Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: RP/00092/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 July 2019	**On 09 September 2019**

Before

THE HON. MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

M A
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr I Jarvis, Senior Home Office Presenting Officer
For the Respondent: Not represented

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, MA is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

Introduction

1. This decision re-makes MA's appeal on Article 3 ECHR grounds, made in the context of deportation proceedings. It follows a decision of the Upper Tribunal dated 1 May 2019 which set aside a First-tier Tribunal decision which found that MA was from the minority Gaboye clan and that he would face a breach of his rights under Article 3 of the European Convention on Human Rights (ECHR) if returned to Somalia.

2. For ease of reference, in this decision we refer to the Secretary of State for the Home Department as the respondent and to MA as the appellant, reflecting their positions before the First-tier Tribunal.

Background

3. The appellant's background is set out in full in the error of law decision but it is expedient to set out the key parts again here.

4. MA is a citizen of Somalia, born in 1975. He came to the UK in 1989 with his family. He was granted refugee status on 4 November 1990 until 4 November 1994. He was granted indefinite leave to remain (ILR) on 15 July 1995.

5. The appellant went on to amass an extensive and serious criminal record. For the purposes of this decision it is not necessary to rehearse all of his convictions but the following offences are notable.

6. In 1995 the appellant was convicted of robbery for which he received a sentence of 3 years in a Youth Offenders' Institute and was recommended for deportation.

7. In 2001 the appellant was convicted of Class A drugs offences and sentenced to 42 months' imprisonment.

8. On 7 February 2011 he was convicted of further Class A drugs offences and sentenced to 54 months in prison.

9. The respondent wrote to the appellant on 23 March 2011 notifying him of an intention to deport him and requesting that he provide reasons why he should not be deported.

10. Notwithstanding that notification, on 18 November 2013 the appellant was again convicted of Class A drugs offences and sentenced to 40 months' imprisonment.

11. Unsurprisingly, on 29 September 2015, the respondent made a deportation order against the appellant under s.32(5) of the UK Borders Act 2007.

12. Further, in a decision dated 1 October 2015 the appellant's refugee status was revoked. The respondent also made a certificate under Section 72 of the Nationality, Immigration and Asylum Act 2002 against the appellant as it was considered that he

had been convicted of a particularly serious crime and that he constituted a danger to the community of the UK.

13. The decision of 1 October 2015 also refused the appellant's human rights claims, finding that Articles 3 and 8 of the ECHR would not be breached if the appellant was deported.

14. The appellant appealed the decisions of 1 October 2015, maintaining that he was a refugee, that he qualified for humanitarian protection, that the s. 72 certificate was not lawfully made and that his removal would amount to a breach of Articles 3 and 8 of the ECHR.

15. The appeal was first heard by First-tier Tribunal Andrew on 16 August 2016. In a decision issued on 22 August 2016, Judge Andrew found that the s.72 certificate was lawful and that, therefore, the appellant was excluded from the benefit of the Refugee Convention and humanitarian protection. She went on to dismiss the Article 3 and Article 8 appeals.

16. The appellant appealed to the Upper Tribunal. In a decision issued on 30 October 2016, Upper Tribunal Judge Kopieczek found an error of law and set aside the decision of First-tier Tribunal Judge Andrew. The appeal was remitted to the First-tier Tribunal to be re-made. Paragraph 31 of the error of law decision made it clear that the re-making of the appeal was limited to findings on the appellant's clan membership and an assessment of whether his circumstances on return to Mogadishu amounted to a breach of Article 3 ECHR.

17. The appeal then came before First-tier Tribunal Judge Bird on 21 January 2019. In her decision issued on 13 February 2019, she found that the appellant was from the minority Gaboye clan and that his circumstances on return to Mogadishu would amount to a breach of Article 3 ECHR.

18. The respondent appealed to the Upper Tribunal against the decision of First-tier Tribunal Bird. In a decision dated 1 May 2019, the Upper Tribunal found that the First-tier Tribunal had erred in law when finding that the appellant was from the Gaboye clan. The First-tier Tribunal findings on that issue relied heavily on the evidence of a journalist, Ms Mary Harper. The First-tier Tribunal failed to assess Ms Harper's evidence against the criticism of her in the Country Guidance case of MOJ and Others (return to Mogadishu) Somalia CG [2014] UKUT 00442 (IAC) and in the reported case of AAW (expert evidence – weight) Somalia [2015] UKUT 00673 (IAC).

