Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00043/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 26 June 2019	**On 05 July 2019**

Before

LORD BOYD OF DUNCANSBY
(sitting as Judge of the Upper Tribunal)
UPPER TRIBUNAL JUDGE PICKUP

Between

Secretary of State for the Home Department

Appellant

and

FA
[Anonymity direction made]

Claimant

Representation:
For the claimant: Ms S Walker, instructed by Turpin & Miller LLP
For the respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269), I make an anonymity direction. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the claimant.

1. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge Gribble promulgated 23 May 2018, allowing the claimant's

appeal against the decision of the Secretary of State, dated 27 November 2017 to cease refugee status, refuse his human rights claim, and to maintain the decision dated 9 September 2016 to deport him pursuant to s32(5) of the UK Borders Act 2007, certifying the protection claim under s72 of the Nationality, Immigration and Asylum Act 2002. The effect of the latter, if upheld, is that the certificate is regarded as conclusive that the claimant's removal from the UK will not breach the UK's obligations under the Refugee Convention.

2. First-tier Tribunal Judge O'Keeffe refused permission to appeal on on 21 June 2018. However, when the application was renewed to the Upper Tribunal, Deputy Upper Tribunal Judge Pickup granted permission on 14 May 2019.

3. Thus the matter came before us sitting as a panel of the Upper Tribunal on 26 June 2019.

4. At the outset of the hearing our attention was drawn to the fact that the Upper Tribunal President was in the process of conducting a Somali Country Guidance case on the same or similar issues as arise in the present case. Mr Tufan made no application for adjournment but Ms Walker suggested that it would be appropriate to stay our error of law decision behind the outcome of the Presidential case. Effectively, if we did not stay this case of our own volition she was asking for an adjournment. We bore in mind that the principle issue in the present case is whether the judge of the First-tier Tribunal erred in law in the approach to s72 certification and cessation of refugee protection. We considered that on the basis of the current and binding decisions of the Court of Appeal there was no practical purpose in a stay or adjournment. We (later) agreed with the two representatives that if an error of law was found the appeal should be remitted to the First-tier Tribunal to be remade. By that time, any further Upper Tribunal Country Guidance would have been promulgated. If we found no error of law, there would be no prejudice to the claimant. We concluded that it was in the interests of justice and consistent with the overriding objectives of the Tribunal to deal with cases fairly and justly to proceed with the error of law hearing.

5. In the first instance we have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that it should be set aside. We heard submissions from both Mr Tufan and Ms Walker and had the advantage of Ms Walker's skeleton argument, which we have taken into account in reaching our findings. In addition, we were referred to a number of case authorities including:

   (a) MOJ & Ors (return to Mogadishu) Somalia CG [2014] UKUT 00442 (IAC);

   (b) MA (Somalia) [2018] EWCA Civ 994;

   (c) Said [2016] EWCA Civ 422;

(d) AMA (Article 1C(5) – proviso – internal relocation) Somalia [2019] UKUT 11 (IAC).

6. For the reasons summarised below, we found material errors of law in the decision of the First-tier Tribunal and set it aside to be remitted to the First-tier Tribunal to be made afresh in accordance with the directions below.

7. The grounds raise three primary issues alleged to be errors of law, each of which we shall address in turn.

8. First, the Secretary of State challenges the judge's finding that the claimant had successfully rebutted the presumption under s72 that he has been convicted of a particularly serious crime and constitutes a danger to the community of the UK.

9. It was not challenged that the offences for which the claimant had been convicted constituted a 'particularly serious crime.' The judge recognised at [37] that the claimant had been sentenced to a total term of five years' imprisonment for drug dealing offences involving Class A and B drugs (crack cocaine, heroin, and cannabis) and went on to consider whether he poses a risk to community of the UK. The judge noted the absence of previous convictions and took into account: the OASys Report which suggest the risk was so low that a full risk assessment was not necessary; the fact that he had received no reprimands in prison and had undertaken courses addressing drug offending; and the claimant's own evidence that he had been manipulated into drug dealing and had only been doing it a couple of months. He had also committed himself to avoiding further offending.

10. However, whilst the two sets of offending is referenced at [37] of the decision, the judge does not appear to have placed any weight on the fact that the claimant had been bailed after being arrested for the first set of offences and was caught again shortly thereafter for similar offences, which were committed whilst on bail, suggesting a disregard for the authority of the courts and a risk of further offending behaviour. Neither did the judge address the claimant's letter, copied in the Secretary of State's bundle at N1-6. On the third page of this letter, dated 11 May 2017, he said that he had been jailed with the same people that he worked for "and they made it clear that upon my release they expect me to go back and work for them without pay to get back their losses, so you will be helping me by not releasing me." The letter was drafted in response to notification of intention to cease refugee status and he stated at the beginning of the letter that he was willing to return to Somali where he believed he would be able to live in peace in Mogadishu. Paragraph [28] of the decision indicates that he was asked some questions about this letter in cross-examination at the First-tier Tribunal appeal hearing, to which he said he wrote out of frustration and did not mean his comments. It is not clear from the decision whether he was specifically asked about the statement that he would be obliged to return to drug dealing on

release but the letter was part of the documentary materials placed before the First-tier Tribunal and was, we find, highly relevant to the issue of risk. We acknowledge that there was a later letter, copied at K of the Secretary of State's bundle, in which he expressed regret for offending and committed himself to not getting into the same situation in the future. However, on its face, the first letter suggested that the claimant remained a danger to society and this evidence ought to have been addressed by the judge. Considering the decision as a whole, we find that the judge's reasoning for concluding that the s72 presumption had been rebutted was insufficient and unbalanced, amounting to an error of law.

11. On that conclusion, it is not strictly necessary for us to consider the findings on cessation of refugee status as if the claimant is excluded by the operation of s72 the judge would not have been able to consider cessation of refugee protection at all. However, as the issues were argued before us we turn to address them.

12. The second challenge of the Secretary of State is to the judge's finding in the claimant's favour on consideration of cessation of refugee status pursuant to Article 1C(5) of the Convention and paragraph 339A of the Immigration Rules. Noting that the claimant's refugee status was linked to that of his mother, who was recognised as a refugee on the basis of her minority clan status, the Secretary of State asserted that there had been a fundamental and durable change in the security situation in Somalia, relying on MOJ, and contended that whilst there may be difficulties returning to his home area of the Bajuni Islands, the claimant could safely relocate to Mogadishu, to where he would, in fact, be returned.

13. The judge correctly noted at [40] the need to be satisfied that this was a significant and non-temporary change, in which the burden of proof is on the Secretary of State. We agree that it is important to ensure that no action is taken to prejudice the status of a refugee until it is clear that the protection for him will be on a lasting basis. Clearly, such an assessment must be based on an individual and not merely a general evaluation of the changed conditions and risks arising in the country of return. The UNHCR Cessation Guidelines and the House of Lords in R v Special Adjudicator ex parte Hoxha [2005] 1 WLR 1063, explain that a strict and restrictive approach to cessation is required. However, at [44], the judge appears to have dismissed the "durable change" in circumstances in Somalia addressed in MOJ on the basis that it was not a cessation case. That is inconsistent with the binding authority of the Court of Appeal in MA (Somali), promulgated a few weeks before the First-tier Tribunal appeal hearing in the present case, in which Lady Justice Arden made it clear that there should be a symmetry between the grant and cessation of refugee status. She held that it was necessary to simply determine whether any fear for a Refugee Convention reason ceased to exist such that it could be described as 'significant and non-temporary' within the terms of article 11(2) of the Qualification Directive. At [47] she said, "There is no necessary reason why refugee status should be continued beyond the time when the refugee is subject to the persecution which would entitle

him to refugee status or any other persecution which would result in him being a refugee, or why he should be entitled to further protection."

