



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/10727/2019

THE IMMIGRATION ACTS

Heard at: Manchester Civil Justice Centre  
On the: 18<sup>th</sup> November 2020

Decision & Reasons Promulgated  
On the: 24<sup>th</sup> November 2020

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

SOC

(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SOC

(ANONYMITY DIRECTION MADE)

Respondent

Representation

For SOC: Mr Toal of Counsel, instructed by Wilson Solicitors LLP  
For the Secretary of State: Mr McVeety, Senior Presenting Officer

## DECISION AND REASONS

1. SOC is a national of Somalia born in 1976. He has lived in this country since 1998 but has never had lawful leave to do so. In 2008 he was convicted of two counts of possessing Class A drugs with intent to supply and sentenced to a total of 30 months' imprisonment. As such he is a foreign criminal as defined at s 32 Borders Act 2007 and the public interest requires his deportation. To that end the Secretary of State made a deportation order against him on the 12<sup>th</sup> November 2008.
2. Having made that order, the Secretary of State apparently failed to deport SOC. At various points SOC made representations requesting that the Secretary of State revoke the deportation order and grant him leave to remain on protection and human rights grounds. By her decision of the 21<sup>st</sup> October 2019 the Secretary of State rejected those claims, but the representations were treated as a 'fresh claim', giving SOC a right of appeal, duly exercised before the First-tier Tribunal.
3. The matter came before the First-tier Tribunal (Judge Mayall) on the 18<sup>th</sup> February 2020.
4. The factual claim advanced by SOC was that he was a member of a recognised 'minority' clan in Somalia, the Bajuni, living in a village near Kismayo. He had fled Somalia as a teenager, living as a refugee in Kenya before making his way to the United Kingdom. SOC avers that he has lost contact with his family and that he has no one to whom he could turn to in Somalia for support: he has heard that everyone who was left in his village were killed or taken by militiamen. He was 22 years old when he arrived in this country. He was alone and had experienced extreme trauma. He was introduced to drugs to 'help him sleep'. He became addicted and ended up dealing in order to finance his habit. When he was sent to prison the trial judge recognised that he had been leading a "rather desperate life", living partially on the streets. He had become infected with HIV. This status has become known in his community which has turned its back on him. Since his release from prison he has tried to lead a "simple life". He has been diagnosed with depression. He has never been to Mogadishu and knows no one there.
5. The legal case built on those facts by Mr Toal was that SOC has a well-founded fear of persecution in Somalia for reasons of his membership of a particular social group/ethnicity. Further and in the alternative he faces a real risk of serious harm contrary to the UK's obligations under Article 3/Article 15(b) of the Qualification Directive. It was submitted that the

passage of time, and all of the evidence read as a whole, indicated that SOC was no longer a danger to the community.

6. The Secretary of State's case, insofar as it is relevant here, is set out in her refusal letter dated 21<sup>st</sup> October 2019:
  - i) Although it is accepted that SOC is Bajuni, he has no current protection needs;
  - ii) Even if he did he would be excluded from protection/humanitarian protection because he is a serious criminal and a certificate has therefore been imposed under s.72 Nationality, Immigration and Asylum Act 2002;
  - iii) In respect of Article 3 the Secretary of State accepted that if SOC were to try and settle in Mogadishu there would be a real possibility of him having to live in "conditions that would fall below acceptable humanitarian standards", and indeed conditions in violation of Article 3, but it was found that SOC could make his way back to Kismayo and re-settle there without facing a threat of violence, lack of access to medication or a risk of destitution. Although travel by road would be risky, he could take a flight. SOC had not demonstrated that he has lost contact with his family, clan members or that he did not have the funds to pay for this travel (SOC had received a substantial award for unlawful detention in 2015).
7. These then were the matters in issue before the First-tier Tribunal.

### **The First-tier Tribunal Decision**

8. The First-tier Tribunal began by considering the s72 certificate. The offence was a very serious one. Although the trial judge had recognised that street dealing fell at the "bottom of the bracket" he evidently considered that it was still serious enough to warrant a lengthy custodial sentence. The Tribunal rejected SOC's claims to now be drug-free: he had tested positive for heroin in 2015 and his explanation (that someone had passed him a laced cigarette) were "utterly implausible". SOC had in addition been made subject to a Drug Rehabilitation Requirement, indicating that the court on that occasion considered that drugs played a significant role in SOC's offending. The "expert" had concluded that SOC presents a "medium risk" of committing further offences, particularly acquisitive and drug related offences. Although the expert determined that SOC presents a low- level risk of harm to others, the Tribunal refuses to accept this:

“the reason why sentences for dealing in drugs are high is because of the real and serious harm that such behaviour does to society in general. Lack of violent behaviour does not equate to a lack of harm”.

On the basis of these findings, the Tribunal upheld the certificate, and thereby dismissed the asylum/humanitarian protection elements of the claim.

9. The First-tier Tribunal next considered whether SOC would be at risk of Article 3 serious harm should he return to Kismayo. It did so on the basis of the accepted fact that SOC is a Bajuni. The Tribunal directed itself to the extant country guidance cases on Bajunis. SA and Ors (minority group – Swahili speakers) Somalia CG [2003] UKIAT 00094 specifically had regard to the position of Bajunis in Kismayo and found them to be at risk. KS (Minority clans – Bajuni – ability to speak Kibajuni) Somalia CG [2004] UKIAT 00271 held that while not all minority groups had an automatically well-founded claim to protection, in that instance the Bajuni appellant did. In NM and Ors (Lone woman – Ashraf) Somalia CG [2005] UKIAT 00076 the panel found the starting point of its risk assessment to be that in general terms, members of minorities from southern Somalia (an area uncontrovertibly including Kismayo) were at risk of breaches of Article 3. The First-tier Tribunal noted that none of these country guidance cases had been replaced or removed from the official Upper Tribunal list. None were superceded by MOJ and Ors (Return to Mogadishu) Somalia CG [2014] UKUT 00442 (IAC) since that case was exclusively concerned with the position in the capital. That being the case, the Tribunal was required to follow the cases mentioned, unless it found there to be strong grounds, supported by cogent evidence, not to do so.
10. It will be noted from my summary at [§6 above] that the Secretary of State had not alluded to any of this country guidance in her refusal letter. The Tribunal put this matter to the Home Office Presenting Officer on the day, a Mr Grennan. His response is recorded at paragraph 46 of the decision:

“It seems to me that Mr Toal’s submissions are correct. When I put this point to Mr Grennan during his submissions he accepted that there was nothing which would cause me to depart from the current Country Guidance. He also accepted that Mr Toal’s skeleton correctly recorded the current Country Guidance. He was not seeking to dissuade me from following that Country Guidance”.
11. The Tribunal went on at paragraphs 47 and 48:

“Nor was any evidence put before me to suggest that there are features in the appellant’s background and circumstances which indicate that the appellant is not in fact at the same risk as that faced generally by other clan members. Nor was it suggested to the appellant in cross examination that such was the case.

In these circumstances I am driven to the conclusion that, simply because he is a Bajuni, he will face a real risk of persecution for a Convention reason, or of other treatment contrary to Art. 3 if he returns to Kismayo. The Respondent accepts that he cannot live safely in Mogadishu. The Respondent has not suggested that there is any other part of the country to which he could return and live safely”.

12. The appeal was therefore allowed on Article 3 human rights grounds.

### **The Challenges**

13. Each party has been granted permission to appeal the decision of the First-tier Tribunal which went against them. I deal first with the appeal lodged by the Secretary of State.
14. Permission was granted by First-tier Tribunal Judge Beach on the 13<sup>th</sup> July 2020. The substance of the grounds (and indeed Judge Beach’s grant of permission) are, curiously, concerned with findings that the Judge did not make:

