



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: RP/00147/2017

THE IMMIGRATION ACTS

Heard at Field House
On 29 June 2018

Decision and Reasons Promulgated
On 10 September 2018

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**A J (aka A Q-M)
[ANONYMITY ORDER MADE]**

Respondent

Representation:

For the appellant: Mr Ian Jarvis, a Senior Home Office Presenting Officer
For the respondent: Mr Mark Allison, Counsel instructed by Turpin & Miller LLP
(Oxford)

DECISION AND REASONS

Anonymity order

The First-tier Tribunal made an anonymity order pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. I continue that order pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008: unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall identify the original claimant, whether directly or indirectly. This order applies to, amongst

others, all parties. Any failure to comply with this order could give rise to contempt of court proceedings.

Decision and reasons

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal allowing the claimant's appeal against his decision to remove international protection and to deport the claimant to his country of origin, pursuant to section 32(5) of the UK Borders Act 2007. The Secretary of State considered that the claimant's offence was a particularly serious crime as defined by section 72 of the Nationality, Immigration and Asylum Act 2002 (as amended).
2. The claimant is a citizen of Somalia, born in 1988 in Mogadishu, and is a member of the majority Isaaq clan. He claims first to have discovered his clan membership when reading Home Office papers in this appeal.

Background

3. The claimant is the eldest of seven siblings, all of whom live in the United Kingdom. The claimant's father has had refugee status since 7 January 1990, based on his perceived support for, or membership of, the Somali National Movement.
4. The claimant arrived in the United Kingdom as a child with his grandmother, and his aunts: it is not known exactly when he arrived, but he says he was 5 years old, which would make it 1993. They came to join his parents, who were already here with two of his siblings. The claimant's parents had three more children after he arrived in the United Kingdom, but they separated when he was very young, and his mother returned in Somalia.
5. In 1994, the claimant's parents divorced. He has never had a relationship with his mother. He has not seen his mother (who lives in Somalia) since he was a child.
6. The claimant's father and grandmother raised him. His grandmother comes from Somaliland and since coming to the United Kingdom, she has kept in touch with family there by buying telephone cards and having regular conversations with people in Somaliland; she has also returned to Somaliland to visit.
7. On 12 November 1993, the claimant, his grandmother and his aunts were granted refugee status in line with that of his father. On 27 June 1994, the claimant was granted indefinite leave to remain. He was 6 years old. The claimant thinks, but is not sure, that his father is now a British citizen.
8. The claimant left school at 14 and started work four years later, when he was 18, working in a warehouse on an agency basis until he was about 23 years old. When he was 24, the claimant moved to Coventry. He did have a partner, but the relationship failed after they had a baby who lived for just a few hours.

9. The claimant has a large extended family in the United Kingdom: two of his aunts visited him in prison, as well as his father. The rest of his family, apart from his grandmother, have refused to have anything to do with him since he was imprisoned.
10. On 11 December 2015, when he was about 28 years old, the claimant was convicted of battery at Coventry Magistrates' Court and received 6 months' conditional discharge.
11. On 7 January 2016 at Warwick Crown Court, within that 6-month period, the claimant was convicted of assault by beating and robbery and sentenced to a total of 50 months' imprisonment (4 years and 2 months). The claimant was intoxicated, and it was late at night. The claimant, with a friend, viciously beat and kicked a stranger, and in addition, the claimant stole his wallet.
12. The OASys report found that the claimant was a medium risk to the public and to known adults in the community; his probability of violent offending in the next two years was 47%. In May 2016, the claimant was refused permission to appeal against the sentence.
13. The claimant's prison sentence expired on 20 October 2017 and thereafter he was held in immigration detention until 1 February 2018, when he was released. He presently lives in Erith in Kent. While in prison, the claimant took every opportunity to improve himself and now expresses remorse for his crime.
14. On 6 November 2017, the respondent revoked the claimant's refugee status and on 23 November 2017, he made a deportation order.
15. The claimant's family in the United Kingdom are very disappointed with him: if deported to Somalia, the claimant says they will not assist him in any way, including financially. The claimant thinks his father is now in South Africa. They have had a telephone conversation, but he also does not think his father will support him if he is returned. The Judge accepted the claimant's evidence on these points.
16. The claimant is now 30 years old and has not lived in Somalia for approximately 25 years. He has anxiety and depression but no physical health problems.

