IAC-AH-DN-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00001/2020 (V)

THE IMMIGRATION ACTS

Heard at Field House remotely by Skype	**Decision & Reasons Promulgated**
On 23rd October 2020	**On 10th November 2020**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR A A
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Ms S Cunha, Home Office Presenting Officer
For the Respondent: Ms C Bayati, