Upper Tribunal
(Immigration and Asylum Chamber) **Appeal no**: **PA/02504/2017**

THE IMMIGRATION ACTS

Heard At Field House **Decision & Reasons Promulgated**
on 05.02.2108 **on 16.02.2018**

Before:

UPPER TRIBUNAL JUDGE JOHN FREEMAN

Between:

KHALID ALI

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: *Althea Radford* (counsel instructed by Turpin & Miller, Oxford)
For the Respondent: Mr D Clarke

DECISION AND REASONS

This is an appeal, by the appellant, against the decision of the First-tier Tribunal (Judge Malcolm Parkes), sitting at Birmingham on 30 August 2017, to dismiss a deportation appeal by a citizen of Somalia, born 1974. Permission was given on the appellant's article 3 human rights grounds, on the basis that the judge was arguably wrong not to take the view that, if returned, he would have to live in a camp for internally displaced persons or the like.

2. The appellant had come here in 1990, when he was refused asylum, but given exceptional leave to remain, and, in 2001, indefinite leave. In 2009

NOTE: (1) no anonymity direction made at first instance will continue, unless extended by me.
(2) persons under 18 are referred to by initials, and must not be further identified.

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he was convicted of the attempted murder of a friend, and sentenced to 16 years' imprisonment. In 2010 he was given notice of intention to deport him, but the order was made on 1 March 2017, presumably at the end of the normal custodial period of his sentence, taking account of credit given for days on remand.

3. The judge who granted permission in the Upper Tribunal referred, as did Miss Radford, to *FY (Somalia)* [2017] EWCA Civ 1853, where the country guidance in *MOJ & others* (Return to Mogadishu) (CG) [2014] UKUT 442 (IAC) was discussed,. As in the present case, it was accepted in both of those that having to live on return in a camp for internally displaced persons would present an article 3 risk. The question in each was whether that was reasonably likely to happen to the appellant in question.

4. The relevant part of the country guidance is set out by Thirlwall LJ at paragraph 13 of *FY*; but I have restored the Tribunal's original numbering, at paragraphs 407 - 408:

407. f. 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.

g. The significance of clan membership in Mogadishu has changed. Clans now provide, potentially, social support mechanisms and assistance 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.

h. 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:

(i) circumstances in Mogadishu before departure;

(ii) length of absence from Mogadishu;

(iii) family or clan associations to call upon in Mogadishu;

(iv) access to financial resources;

(v) prospects of securing a livelihood, whether that be employment or self employment;

(vi) availability of remittances from abroad;

(vii) means of support during the time spent in the United Kingdom;

(viii) why his ability to fund the journey to the West no longer enables an appellant to secure financial support on return.

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.

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.

5. The Court of Appeal did not introduce any modification of that country guidance: on the other hand, they upheld, as consistent with it, the first-tier judge's decision, upheld in turn by the Upper Tribunal, that the appellant in *FY* did face an article 3 risk through not being able to find work, and so accommodation, on return to Mogadishu. As Thirlwall LJ said at 24 "…properly analysed this appeal is a straightforward attack upon findings of fact which led to a conclusion with which the SSHD does not agree". So, regardless of any similarity with *FY* on the facts, this case still has to be decided on the country guidance in *MOJ & others* .

6. As already seen, the appellant's likely situation in Mogadishu was the point on which permission was given. The grounds before the Upper Tribunal also included a challenge to the judge's remark at 28 about finding it difficult to see how the writer of the OASys report [AB 50] had been able to assess him as presenting a low risk of serious harm to others, either in the community or in custody, at a time when his behaviour in the community had not been tested. As Miss Radford pointed out, the writer had already made allowances for this difficulty, at s. 10.8 of their report [AB 27].

7. The reason why in my view this point is not material is that, as the judge also noted at 27, the OASys writer had also assessed the appellant as presenting a high risk to a known adult, presumably his victim, when in the community. This was something the judge was fully entitled to take into account, with other relevant factors, as she did at 30, in reaching his decision that the appellant had not rebutted the presumption raised by s. 72, and so was excluded from refugee or humanitarian protection. There is nothing in *IH* (s.72; 'Particularly Serious Crime') Eritrea [2009] UKAIT 00012 to forbid finding someone a danger to the community on the basis of a high risk to one member of it.

8. It follows that the sole issue before me is whether the judge was wrong, in the light of *MOJ & others* , and the facts of this appellant's case, in deciding that he was not entitled to article 3 protection either. The judge set out the main basis for his conclusions on this very concisely at 41:

> The Appellant may not be familiar with the working of the clan system in Somalia but that is the country of his birth and he lived there till he was 16 [so] it would be surprising that he has no ability to locate their support if needed. Given the finding that the Appellant can reasonably be expected to find work and to support himself he does not come within the categories of risk in Somalia and I find that he is not in need of international protection.

9. The first challenge to these findings is based on what was said in *MOJ & others* at 152, under the heading 'Significance of clan membership': the Tribunal begin, quoting one of the 'country experts' before them (Dr Hoehne), and going on to refer to the other

> "Moreover, clan protection does not function automatically. … Clans support and protection is also sometimes dependent on the "value" a clan members has for the community. If a person is, for instance, very

> poor, a drug addict, a notorious criminal or a prostitute, relatives will not or only unwillingly offer support and protection."

That evidence is consistent with the view offered by Dr Mullen of the declining significance of clan membership in Mogadishu and the analysis that clan membership is now more relevant to the issue of social support rather than protection.

10. It is of course social support, rather than protection, which is the relevant point in this case; and it is clear that the judge was entitled to rely on the appellant's membership of a sub-clan of the majority Darod clan in deciding whether or not he would get it. Miss Radford suggested that he might found himself excluded from it as a 'notorious criminal'; but she was unable to refer me to any evidence as to the clan membership of the appellant's victim, without which it is hard to say that he would be regarded in this light by his fellow-clansmen.

11. Miss Radford's next point was on *MOJ & others* at paragraphs 342 – 343:

> 342. It follows from this that for a returnee to Mogadishu today, clan membership is not a potential risk factor but something which is relevant to the extent to which he will be able to receive assistance in re-establishing himself on return, especially if he has no close relatives to turn to upon arrival. [*at this point the Tribunal quote another of the 'country experts', Ms Harper*]
>
> 343. We understand that to mean that while there was no guarantee that help would be available from clan members outside the close family network of a returnee, at least there is more likelihood of such a request being accommodated than if made to those unconnected by the bond of clan membership. That is, perhaps, wholly unsurprising. However, it should be noted that in the UNHCR January 2014 report the view was expressed that a returnee might be rather more confident of receiving help from his clan, if not a minority clan member …

12. It was the view taken by UNHCR which was reflected in the guidance given at points (f) and (g) (see **4**). Clan support was open to this appellant, as a majority clan member: since he has no nuclear family or close relations in Mogadishu, what is required is 'careful assessment' in the light of the factors at (h).

13. The first factor which Miss Radford suggested had gone unconsidered was (ii), the length of time the appellant had been away from Mogadishu. It goes without saying that the very experienced judge had been well aware of this: see the concise history he gave at 17; but Miss Radford's complaint is that he did not take account of it in his assessment of the appellant's situation on return.

14. I do not regard this as tenable, in view of the way the judge dealt with the appellant's situation at 41 (see **8**). The judge reminded himself that the appellant had been here since he was 16, and, if only because he gave evidence before him, must have been well aware that he was now in his 40s. That was the context in which the judge made his finding on clan support.

15. Miss Radford's other point on the judge's conclusions at 41 was that his words "… surprising that he has no ability to locate clan support if needed." do not equate to a finding that there was no real risk of his not getting it. While that would certainly have been the best way of putting

what obviously was the judge's conclusion on this point, I regard the objection to the way he did so as semantic, rather than of any real significance.

16. At this stage Miss Radford went on to the judge's findings about the appellant being able to get work on return to Somalia. These came at 39:

> The real question from MOJ turns on the Appellant's ability to gain employment. To that end the Appellant has obtained skills and qualifications whilst in prison and has worked in the UK in a number of jobs. The evidence provided in the various reports does not undermine the final point from MOJ that the Appellant has to show that he would be unable to access employment, The evidence does not show he would be unable to do so. There is nothing in the evidence to suggest that an individual in the Appellant's situation would need to be able to speak Somali, or that the Appellant has no ability at all in that language.

17. The judge was of course right in what he said about the effective burden of proof on this point: see the last part of the guidance from *MOJ & others* from paragraph 407, at **4**, which appears, more conveniently for reference purposes, at (x) of the judicial head-note. Miss Radford's complaint was that he did not take account of the fact that, by this time, the appellant has been in prison and out of work for the last nine years. However, the judge's findings at 39 expressly refer to the appellant's time in prison, and the skills and qualifications he has (to his credit) obtained while there. It cannot reasonably be suggested that he did not have this period well in mind in reaching his conclusions.

18. Though I have taken account of Mr Clarke's helpful submissions in reaching my conclusions, there is no need to set them out here, beyond referring to the detailed conclusions in *MOJ & others* at 349 – 352 which formed the basis for what appears in the country guidance about the 'economic boom' and the large numbers of people returning to Mogadishu.

19. In reply, Miss Radford objected that, contrary to the advantages in the employment market for those returning, identified by the respondent's 'country expert' (Dr Mullen) at 351, there was nothing to show that this appellant, with only low-level prison courses to his name, would be seen on return as better educated or more resourceful than those who had remained in Somalia.

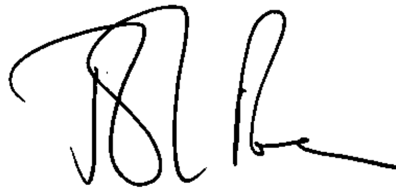
20. However, in the end the question whether this appellant would be able to support himself, with whatever help he could get, was one of fact for the judge (who referred accurately to this appellant's skills and experience at 39), just as in *FY*. There the first-tier judge had found in that appellant's favour, and at 19 Thirlwall LJ said this

> It is uncontroversial to observe that having a criminal record does not make it easier to get work. … It is a negative factor.

21. However, in the prevailing circumstances in Somalia, and short of any significant evidence to show that he would be regarded as a 'notorious criminal' there (as to which see **10**); or, still less, that PNC/CRB records would be available to prospective employers there, as here, I do not think the country guidance or that authority obliged the judge in this case to do

more than bear this appellant's record in mind, as he clearly did. The result is that there was no material error of law on the part of the judge.

Appeal dismissed



(a judge of the Upper Tribunal)