Upper Tribunal

(Immigration and Asylum Chamber) **Appeal Number: RP/00074/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2 May 2018	**On 10 May 2019**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

-and-

AMS-A

(ANONYMITY ORDER MAINTAINED)

Respondent

Representation

For the Appellant: Mr. T. Lindsey, Home Office Presenting Officer

For the Respondent: Mr. E. Fripp of counsel, instructed by Duncan Lewis & Co Solicitors (Harrow)

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Respondent is a national of Somalia who was born in Kismayo and is from the Ashraf clan. He arrived in the United Kingdom on 3 September 2003 and applied for asylum on 9 September 2003. His application was refused and he appealed. His appeal was allowed on 12 February 2004 and on 7 April 2004 he was granted indefinite leave to remain as a refugee.

2. On 12 May 2016 the Respondent was convicted of one count of assault occasioning actual bodily harm and one count of breaching a bail order by failing to surrender to custody and sentenced to 1 year, six months and 28 days imprisonment. As a consequence, on 23 May 2016, he was informed that he had become liable to automatic deportation under section 32(5) of the UK Borders Act 2007. He did not respond and therefore a deportation order was signed on 12 April 2018.

3. On 13 April 2018 the Appellant informed the Appellant that he did not have the right to appeal against the decision to deport him but that he may appeal against the decision to refuse his human rights claim, which had been deemed to have been made from the information already known to the Secretary of State. Attached to this decision, which was served on 16 April 2018, there was also a decision revoking his refugee status, which had been dated 10 August 2017. The Respondent appealed on 27 April 2018 on the basis that he would face persecution as a member of the Ashraf clan if deported to Somalia and that his removal would breach his human rights.

4. First-tier Tribunal Judge Hussain allowed the Respondent's appeal in a decision promulgated on 9 January 2019. The Secretary of State appealed and Deputy Upper Tribunal Judge Davey granted him permission to appeal to the Upper Tribunal on 21 March 2019.

ERROR OF LAW HEARING

5. Counsel for the Respondent accepted that there was an error of law in the decision by First-tier Tribunal Judge Hussain but submitted that the error was not a material one. The Home Office Presenting Officer submitted that the error was material and that the decision could not be maintained. At the end of the hearing, the Home Office Presenting Officer also undertook

to find a copy of the determination, promulgated on 12 February 2004, which allowed the Respondent's asylum appeal and led to him being granted refugee status on 7 April 2004, and serve it on the Respondent's solicitors and the First-tier Tribunal.

ERROR OF LAW DECISION

6. The Respondent had a right to appeal under section 82 of the Nationality, Immigration and Asylum Act 2002 against the decision to revoke his refugee status and the decision to refuse his deemed human rights claim. He appealed on the basis that he was still entitled to refugee status or Humanitarian Protection and that returning him to Somalia would breach his rights under the European Convention on Human Rights. At the hearing, the Respondent did not rely on any rights under Article 8 of the European Convention on Human Rights.

7. At paragraph 39 of his decision, when considering whether the Respondent continued to be entitled to refugee status, First-tier Tribunal Judge Hussain relied on *MS (Art 1C (5)-Mogadishu) Somalia* [2018] UKUT 00196 (IAC) where the Upper Tribunal's headnote stated that:

> "The Secretary of State is not entitled to cease a person's refugee status pursuant to Article 1C (5) of the Refugee Convention solely on the basis of a change of circumstances in one part of the country of proposed return".

8. This finding relied in part on paragraph 54 of the decision which stated:

> "Although it was suggested on behalf of the respondent in submissions that there was no difference in principle between the grant or the cessation of refugee status, because a person is only a refugee so long as there is no safe area of return, I do not agree. There is, in my judgement, a very significant philosophical and indeed practical difference between the grant and the cessation of refugee status…"

9. Both parties agreed that these findings conflict with the higher authority to be found in *Secretary of State for the Home Department v MA (Somalia)* [2018] EWCA Civ 994, where Lady Justice Arden stated that:

> "A cessation decision is the mirror image of a decision determining refugee status. By that I mean that the grounds for cessation do not go beyond verifying whether the grounds for recognition of refugee status continue to exist. Thus, the relevant

> question is whether there has been a significant and non-temporary change in circumstances so that the circumstances which caused the person to be a refugee have ceased to apply and there is no other basis on which he would be held to be a refugee. The recognising state does not in addition have to be satisfied that the country of origin has a system of government or an effective legal system for protecting basic human rights, though the absence of such systems may of course lead to the conclusion that a significant and non-temporary change in circumstances has not occurred".

10. I note that this reflects the wording of Article 1C (5) of the Refugee Convention which states that the Convention shall cease to apply to any person falling under the terms of Article 1(A) if:

> "He can no longer, because the circumstances in connexion with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality".

11. Paragraph 339A of the Immigration Rules also states that:

> "A person's grant of asylum under paragraph 334 will be revoked or not renewed if the Secretary of State is satisfied that:
>
> (v) he can not longer, because the circumstances in connection with which they have been recognised as a refugee has ceased to exist, continue to refuse to avail themselves of the protection of the country of nationality".

12. In addition, paragraph 339A of the Rules states that:

> "In considering (v) and (vi), the Secretary of State shall have regard to whether the change of circumstances is of such a significant and non-temporary nature that the refugee's fear of persecution can no longer be regarded as well-founded".

13, As a consequence, I find that First-tier Tribunal Judge Hussain did err in law in so far as he relied upon *MS.*

14. Counsel for the Respondent submitted that this did not amount to a material error of law as the facts of the case indicated that the Respondent was still entitled to Refugee Protection if

the country guidance in *MOJ & Others (Return to Mogadishu) Somalia CG* [2014] UKUT 00442 (IAC) was correctly applied.

15. This guidance indicates that:

"(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.

(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.

16. However, although the decision indicates that some evidence had been led at the hearing which related to this guidance and the potential applicability of it to the Respondent, First-tier Tribunal Judge Hussain did not reach any findings as to its applicability. In my view, this amounted to a further error of law which was *Robinson* obvious. In addition, in order to find that the error of law referred to above was not material, I would have had to speculate about what findings of fact would have been made if the country guidance had been applied. This would not have been a suitable approach to the issue of materiality.

17. First-tier Tribunal Judge Hussain also failed to take into account that, at paragraphs 6 to 8 of the decision under challenge, the Secretary of State also concluded that it would be safe for the Respondent to return to Kismayo. First-tier Tribunal Judge Hussain did not address this finding or indicate any basis upon which he found that this was not the case. Counsel for the Respondent submitted that there was recent objective evidence which indicated that it was only the central part of Kismayo that was safe and that the road to the airport was vulnerable to attacks by Al-Shabaab. However, this evidence was simply not addressed by First-tier Tribunal Judge Hussain and I am not able to speculate as to what findings of fact he would have made if he had considered it.

18. For all of these reasons there were errors of law in First-tier Tribunal Judge Hussain's decision.

Decision

(1) The Secretary of State for the Home Department's appeal is allowed.

(2) The decision of First-tier Tribunal Judge Hussain is set aside.

(3) The appeal is remitted to the First-tier Tribunal to be heard *de novo* by a First-tier Tribunal Judge other than First-tier Tribunal Judge Hussain, Landes or Davey.

Nadine Finch

Signed Date 8 May 2019

Upper Tribunal Judge Finch