



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/02369/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 1 March 2017**

**Decision & Reasons Promulgated
On 10 May 2017**

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

**NHA
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Hawkin
For the Respondent: Mr Kotas

DECISION AND REASONS

Introduction

1. The Appellant is a citizen of Somalia born in 1999. He arrived in the UK in April 2015 and claimed asylum in May 2015. He was reunited in the UK with his mother who is settled here.
2. His claim for asylum was refused by the Respondent on 26 February 2016 on the grounds that his account that he was a member of the Bantu or

Jareer clan was not credible and that he faced no risk of being targeted by Al-Shabaab. Reliance was placed on the country guidance case of **MOJ and Others (return to Mogadishu) Somalia CG [2014] UKUT 00442**. At the date of the refusal letter the Appellant's grandmother, aunt and two siblings were living in Mogadishu and it was argued that it would be reasonable for him to return to Somalia.

Background

3. The background to be taken into account was that in 2004 following an appeal against refusal to grant refugee status to the Appellant's mother, the FTT (Judge Turquet) found the Appellant's mother was lacking in credibility in terms of her clan membership. One of the issues in the current appeal was whether or not the FTT should take as its starting point the 2004 determination pursuant to the guidance in **Devaseelan [2003] Imm AR 1**.
4. The FTT (Judge Cockrill) at a hearing at Taylor House on 21 December 2016 heard oral evidence from the Appellant, his mother and his brother, who both have refugee status. The FTT found that the Appellant was a member of the Jareer clan. It found that the Appellant's account of an incident when his madrassa had been under attack from Al-Shabaab was credible and that he had been the victim of ill-treatment at the hands of Al-Shabaab. The FTT then went on to consider risk on return with reference to background material which named the Jareer clan as a marginalised group and which referred to the risks of ill-treatment from Al-Shabaab. The FTT also found that there was no-one in Somalia who could help the Appellant, who is a minor, and he would be vulnerable because of his clan membership. On that basis the FTT allowed the appeal on asylum grounds.
5. The Secretary of State sought permission to appeal which was granted by a judge on 11 November 2016 for the following reasons:
 - (a) In making a finding that the Appellant was a member of the Bantu clan the judge ignored the fact that his mother in her appeal in 2004 had not told the truth about her clan membership. The judge did not consider whether he should rely on **Devaseelan** in this regard.
 - (b) In making his finding as to the risk on return the judge took no note of the CG cases in relation to the Bantu: see **DJ (Bantu-not generally at risk) Somalia CG [2005] UKIAT 00089**.
 - (c) The judge did not take note and make findings in respect of the Appellant's claimed history whilst he was in Somalia and, in particular, the claimed return of the family to rented accommodation in Mogadishu.
 - (d) The judge did not engage with the CG case of **MOJ** and the Appellant's claim of specific targeting from Al-Shabaab.

- (e) The judge made no finding as to the Appellant's return to Mogadishu (or an area of that city) in line with the guidance contained in **MOJ**.
6. Following the error of law hearing on 21 December 2016, Deputy Upper Tribunal Judge G A Black issued the following decision - (to avoid repetition it is necessary to note only the later paragraphs):

"...

Discussion and decision

15. *I decided that there was a material error in the decision and reasons. The FTT failed to make the findings with reference to risks based on clan membership and risks from Al-Shabaab, and took no account of country guidance cases dealing with these issues. It is clear from **MOJ** and **DJ** that the current country guidance shows that there is no real risk of forced recruitment to Al-Shabaab for civilians of Mogadishu, including recent returnees from the west, and that the significance of clan membership in Mogadishu has changed. There are no clan militias in Mogadishu, no clan violence and no clan based discriminatory treatment, even for minor clan members. Accordingly, I am satisfied that the decision reached by the FTT to allow the appeal on asylum grounds cannot stand.*
16. *In respect of the **Devaseelan** issue I conclude that the Secretary of State failed to make out her grounds in this regard. The 2004 determination was that of a family member of this claimant and it was therefore of relevance to the current proceedings. The FTT made reference to the guidance in **Devaseelan** and indicated that the findings in the earlier determination were a starting point. It may be that the FTT ought to have gone into greater detail and engaged with the findings made in 2004. However, having regard to the evidence that was before the FTT, which included the claimant's evidence, his mother's evidence and his brother's evidence, I am satisfied that there was sufficient evidence before the FTT to justify reaching a conclusion that the claimant was a member of the Bantu.*
17. *Accordingly, in consideration of the future disposal and remaking of this appeal, I direct that the matter be listed for oral submissions on Article 3 and/or humanitarian protection focusing on any risks to the claimant on return to Somalia and/or Mogadishu in line with the guidance contained in **MOJ**.*

Notice of Decision

18. *The Secretary of State appeal is allowed. The decision to allow the appeal on asylum grounds is set aside.*

19. *The matter is to be remade by the Upper Tribunal and listed for oral submissions (as set out in paragraph 17 above) before the Upper Tribunal. The findings of fact from the First-tier Tribunal are preserved."*

7. Thus, the matter came before me at the resumed hearing.

Submissions

8. In his submissions Mr Kotas said he was constrained by the findings of fact. On that basis the Appellant would be returning as a child, from a minority clan, and with no family there. His mother would also be unable to send remittances. Nonetheless although the general situation in Mogadishu is fluid, the country guidance in **MOJ** is still good law. There is not an Article 15(c) risk.
9. Further, even though he is a child he is approaching majority and he could get work. He is fluent in his native language. Also, he is not necessarily at risk of finding himself living in an IDP camp.
10. In reply, Mr Hawkin submitted that as a minor, from a minority clan who had suffered at the hands of Al-Shabaab and who has no family members there and who would get no financial support from family here the Appellant's case should succeed. It was a paradigm **MOJ** case.
11. Mr Hawkin, referring to recent news reports submitted that the situation generally in Somalia had got worse. The number of people in IDP camps has increased. Such enhanced the Appellant's claim.

Consideration

12. In considering this matter I apply, as required, the facts as found and preserved, in light of the country guidance in **MOJ**, in particular paragraph 407(h) (reflected in the headnote at (ix)).
13. It reads:

"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 ..." [it then lists eight such considerations].

14. The first consideration is the person's circumstances in Mogadishu before departure: in this case the Appellant has suffered at the hands of Al-Shabaab, namely, an incident when the madrassa was attacked. Also, an incident when he was beaten because he was playing football an activity seen as un-Islamic and Western.

15. Second, length of absence from Mogadishu: he has been away for two years, a relatively short time, but such needs to be seen in the context of his being a minor.
16. Third, family or clan associations to call upon in Mogadishu: he is from a minority clan. Further, he has no family members there.
17. Fourth, access to financial resources: the Appellant has no access to such resources.
18. Fifth, prospects of securing a livelihood, whether that be employment or self-employment: again, it must be observed that the Appellant is a minor and he must be dealt with as such. He has no history of work and no record of working on his own.
19. Sixth, availability of remittances from abroad: again such would not be available. His mother is in receipt of benefits, and has responsibility for her children here as well as herself.
20. Seventh, means of support during the time spent in the UK: he lives with and is dependent on his mother.
21. Eighth, why his ability to fund the journey to the West no longer enables an Appellant to secure financial support on return: his departure was arranged by adult relatives who are no longer there.
22. The guidance (at [407(h)]) continues:

“Put another way, it will be for the person facing return to Mogadishu 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.”

23. And (at [408]):

“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.”

24. Going on (at [409]ff) to consider the circumstances of those living in IDP camps (in Mogadishu), the Tribunal concluded (at [424, 425]) and reflected in headnote (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.”

25. In my judgement in considering the particular, individual circumstances of this Appellant I find it to be reasonably likely that as a minor who is vulnerable and who because of his youth is unlikely to be able to get work sufficient to support himself, who is from a minority clan, who has no family there, and no financial support from elsewhere, he will be at real risk of having no alternative but to live in makeshift accommodation within an IDP camp.
26. I conclude that on the facts of this case the appeal succeeds.
27. As to whether such should be under Article 15 (b) and/or Article 3 ECHR Mr Kotas made brief reference to **SSHD v Said [2016] EWCA Civ 442**.
28. In that case it was noted that paragraph 408 of **MOJ** raised the possibility of a person's circumstances falling below *“what is acceptable in humanitarian protection terms.”* However, if a Somali national brought himself within the rubric of [408], it did not follow that he had established that removal would breach Article 3 of ECHR. Such an approach would be inconsistent with jurisprudence. The position was accurately stated at paragraph 422 of **MOJ**, which drew a proper distinction between humanitarian protection and Article 3 and recognised that the individual circumstances of the person concerned must be considered (at[31]).
29. Having sought to consider the Appellant's individual circumstances and laying particular emphasis that on return to Mogadishu he would be vulnerable as a child, I conclude that substantial grounds have been shown for believing that if returned he would face a real risk of suffering serious harm. He succeeds under Article 15 (b). For the same reasons and taking into account the standard applicable to it he also succeeds under Article 3.
30. Mr Hawkin briefly raised Article 15(c) referring me to several reports indicating a number of deadly attacks in Mogadishu in 2016 and 2017. Also, to the Amnesty International Report 2016/17 and the US State Department Report on Human Rights Practices for 2015.
31. In **MOJ** it was concluded (headnote (iv and v) that:

“The level of civilian casualties, excluding non-military casualties that clearly fall within Al-Shabaab target groups such as politicians, police officers, government officials and those associated with NGOs and international organisations, cannot be precisely established by the statistical evidence which is incomplete and unreliable. However, it is

established by the evidence considered as a whole that there has been a reduction in the level of civilian casualties since 2011, largely due to the cessation of confrontational warfare within the city and Al-Shabaab's resort to asymmetrical warfare on carefully selected targets. The present level of casualties does not amount to a sufficient risk to ordinary civilians such as to represent an Article 15(c) risk."

32. Further,

"It is open to an ordinary citizen of Mogadishu to reduce further still his personal exposure to the risk of 'collateral damage' in being caught in an Al-Shabaab attack that was not targeted at him by avoiding areas and establishments that are clearly identifiable as likely Al-Shabaab targets, and it is not unreasonable for him to do so."

33. In the news reports to which I was referred, there is mention of attacks against army and police checkpoints, against a lawmaker, against a hotel near the parliament in Mogadishu. These are the type of targets referred to above as "*clearly identifiable as likely Al-Shabaab targets.*"

34. Such tactics by Al-Shabaab are confirmed by the more general reports.

35. Mr Hawkin did not press his Article 15(c) submission strongly. In my judgement he was right not to do so.

36. On the limited, more recent evidence before me, while the situation clearly remains fluid, I see no reason to divert from the guidance given in **MOJ**. The Appellant does not succeed under Article 15(c). However, as indicated he succeeds under Article 15(b)/Article 3.

Notice of Decision

The appeal is allowed on Humanitarian Protection grounds (Article 15(b)).

The appeal is allowed on Article 3 ECHR grounds.

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

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

Signed

Date 6 May 2017

Upper Tribunal Judge Conway