First-tier Tribunal decision

17. The First-tier Judge found that the claimant was socially and culturally integrated in the United Kingdom, and that Exceptions 1 and 2 in section 117C of the 2002 Act were met. He found that the claimant had no family to call on in Mogadishu and that he would receive no support on return from his United Kingdom family. He noted that the claimant had left school without qualifications and that his only job had been in a warehouse.
18. He considered that the claimant would struggle to find employment and would probably have to live in very poor conditions in an internally displaced person (IDP) camp, where his treatment was likely to violate Article 3 ECHR. It was not asserted on behalf of the claimant that any health problems he had would reach the Article 3

threshold, nor that he had family and private life for which Article 8 would require the Secretary of State to grant leave outside the Rules.

19. The Judge found, implicitly, that the claimant had shown significant obstacles to return, over and above those contained in Exceptions 1 and 2 and allowed the appeal.
20. The Secretary of State appealed.

Permission to appeal

21. The Secretary of State contended in his renewal grounds to the Upper Tribunal that the First-tier Judge had misapplied the country guidance in *MOJ and others* (Return to Mogadishu) [2014] UKUT 00442 (IAC), and should have had regard to the claimant's membership of the majority Isaaq clan when assessing whether he could obtain work and support on return to Mogadishu.
22. In oral argument, though not in his grounds, Mr Jarvis for the Secretary of State argued that the Judge had erred in considering whether, applying *The Secretary of State for the Home Department v Mosira* [2017] EWCA Civ 407, on the basis that the grounds for granting of refugee status to the claimant (the risk to his father) had not come to an end and it had not been open to the Secretary of State to end protection on that basis, even if there were no current risk on return to the claimant. Mr Jarvis further argued that this question, raised by the claimant in his Rule 24 Reply, was a 'new matter', on which he had not been invited to make submissions, and that the Secretary of State had been refused permission on this point by the Court of Appeal in *Mosira*. He contended that this was an issue which now needed to be considered and addressed.
23. Upper Tribunal Judge Rimington granted permission to appeal on all grounds, but in particular on the *MOJ and others* ground, with reference to clan considerations and employment.

Rule 24 Reply

24. In his Rule 24 Reply, the claimant relied on reasoning in the initial refusal of permission by the First-tier Tribunal. Dealing first with the *Mosira* question, the claimant noted that the Secretary of State had not apparently sought to appeal *Mosira*, which preceded her decision to cease refugee status for the present claimant, but had not addressed *Mosira* in her decision. The claimant's skeleton argument before the First-tier Judge had included submissions on *Mosira*, and both the Judge and the Secretary of State's representative had been provided with a copy of the decision, which was considered over the short adjournment. The Secretary of State's representative had not sought any longer adjournment to consider the implications of *Mosira*.
25. As regards the application of *MOJ and others*, the claimant would also rely (as he had in his First-tier Tribunal skeleton argument) on *FA (Libya: Article 15(C)) Libya* [2016] UKUT 00413 (IAC). The claimant further relied on *Secretary of State for the Home Department v FY (Somalia)* EWCA Civ 1853 and on *Secretary of State for the Home Department v Said* [2016] EWCA Civ 442.

26. The First-tier Judge had regard to the claimant's country evidence, much of which post-dated *MOJ and others*, and was fully entitled so to do. I have regard to the discussion of *MOJ and others* in the judgment in *Said's* case of Lady Justice Arden, with whom Lady Justice Sharp and Lord Justice Christopher Clarke agreed, at [31]:

"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."

27. For the claimant, Mr Allison's skeleton argument argued that the First-tier Judge's disputed findings were supported by evidence and should stand. He reminded the Tribunal of the claimant's evidence that he did not know his clan origin until he read the Home Office decision and had not had any contact with his family in Somalia while growing up. The Judge had regard to all of the facts before her, including the claimant's low level of education and the country evidence which post-dated *MOJ and others*. The grounds of appeal were really no more than a disagreement with findings which were open to the Judge.

28. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

29. At the Upper Tribunal, Mr Jarvis for the Secretary of State indicated that he was not relying on *Mosira*, which was not relevant to the circumstances of this appeal. His father still had refugee status but the risk in Somalia to his father and to the claimant as a member of his father's family had come to an end. Section 72 certification remained appropriate in this appeal and the First-tier Tribunal was required to consider it, whether or not a claimant raised it. The section 72 test was *Robinson* obvious.

30. Mr Allison argued that the Upper Tribunal was bound by *Mosira*: the 'circumstances' in which the appellant had been granted refugee status were that he was a member of his father's family, and that his father was a refugee. Section 72 was not raised in the grounds of appeal and the claimant had not been cross-examined on that question, nor was it signalled in the skeleton argument served the day before the Upper Tribunal hearing by the Secretary of State. The claimant would rely on *VV* (grounds of appeal) [2016] UKUT 53 (IAC) and argue that it was inappropriate to raise section 72 issues now.

31. Even if section 72 were relevant, and the Tribunal found a material error of law, the judgment of the First-tier Tribunal did not deal with Article 32 of the Refugee

Convention, nor with *MOJ and others*. The Judge could not be criticised for not taking into account the Court of Appeal judgment in *Secretary of State for the Home Department v MA (Somalia)* [2018] EWCA Civ 994 which was promulgated on 2 May 2018, after the First-tier Tribunal hearing.

32. The decision in *FY (Somalia)* had been relied upon before the First-tier Tribunal. There was a real possibility that the claimant might have to live in conditions which violated Article 3 ECHR, in an IDP camp. Mr Allison contended that the *Said/FY* issue was a discrete issue on which the Secretary of State had not relied before the First-tier Tribunal and she should not be permitted to introduce it on appeal. There had been no submission that the decision of the Court of Appeal in *Said* rendered [12] in the *MOJ and others* guidance incorrect.
33. The decision was made on Article 3 grounds, not Article 8, so the Rules regarding the applicability of Article 8 ECHR were not relevant or material. The Secretary of State had not challenged the Article 8 findings of the First-tier Judge. The Judge had considered whether there were very significant obstacles; the Article 8 case was not made out.
34. Mr Allison invited me to limit the scope of the appeal to Article 3 only and to conclude that the Secretary of State's criticisms of the Article 3 findings were not made out. *MA (Somalia)* was authority for the proposition that socio-economic issues could be a basis for protection.
35. Mr Allison reminded the Tribunal that the First-tier Judge had accepted that experience of working in a warehouse was insufficient to enable the claimant to get a job in Mogadishu, when the locals wanted jobs as well. The First-tier Judge's reasoning could have been fuller but there was no error of fact or law in relation to the Article 3 finding.
36. An Article 3 ECHR 'near miss' on the facts of this application would still be capable of amounting to 'compelling circumstances' in the section 117C sense.

Discussion

37. The grant of permission is based on an arguable misapplication of the Upper Tribunal's guidance in *MOJ and others*. The relevant parts of the guidance are as follows:

(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:

- circumstances in Mogadishu before departure;
- length of absence from Mogadishu;
- family or clan associations to call upon in Mogadishu;
- access to financial resources;
- prospects of securing a livelihood, whether that be employment or self employment;
- availability of remittances from abroad;
- means of support during the time spent in the United Kingdom;
- 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."

38. I remind myself of the strong public interest in deportation. However, in this case, the unchallenged factual matrix is that this claimant's nuclear family has scattered. His mother is somewhere in Somalia. His father is said to be in South Africa. His brothers and sisters are in the United Kingdom and few of them want anything to do with him. He is a majority clan member, but on his account, has no clan knowledge and did not know he was a member until these proceedings began. He has lived in the United Kingdom, lawfully, for 25 of his 30 years.
39. The Judge found as a fact that it was unlikely that the Isaaq clan would support him on return 'given his lengthy absence from Mogadishu and his lack of any family ties'. The grounds of appeal do not challenge that finding of fact, which was open to the Judge on the evidence before her. Nor do the renewal grounds challenge the finding that 'his access to financial resources from family appear[s] to be extremely limited as is the availability of remittances from abroad'.
40. On the basis of those findings of fact, the Judge's assessment that the *MOJ and others* test fell in the claimant's favour was open to her, as it was to the First-tier Judge in *FY*, where the facts were very similar.
41. The next question is whether *Mosira* affects the outcome of this appeal such that there is a *Robinson* obvious error of law. *Mosira* concerned whether a child granted leave in line with a refugee parent themselves has refugee status derived under paragraph 334 of the Rules, such that cessation can be applied to her, where the status of the refugee parent is unaffected, even where there is no risk on return to the dependant in the country of origin.

42. As in *Mosira* itself, this point was raised at the eleventh hour and is not presaged in the First-tier Tribunal decision or the Secretary of State's arguments therein. Nor is it in the grounds of appeal. It is inappropriate to allow it to be raised at this late stage, still less to determine the application. Even if the *Mosira* point had been raised, I doubt whether it would have availed the Secretary of State in this appeal: the claimant is no longer a child, but there are unchallenged findings in the decision that he will be at risk at least of an Article 3 ECHR breach on return.

DECISION

43. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of no error on a point of law

I do not set aside the decision but order that it shall stand.

Date: 3 September 2018

Signed *Judith AJC Gleeson*
Upper Tribunal Judge Gleeson