19. The Upper Tribunal also found an error of law where the First-tier Tribunal had not applied the correct, stringent test for an Article 3 ECHR claim based on destitution, identified in the cases of SSHD v Said [2016] EWCA Civ 442 and SSHD v MA (Somalia) [2018] EWCA Civ 994.

20. It is of note that the appellant did not appear before First-tier Tribunal Bird on 21 January 2019 or the Upper Tribunal at the error of law hearing on 16 April 2019. He was represented at those hearings by Counsel, instructed by Birnberg Peirce Solicitors.

21. On 22 July 2019, Birnberg Peirce Solicitors wrote to the Upper Tribunal stating that they no longer acted for MA and that no-one would be attending to represent him at the re-making hearing listed for 23 July 2019.

22. Once again, MA did not attend the hearing of his appeal on 23 July 2019. Notice of hearing had been sent to the address for service provided by him, there was no application for an adjournment and no explanation for his absence. The Tribunal concluded that it was in the interests of justice to proceed in his absence having applied Rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008. The Tribunal heard oral submissions from Mr Jarvis and reserved its decision.

Clan Membership

23. The first question that remains to be answered concerns the appellant's claim to be from the Gaboye clan.

24. In his undated witness statement, at pages 1-6 of Tab C of the appellant's bundle, in paragraph 1, the appellant stated that he was born in Shabelle in Southern Somalia.

25. In paragraph 2 of the witness statement, the appellant maintained that his father was from the Gaboye clan and that his mother was from the Ogaden clan. He considered that he derived his clan membership from his father and so was from the Gaboye clan. He submitted that he would face persecution and discrimination on return to Somalia as a member of the Gaboye clan.

26. The appellant went on to explain in paragraph 3 of his witness statement that he was aware that when his mother claimed asylum she had stated that the appellant was born in Hargeisa, Somaliland. Although he knew this was not correct he had continued to state that he was born in Hargeisa in order to remain consistent with what his mother had said. Nevertheless, his true place of birth was Shabelle in Southern Somalia.

27. In paragraphs 5 to 11 of his statement, the appellant maintained that the family left Hargeisa and went to Mogadishu. His father worked in Saudi Arabia for the regime of President Siad Barre. The appellant joined his parents in Saudi Arabia in 1984. He came to the UK with his parents in 1989 and was a dependent on his mother's asylum claim. At some point his father returned to Somalia. The appellant and his family were informed in 1991 that his father had been executed because of his association with the Siad Barre regime.

28. The respondent disputed the appellant's claim to be from the Gaboye clan. The respondent pointed out that when the appellant's mother claimed asylum in 1989 with the appellant as a dependent, she maintained that she was from the major Ogaden clan and stated that the family had come to the UK from Hargeisa in Somaliland. It was only when the appellant put forward an independent asylum claim after he became aware of the respondent's intention to deport him in 2013, that he maintained that he was from the minority Gaboye clan, though his father, and that he was born in Hargeisa and had moved to Mogadishu before coming to the UK.

29. The respondent's decision of 1 October 2015 addressed this issue in paragraph 58:

> "Consideration has been given to the claim that you were not born in Hargeisa but in Shabeela in southern Somalia. It is accepted that in a completed notice of liability to automatic deportation letter questionnaire of June 2014 you stated that you and your father were born in Shabeela, although you have not provided any evidence to support this claim. However, on Travel Document application forms dated December 1997 and 15 February 1999 you stated that you were born in Hargeisa, Somalia. On you mother's file is a statement made by her that the family fled Hargeisa in mid-1988. It is also noted that in an application for naturalisation as a British citizen, dated 8 November 1998, your mother provided her place of birth and those of your siblings as Hargeisa. While it is unclear why you would supply two different locations as your place of birth, it is considered that your earlier statements and those of your mother indicate that you were born in Hargeisa."

30. The appellant seeks to rely on a report dated 25 May 2018 prepared by Ms Mary Harper. Her instructions, set out on pages 1 and 2 of the report, were to address the issue of the appellant's clan membership and the treatment of the Gaboye in Somalia and describe whether any other aspect of the appellant's profile, for example being away from Somalia for many years, could lead to ill-treatment or discrimination.

31. As found in the error of law decision dated 1 May 2019, our view was that Ms Harper's report had to be approached with caution. Significant parts of her evidence were not found not to be reliable in the Country Guidance case of MOJ and Others (return to Mogadishu) Somalia CG [2014] UKUT 00442 (IAC). Also, in the reported case of AAW (expert evidence – weight) Somalia [2015] UKUT 00673 (IAC) there is detailed criticism of the report Ms Harper provided in that appeal as it continued to put forward the same evidence that was found unreliable in MOJ. The Upper Tribunal in AAW also found that Ms Harper's report failed to follow material aspects of the Senior President's Practice Direction No 10 (2010) which sets out a series of duties for expert witnesses.

32. We noted that in paragraphs 3.5 to 3.8 of the report prepared for this appeal, Ms Harper identified that not all of her evidence in MOJ was accepted and indicated that she had "reflected on the Tribunal's reasoning and endeavoured to take it on board when providing opinions in this case". In paragraph 3.6 Ms Harper also identified that she had "considered and engaged with" the findings in AAW. She also indicated in paragraph 3.8 that she had had particular regard to the relevant Senior President's Practice Direction on expert evidence as summarised in MOJ in paragraph 25 and referred to in AAW in paragraph 24.

33. It was not our conclusion that the body of the report reflected those self-directions in substance, however. We found numerous examples of the shortcomings in Ms Harper's evidence identified in MOJ and AAW being repeated in the report prepared for this appeal.

34. One example is that the head note of MOJ at (viii) states that there "are no clan militias in Mogadishu, no clan violence, and no clan based discriminatory treatment, even for minority clan members." Ms Harper's report at paragraphs 7.2 to 8.2, however, maintains that there is significant discrimination and risk of violence on the

basis of being from the Gaboye clan. Nowhere in Ms Harper's current report, on this issue or any other, is there an attempt to identify the "very strong grounds supported by cogent evidence" required for findings in a Country Guidance case to be considered no longer authoritative and set aside or replaced; SG (Iraq) v Secretary of State for the Home Department [2012] EWCA Civ 940 applied.

35. Further, at paragraph 9.4 of the report, Ms Harper maintains that the length of time that the appellant has been absent from Mogadishu:

> "… would cause him immense difficulty on return as he would be completely unfamiliar with his surroundings and would not know how to behave during periods of violence and insecurity."

Ms Harper put forward the same evidence in MOJ and it was rejected by the Upper Tribunal in paragraph 197:

> "Once again, we find it impossible to accept that a person returning to Mogadishu today after a period of absence would be sufficiently ill-informed as to not instinctively appreciate that these are examples of behaviour to be avoided, whether anyone locally "in the know" informed them of that or not."

36. Ms Harper suggests in paragraph 9.5 of her report that the Somali security forces would be a threat to the appellant's security on return. This is contrary to the findings of the Upper Tribunal in paragraph 178 of MOJ in which the Tribunal identified reliable source material showing that abuses by security forces "have decreased in recent times."

37. Also in paragraph 9.5 of her report, Ms Harper comments that civilians are being disproportionately affected by security incidents in Mogadishu. This part of her evidence was rejected by the Upper Tribunal in paragraph 166 of MOJ:

> "However, what has not been mentioned, either by Ms Harper or in the UNHCR report is that the view that civilians were bearing the brunt of the Al Shabaab attacks in Mogadishu was put by the author of this memo to the High Court in the Hague, supported by the statistical evidence assembled, but was rejected by the court which went on to uphold the deportation order being challenged. Thus what is now relied upon has failed to survive judicial scrutiny and the data itself offered in support is not made available to us, either in the memo or the UNHCR report."

38. In paragraph 9.6 of the report, Ms Harper contends that "individuals with a criminal past are likely to face increased difficulties including being stigmatised by others and problems finding work." Her evidence to the same effect was rejected by the Upper Tribunal in MOJ at paragraph 200:

> "… this is yet another example of an opinion being offered that is simply unsupported by any actual evidence of it occurring, being based instead upon what the witness believes would be the case."

Also, in AAW, the Upper Tribunal found in paragraph 64(b):

> "b. While it may become known that the appellant has been removed to Mogadishu on account of a deportation order following conviction for a serious criminal offence, the evidence does not establish any real risk to returnees on such account. There is no reason why an earlier conviction for sexual assault would become known and the appellant has identified no reason to suppose anyone who would be able to do so would now wish to make that known and, in any event, the evidence simply does not establish that persons convicted of offences that might be thought to offend social mores do in fact face a real risk of Article 3 ill-treatment, even if that matter may have been left open by the Tribunal in MOJ and Ors;"

39. In paragraph 9.7 of her report, Ms Harper refers to interviews with security officials, NGO workers and others as support for her view that returned criminals are at risk on return to Somalia but fails to provide any transcripts. As noted by the Upper Tribunal in AAW, the failure to provide the source material means that little or no weight can be placed on this evidence.

40. As a result, we were in agreement with the Upper Tribunal in paragraph 46 of AAW that:

> "Her report lacks the objectivity demanded and her review of the country information available is selective. Where she expresses opinions that conflict with current country guidance, she offers no basis upon which her own opinions should properly be accepted to prevail. Therefore, this evidence stands as the view of an experienced journalist with personal experience of the city from her regular visits. It is not to be disregarded, but considered in the round with all of the other evidence available and in the light of current country guidance."

41. In light of that conclusion, we also found that we must approach Ms Harper's comments on the appellant's clan membership with similar caution. Even were that not so, we did not find that Ms Harper's report even at its highest provided a great deal of support for the appellant's claim to be from the Gaboye clan. In paragraph 5.3, Ms Harper states that "[MA]'s description of his life in Somalia is sketchy and vague." She goes on to qualify this statement, stating that this is "not entirely surprising" as he left Somalia aged 9 years old. Our reading of this part of the report is that the applicant's evidence on his claim to have spent his early life in Somalia is not strong but there is a partial explanation for this. However, the consistent evidence of the appellant and his mother in various applications prior to the appellant facing deportation proceedings was that the appellant had spent most of his life prior to coming to the UK in Hargeisa/Somaliland and not in Mogadishu/Somalia. In that context, we found that his limited evidence on his time in Somalia supported the earlier claim to be from Somaliland and to be of Ogaden ethnicity rather than being a member of the Gaboye clan from Somalia.

42. We found that the applicant's claim regarding his ethnicity is undermined further comments made by Ms Harper in paragraph 5.3 of her report:

> "I find it surprising that [MA]'s mother is a member of the Ogaden clan while his father's status is claimed to be Midgan/Gaboye. The Midgan/Gaboye are a particularly despised minority group and it is not usual for them to marry members of majority clans such as the Ogaden."

43. Ms Harper comments in paragraph 5.4 that she did not find it surprising that the family lied about their origins and said that they came from Somaliland when they came to the UK in 1989 as there was intense violence there at the time. In our view, an acceptance that the appellant (and his mother) were dishonest about their history in previous applications does not assist the appellant now in his claim to be Gaboye. It shows him to be an unreliable witness and undermines his current claim to be from the Gaboye clan.

44. Ms Harper confirms in paragraph 5.5 of her report that Gaboye clan members were employed by the Siad Barre regime and suffered severe reprisals when the regime was overthrown in 1991. We accept that this is consistent with the appellant's assertions in his most recent claim that his father was associated with the Barre regime and was killed as a result. Against the evidence on this issue as a whole, we did not find that this consistency could be determinative of the appellant's claim to be Gaboye, however.

45. In paragraph 6.2 Ms Harper finds the appellant's evidence of the discrimination he experienced as a Gaboye was detailed and, in paragraph 6.4, that this was consistent with what she knew of the discrimination experienced by Gaboye and other minority clans in Somalia. We did not find this part of the report and the appellant's evidence could be determinative given that the historical mistreatment of minority clans is relatively well known and available to someone growing up in a Somali community, even in the UK.

46. In paragraph 6.4, Ms Harper again comments on the difficulty with the appellant's claim to be of mixed Gaboye/Ogaden ethnicity:

> "The one aspect that continues to confuse me is the majority clan status of [MA]'s mother, as members of majority clans usually do not marry members of occupational "caste" groups in Somalia, such as the Midgan/Gaboye, who are considered exceptionally lowly. As stated by Ms Luling. "Midgaan could not intermarry with members of the 'noble' Somali clan (sic). This rule is less strictly observed in modern times, but all the same there are known cases of couples who tried to do so being lynched."

47. Having considered Ms Harper's evidence together with that of the appellant, we do not find that he has shown that it is likely that he is from the Gaboye clan though his father. Taking Ms Harper's view of his ethnicity at its highest, she is equivocal and finds the claim regarding his parents' marriage to be very unusual. The appellant's mother consistently put forward the family as being Ogaden and from Hargeisa, not half-Gaboye and from Shabelle. The appellant adopted his mother's account until faced with deportation in 2014. Our conclusion is that the overwhelming likelihood is that the appellant is not from the Gaboye clan but is from the majority Ogaden clan, as he and his mother put forward in their previous dealings with the respondent.

Article 3

48. The Court of Appeal has confirmed recently in SSHD v MS (Somalia) [2019] EWCA Civ 1345 that the test for a breach of Article 3 ECHR on the basis of destitution is not

synonymous with the factors identified in paragraph 407h of MOJ being met. The Court approved the guidance provided in paragraph 28 of SSHD v Said [2016] EWCA Civ 442, commenting on the factors identified in MOJ as relevant to return as follows:

> "Whilst they may have some relevance in a search for whether a removal to Somalia would give rise to a violation of article 3 of the Convention, they cannot be understood as a surrogate for an examination of the circumstances to determine whether such a breach would occur. I am unable to accept that if a Somali national were able to bring himself within the rubric of para 408 [of MOJ], he would have established that his removal to Somalia would breach article 3 of the Convention. Such an approach would be inconsistent with the domestic and Convention jurisprudence which at para 34 UTIAC expressly understood itself to be following."

49. As identified in paragraph 18 of Said,

> "These cases demonstrate that to succeed in resisting removal on article 3 grounds on the basis of suggested poverty or deprivation on return which are not the responsibility of the receiving country or others in the sense described in para 282 of *Sufi and Elmi*, whether or not the feared deprivation is contributed to by a medical condition, the person liable to deportation must show circumstances which bring him within the approach of the Strasbourg Court in the *D* and *N cases.* "

The cases referred to in the final sentence are D v United Kingdom [1997] 2004 EHRR 423 and N v United Kingdom 47 EHRR 885 which require exceptional or very compelling circumstances for a finding of a breach of Article 3 ECHR.

50. It is our conclusion that the appellant cannot show the required level of exceptionality or very compelling circumstances if he is returned to Somalia. He is from the majority Ogaden clan. He maintains that he has no family in Somalia. We accept that he left at a young age and that he and his family have been outside the country for many years but that in itself does not mean that he and his family lost contact with all relatives who remained. We say this, having regard to the fact that he has not attended to be cross-examined on this or any other part of his evidence and in the context of the lack of credibility in his claim to be Gaboye and his own acceptance that he was dishonest previously when applying for travel documents.

51. Even if the appellant has no relatives in Mogadishu, following paragraphs (vii) and (viii) of the headnote of MOJ, he can still look for support from Ogaden or Darod clan members. A USAID report from 2013 identifies that "the Darood represent the third largest ethnic minority clan population in Mogadishu".

52. We accept that the appellant left Somalia at the age of 9 and that now, at the age of 44, he will face a significant readjustment on return. As above, he can expect Ogaden or Darod clan members to provide some support. He is a healthy, still relatively young man who can be expected to work.

53. We accept that the appellant is unlikely to be sent remittances from his family in the UK given his estrangement from them as a result of his serious criminal offending. In

paragraph 10 of his witness statement he refers to having found casual work in the UK, however, and so it is reasonable to expect him to look for such work in Somalia.

54. Further, the appellant is entitled to a Facilitated Returns Scheme (FRS) payment of £500 on a pre-paid cash card before returning to Somalia and to a further payment of £250 via the IOM after returning. A LANDINFO report dated 1 April 2016 indicated on pages 14 to 15 that:

> "The cost of living in Mogadishu, as in all other big cities, varies depending on where one lives, material standard of living, and where purchases are made. Another question to ask is how much a person needs to survive in Mogadishu, or what is needed to live a decent or good enough life in Mogadishu? There are no studies that provide a clear and unambiguous answer to the above questions. However, the questions were asked during Landinfo's visit to Mogadishu in January 2016: The IOM representative believed that USD 400 a month would be sufficient to maintain a family of four in terms of food and rent, but not enough to also cover children's school fees or any expenses for healthcare. The source was also of the opinion that 20 % of Mogadishu's population live a good life, 40 % are doing tolerably well and 40 % are poor. He believed that a family of four with USD 400 available belongs to the category that is doing tolerably well."

55. Where the appellant can obtain some support from members of his clan, can be expected to seek casual work and would have at least £500 available on return, a sum more than sufficient to support a family of four for a month, we did not find that he could be found to face a real risk of destitution on return.

56. It was therefore our conclusion that the appellant could not show a real risk of inhuman or degrading treatment mistreatment on return to Somalia and that he had not made out a claim under Article 3 ECHR.

Decision

57. The decision of the First-tier Tribunal disclosed an error of law and was set aside to be re-made.

58. The appeal is remade as refused under Article 3 ECHR

Signed: Date: 4 September 2019
Upper Tribunal Judge Pitt