore, were whether the revocation of protection status breached obligations either under the Refugee Convention or on the basis of an entitlement to humanitarian protection and also whether removal would breach obligations under the Refugee Convention, obligations in relation to eligibility for a grant of humanitarian protection and/or the Human Rights Act 1998 (under Articles 3 and 8 ECHR).

Section 72 certificate

21. I readily accept the proposition apparent from the headnote in Mugwagwa that the Tribunal is required to consider of its own motion whether section 72 applies even if the Respondent has not raised this

in her decision. That is though a slightly different proposition to that raised by the Respondent in the second of her additional grounds whether the certificate is relevant at all when one is dealing with removal of status. I do not need to determine that issue though because, although the Judge said at [22] of the Decision that the issue did not fall for determination, she in fact went on to determine it at [23] of the Decision.

22. In relation to the second of the grounds, the Judge found at [23] of the Decision that the Appellant is no longer a danger to the public and that, accordingly, the rebuttable presumption contained in section 72 was rebutted. The Respondent relies in her second additional ground on evidence post-dating the hearing before the First-tier Tribunal Judge and indeed post-dating the Decision itself that the Appellant has pleaded guilty to an offence involving the importation of Class C drugs.

23. Neither the evidence nor the charge concerned were in existence at the time of the hearing or the Decision. This is not a case where evidence of that charge could have been produced but was not due to some failing by one or other of the parties.

24. Mr Kotas relied on the case of Ladd v Marshall [1954] EWCA Civ 1. I accept that on the face of it the three criteria for the adducing of further evidence as outlined by Denning LJ in that case are met. Although there is a distinction to be drawn between that case and this appeal in that the charge underlying the new evidence was not in being at the date of the hearing before the First-tier Tribunal Judge, the offence was committed, according to the evidence between February and March 2017 and the Appellant knew that he had committed that offence. The facts underlying the further charge were therefore already in being. The Judge therefore erred in finding that the Appellant had not committed any further offence since his release in 2013, based either on his evidence that he had not done so or an assumption based on the Appellant not mentioning this.

25. I turn to consider whether the further evidence could make any material difference to the finding that the Appellant is not a danger to the public given his statement that he was involved in the importation of drugs only for his own personal use. However, doubt is cast on that explanation by the statement of the National Crime Agency Investigation Officer Kevin Holland. He says that the Appellant's involvement was not as he claimed. He says that the Appellant played a significant role in the coordination of the importation by three Romanian nationals.

26. The Judge's finding may not be material if the Appellant is not entitled to the protection of the Refugee Convention in the first place. That is the point raised in one of the Respondent's original grounds. I will come to that after dealing with another of the original grounds also

concerning exclusion namely that the Judge has not considered whether the Appellant should also be excluded from humanitarian protection. The Judge has undoubtedly failed to consider that issue.

27. The basis for exclusion from humanitarian protection is set out at paragraph 339C of the Immigration Rules. The criteria there set out are similar in terms to exclusion under Article 1F of the Refugee Convention. The only sub-paragraph of that Rule which could conceivably apply in this case is paragraph 339C(iii) that "there are serious reasons for considering that he constitutes a danger to the community or to the security of the United Kingdom". That paragraph clearly does not contain the same presumption as section 72. It is though conceivable on the evidence that the criteria could be met depending on the evidence about the Appellant's most recent offence. Again, though, the materiality of the Judge's error depends on the Appellant qualifying for humanitarian protection in the first place and the basis for the Judge's finding as to risk on return. I therefore turn to consider that issue.

Refugee Convention, humanitarian protection and risk on return

28. A refugee is a person who has a well-founded fear of persecution in his home country on account of a Convention reason and who is unable or unwilling to seek the protection of his home authorities against that risk. Article 1C(5) of the Convention provides that a refugee's status can be revoked only where there has been a fundamental and durable change in the refugee's country of origin to the extent that the person will no longer have a well-founded fear of persecution on return.

29. Here, the Judge had before her a letter from UNHCR dated 4 May 2016 which set out the reasons why the UNHCR did not consider that the cessation clause should be applied to the Appellant. The Judge had regard to that letter and to other background evidence. She concluded however at [27] of the Decision that "[w]hilst I fully acknowledge that the recent background information and events in Mogadishu refers to a deteriorating security and humanitarian situation with civilians being at risk of directly being targeted, I do not find that on the evidence before me I am in a position to justify departing from the CG decision of *MOJ and others* at the present time." She therefore directed herself as being bound to apply the guidance in MOJ.

30. Having set out the headnote in MOJ at [24] of the Decision, the Judge went on at [28] and [29] to provide reasons why she found that the Respondent was not entitled to revoke the Appellant's protection status. Those are as follows:-

> "[28]In considering the circumstances of the appellant, it is accepted after hearing his oral evidence that he has no family members left in Somalia. His elder brother and sister are in the

> UK and his youngest brother remains in Kenya. He says that he had an uncle who was killed in the recent bomb blast in October 2017 and that this was his last remaining relative living there as his parents are dead. There is no evidence that he has any clan associations to call upon in Mogadishu. He has been living away from the country for 14 years since the age of 22. The chances of financial assistance from abroad if he returns is very unlikely particularly as he states that he and his family are seriously struggling financially at the present time including the risk of being homeless. He has worked in the UK and says that he is now well enough to work again after a period of medical problems, the chances of him obtaining employment without family assistance in Mogadishu is again limited. He will be returning as a person who has been 'westernised' which could also place him at some risk of forced recruitment to Al Shabaab.
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> [29] The burden is on the respondent to show that the cessation of the protection clauses apply. When the personal circumstances of the appellant are also put in the context of the deteriorating security and humanitarian situation in Mogadishu, I have reached the conclusion that the respondent has not shown that there has been a change of circumstances of a durable and fundamental nature in order to say that the grant of asylum to the appellant in 2004 is no longer necessary. Indeed I find on the lower standard of proof that the appellant remains in need of international protection under the Refugee Convention in relation to Somalia. I therefore do not uphold the respondent's decision to revoke his protection status."

31. There are a number of errors contained in this section, particularly at [29] of the Decision. First, given the acceptance at [27] of the Decision that the background evidence did not provide reason to depart from MOJ, the Judge's finding that the security situation had not changed in a durable way is directly contrary to the guidance at (ii) of the headnote in MOJ which finds that there has been a durable change and (i) that an "ordinary civilian" does not face a real risk of persecution or harm.

32. Second, following on directly from this, the Judge has failed to explain at [29] why the Refugee Convention applies rather than this being a case for humanitarian protection if based on the general security situation. Although the UNHCR letter refers to the need to carry out an individualised assessment of risk based on what it sees as a deterioration in the security situation in Somalia, there is no indication that the Judge found there to be a risk to the Appellant based on his individual circumstances. Furthermore, since the Judge was avowedly applying MOJ, she has also failed to explain why (viii) of the headnote in MOJ does not apply. That provides that "[t]here are no clan militias in Mogadishu, no clan violence and no clan based discriminatory treatment, even for minority clan members".

33. The Respondent's submission that the Judge has failed to consider whether there remains a Convention reason for the risk on return is therefore made out.

34. The finding in the last sentence of [28] of the Decision that the Appellant might run the risk of forced recruitment to Al Shabaab because he would be returning from the West is directly contrary to the guidance at (vi) of MOJ that "[t]here is no real risk of forced recruitment to Al Shabaab for civilian citizens of Mogadishu, including for recent returnees from the West."

35. For those reasons, I am satisfied that the Respondent has also made out her ground that the Judge failed properly to apply MOJ.

36. I have given careful consideration to whether it can be said that those errors are immaterial having regard to the findings at [28] of the Decision which, other than the last sentence, are not challenged. In particular, I have carefully considered whether those findings give rise to an inevitable conclusion that (xi) of the guidance in MOJ is met which would itself lead to the conclusion that the Appellant would be entitled to humanitarian protection. The difficulty in that regard is that the Judge has not considered whether the Appellant is a person who should be excluded from humanitarian protection and, given the new evidence which undermines the Judge's conclusion about the section 72 certificate, I cannot simply read across the finding there to the humanitarian protection context.

37. I have also considered whether the Judge's findings about both the Refugee Convention protection and humanitarian protection are material to the essential question whether the Appellant will be at risk of inhuman and degrading treatment on return. At (xi) and (xii) of the headnote in MOJ the Upper Tribunal says this:-

> "[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."

38. It may well be, in light of that guidance and the findings made at [28] of the Decision (excluding the final sentence) that a conclusion that

the Appellant would be at real risk of Article 3 mistreatment is one which would be open to a Judge. The findings at [28] of the Decision are not however detailed. Further, the Judge has recorded evidence which potentially undermines those findings. For example, the Appellant's evidence is that he has acquired various qualifications in the UK and had worked in a variety of jobs before he was imprisoned. Although he says that he has been unable to get work since being released because of his immigration status, it is unclear on the evidence how the Judge reached the conclusion at [28] that the Appellant's chance of obtaining work in Mogadishu is limited. Similarly, given the evidence that the Appellant's partner is an EU national entitled to work and who has been working and that the Appellant has other family in the UK, it is unclear how the Judge reached the finding at [28] that the Appellant could not obtain financial support from any of his family in the UK while he establishes himself in Somalia.

39. The issue whether deportation breaches the Appellant's Article 3 rights also requires prior consideration whether he remains entitled to the protection of the Refugee Convention and/or the grant of humanitarian protection and whether he is excluded from such protection. The findings at [28] and [29] of the Decision are simply inadequate to deal with those questions.

40. For the above reasons, I am satisfied that the Decision does contain a material error of law. I therefore set it aside.

41. I indicated at the hearing that, if I found an error of law, I was minded to re-make the decision in this Tribunal. However, having given more detailed consideration to the findings made and in light of what I say at [38] and [39] above, I consider it appropriate to remit the appeal. Consideration will need to be given to the new evidence regarding the further offending and whether that impacts on exclusion from Refugee Convention and/or humanitarian protection. Findings are also required as to whether the Appellant remains entitled to either Refugee Convention protection or humanitarian protection. More detailed findings are also required concerning the issue of risk on return and, depending on the outcome of consideration of those issues, findings may need to be made on the issue whether deportation will breach Article 8 ECHR.

42. There is one further matter and that is the basis on which the appeal against the earlier deportation decision was allowed. Although there is a question mark about the Appellant's relationship with his Swedish national partner and although he is not married to her (and therefore not a family member), it appears that there has still been no consideration of the case under the EEA Regulations as required by the earlier appeal. This aspect does not appear to figure in the Respondent's decision or therefore the Appellant's grounds but

consideration ought to be given to whether this issue arises on the facts given the Tribunal's earlier determination.

DECISION

I am satisfied that the Decision contains a material error of law. I therefore set aside the decision of First-tier Tribunal Judge Colvin promulgated on 27 November 2017. The appeal is remitted to the First-tier Tribunal for re-hearing before a different Judge.

Signed  Dated: 15 March 2018
Upper Tribunal Judge Smith