“There is no finding by the FTTJ that any factor, such as the appellant’s claimed mental health condition, precludes his employment in Somalia, nor that he would have no access to support from clan members, who as shown above are present in Mogadishu. Furthermore, there is no finding that the appellant would have no alternative but to live in an IDP camp where conditions may breach the appellant’s Article 3 rights. It is submitted that in making this finding that the FTTJ has failed to have regard to the established case law set out below, which has moved on from MOJ cited at [43-44] *Secretary of State for the Home Department v Saïd* [2016] EWCA Civ 442 (06 May 2016)

15. None of that was relevant. The Judge made no findings about SOC’s mental health conditions, or support from clan members, or IDP camps because none of that was in issue. The Secretary of State had already accepted that this was an individual who could not remain in Mogadishu. It is true that her concession was couched at paragraph 93 of the refusal letter in the very phrase of MOJ that had concerned Burnett LJ in Sa’id:

what are, after all, “acceptable humanitarian standards”? But the refusal letter went on at paragraph 106 to expressly accept, under the heading ‘Article 3 (Destitution)’ that SOC could not be expected to remain in Mogadishu. That concession was neither qualified nor withdrawn by the HOPO before the First-tier Tribunal. In fact, the concessions in the refusal letter are not even withdrawn in the grounds, which simply proceed on the basis that they were never made. They were, and there was absolutely no error of law in the Judge relying on them as he did.

16. The appeal was not allowed with reference to any of the matters raised in the grounds. The grounds are entirely silent on the true ratio of this decision: that as a Bajuni from Kismayo SOC remains at risk of serious harm from violent militias. That finding was made in compliance with the operative law, namely the three country guidance cases relied upon by Mr Toal. As the Court of Appeal remind us in AM (Iran) v Secretary of State for the Home Department [2018] EWCA Civ 2706, country guidance remains country guidance, no matter how ancient, until it is withdrawn or overruled. As a matter of law it is to be followed unless the test for departing from it is met. The HOPO in this instance readily accepted that he had no basis upon which to ask the First-tier Tribunal to depart from that guidance and that being the case, the Tribunal were quite right to have applied it.
17. The Secretary of State’s appeal is dismissed.
18. I now turn to deal with the challenge mounted by SOC, which concerns the Judge’s finding that he failed to rebut the presumption in s72 Nationality, Immigration and Asylum Act 2002, and so was not entitled to refugee status. SOC was refused permission to appeal by the First-tier Tribunal (Judge Beach) but was upon renewed application granted permission by Upper Tribunal Judge Finch on the 23<sup>rd</sup> August 2020.
19. Judge Finch considered it arguable that the First-tier Tribunal had failed to give any, or any sufficient, weight to the chronology in its assessment. The last serious offence had taken place in 2008 and it is arguable that the convictions in 2015 – for shoplifting and failing a drugs test – fell far short of showing that SOC presented an ongoing danger to the community: it was not clear from the First-tier Tribunal’s decision that it had taken those matters into account. Before me Mr Toal expanded on those points. The hearing before the First-tier Tribunal took place in February 2020, almost 12 years since the convictions for the index offences, and obviously even longer since the offences themselves. It was submitted that the passage of time since then was a matter which should have attracted significant weight, and it was not clear from the decision that it had done so. Mr Toal accepted that the Tribunal had been entitled to reject SOC’s evidence about the drug test, but that was peripheral to the matter in issue, since on no reasonable view could it be said that either of the 2015 convictions

were capable of demonstrating that SOC presented a danger to the community.

20. I am not satisfied that the chronology was lost on the Tribunal. It obviously understood when the index offences took place and the date upon which it was making its decision. Nor do I think it right to assume that the passage of time will automatically rebut the statutory presumption. A long period of abiding by the law will always be relevant to the enquiry, but it is of course the case here that the appellant had incurred further convictions so could not be said to be entirely rehabilitated. I accept Mr Toal's characterisation of those offences as relatively minor, but it was not the convictions themselves which caused the Tribunal concern: it was what they revealed about the life being led by SOC.
21. On his own evidence, SOC's involvement with street dealing arose from his own addiction to crack cocaine and heroin. Just as he squarely framed his criminality by his drug dependency, he framed his rehabilitation by his recovery. At paragraph 18 of his witness statement SOC says "going to prison gave me the opportunity to turn my life around because I was able to get off the drugs". He did a medical detox whilst in prison and says of this: "I haven't used either of those drugs since then, I managed to stay clean". That evidence was rejected by the Tribunal flatly contradicted as it was by the evidence: SOC tested positive for heroin in 2015, and the court had at that time seen fit to impose a Drug Rehabilitation Requirement. Of this the Tribunal found:

"I also do not consider that, if he had told the Probation Officer, and the Court, that this was the one and only occasion in the last eight years that he had consumed (inadvertently) class A drugs, and this had been accepted, he would have been, as part of the sentence, required to undertake a Drug Rehabilitation Requirement. From my own, fairly extensive, experience of sitting as a Recorder in the Crown Court, such resources are rare and reserved for those cases in which substance abuse is considered to have played a significant role in the commission of the offence.

The fact that he failed to attend part of the DRR reinforces my conclusion that in 2015 his drug use was not simply a one-off and inadvertent laced cigarette"

22. The Tribunal went on to note that SOC's claim to be completely free of drugs since he left prison is in contrast to the tests undertaken by "the expert". This rather unhelpful reference is to a Dr John Cordwell, a Chartered Forensic Psychologist who undertook a detailed assessment of SOC in 2019. By "tests" the Tribunal means the psychological

questionnaires administered by Dr Cordwell as opposed to physical drug tests. Those questionnaires led Dr Cordwell to find “a low level of drug use in the past 12 months”, the import of this being some, as opposed to no, drug use continuing post-2015. Dr Cordwell concluded from this: “given substance use has been a significant difficulty he has experienced in his life, it is suggested that this remains both relevant to his needs and needs further monitoring”. Dr Cordwell’s findings on SOC’s substance use fed directly into his conclusion that SOC continues to present a medium risk of offending, particularly acquisitive and drug-related offences, a conclusion to which the Tribunal specifically referred in its reasoning.

23. The difficulty for SOC is this. The question for the Tribunal was not whether the offences in 2015 revealed him to be a danger to the community. The question for the Tribunal was whether SOC had successfully rebutted the statutory presumption that he *was*. SOC’s case was that he could do so not only by reference to his relative lack of criminality, but to his success in staying clean: this factual premise was rejected outright by the Tribunal, in findings which Mr Toal acknowledges were open to it on the evidence.
24. It is of course the case that the First-tier Tribunal could on these facts quite legitimately have concluded that SOC was no longer a danger to the community. Even if he has continued to use class A drugs, an argument could be mounted to the effect that this harmed no-one but himself. But this was not the finding of the First-tier Tribunal, which instead drew two different conclusions from the facts as found. These were that SOC’s continued use of drugs underpinned his ongoing risk of re-offending, and even if that “medium risk” was only of “acquisitive and drug-related offences” this remained a risk to society:

“The reason why sentences for dealing in drugs are high is because of the real and serious harm that such behaviour does to society in general. Lack of violent behaviour does not equate to a lack of harm”

[at FTT §35].

25. I am unable to find legal fault with this reasoning. The passage of time since the index offence was only relevant to establishing that SOC today finds himself in materially different circumstances to those he was in when he committed the index offences. As the report of Dr Cordwell makes clear, the sad fact of the matter is that he is not. He remains traumatised by his life experiences; his position is precarious; he faces significant physical health challenges; he feels depressed, lonely and anxious; he has failed to show that he is drug free. That was what led Dr



Cordwell to conclude that SOC continues to present a medium risk of offending, a finding that the Tribunal was plainly entitled to attach weight to in reaching its conclusions. I find no error in its approach.

### **Decisions**

26. The determination of the First-tier Tribunal contains no error of law and it is upheld.
27. The appeal of SOC, and the cross appeal of the Secretary of State, are both dismissed.
28. This appeal concerns a claim for protection, and my decision reveals matters relating to the health of SOC. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order in the following terms:

“Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings”

Upper Tribunal Judge Bruce

20<sup>th</sup> November 2020