14. Effectively rejecting any change in the security situation in Somali addressed by MOJ, at [45] of the decision the judge instead preferred to place reliance on the more recent UNHCR report of May 2016, which suggested that the general situation in Mogadishu and elsewhere in Somalia remains volatile and threats from Al Shabaab continue in Mogadishu. However, the judge failed to recognise that UNHCR reports are advisory only, not binding legal authority, and that the level of scrutiny and threshold applied by the UNHCR is not the same as that required of the tribunal. It follows that the First-tier Tribunal conclusion at [46] that there had not been such changes in Somalia generally as to remove the (claimant) from the protection of the Refugee Convention was flawed, contrary to binding authority, and cannot be sustained.

15. The third complaint of the Secretary of State is that the judge applied the wrong test to the cessation of refugee protection issue by conflating it with humanitarian standards, the prospect of the claimant returning to live in an IDP camp, and in further finding that this was sufficient to invoke article 3 ECHR. As Lady Justice Arden explained at [56] of MA (Somalia), "humanitarian standards are not the test for a cessation decision." At [61] she made it clear that a cessation decision does not involve the question whether article 3 would be violated. It is clear from the decision that the judge did not correctly consider whether the basis on which the claimant was granted refugee protection remained valid.

16. In relation to the allowing of the appeal on article 3 grounds, the Court of Appeal in Said held that there is no violation of article 3 by reason only of a person being returned to a country which for economic reasons cannot provide him with basic living standards. In Said the Upper Tribunal had allowed the Somali claimant's appeal against deportation following a sentence of five years for rape under Article 3 (he being excluded from protection under the Refugee Convention and on humanitarian protection grounds), finding that for the purposes of MOJ he was vulnerable, had PTSD, and would be at risk of destitution and thus likely to end up in an IDP camp. The Court of Appeal held that to succeed in resisting removal on Article 3 grounds on the basis of suggested poverty/deprivation, which was not the responsibility of the receiving country, whether or not the feared deprivation was contributed to by a medical condition, the person liable to deportation was required to show circumstances which brought him within the approach in D v UK (1997) 24 EHRR 423 and N 47 EHRR 885. In the light of Said, the relevance of (ix) to (xii) of the Country Guidance of MOJ to humanitarian protection or article 3 may be in some doubt. However, it is clear that if a claimant is excluded from the protection of the Convention, he cannot defeat the cessation decision or bring himself within article 3 ECHR to defeat deportation on grounds of a risk of deprivation or destitution on return. In theory, it was potentially open to the judge to make findings on humanitarian protection grounds, there having been no certification in relation to humanitarian protection,

but we find the considerations actually relied on were not properly part of the cessation of refugee status consideration.

17. Further complain is made in the judge's finding that the claimant fell "squarely within" (xii) of the headnote in MOJ on the basis that "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." Without supporting reasoning, the judge appears to have discounted the possibility of any financial support from the claimant's employed siblings in the UK, and ignored the Assisted Voluntary Return financial assistance that would be available to him. The judge mentioned some positive factors at [50] but, for example, did not take into account the finding at [351] of MOJ that returnees from the West may have an advantage since they are likely to be better educated and considered more resourceful. We also note that it is was for the claimant to explain why he would not be able to access the improving economic situation in Mogadishu. The decision does not explain that this was done.

18. Whilst the judge did very briefly address article 8 ECHR at [52] of the decision, the conclusion that the claimant would face very significant obstacles to integration rested on the flawed cessation of protection considerations and cannot stand.
19. In all the circumstances, it is clear and we so find that the decision of the First-tier Tribunal was flawed and in error of law in respect of the several aspects explained above.
20. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. The errors of the First-tier Tribunal vitiate the findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal.
21. In all the circumstances, at the invitation and request of both parties we relist this appeal for a fresh hearing in the First-tier Tribunal on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2.

Decision

22. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

We set aside the decision.

We remit the appeal to be decided afresh in the First-tier Tribunal in accordance with the attached directions.

Signed

Upper Tribunal Judge Pickup

Dated

Consequential Directions

1. The appeal is remitted to the First-tier Tribunal sitting at Birmingham;
2. The appeal is to be decided afresh with no findings of fact preserved;
3. The appeal may be listed before any First-tier Tribunal Judge, with the exception of Judge Gribble and Judge O'Keeffe;

Signed DMW Pickup

Upper Tribunal Judge Pickup

Dated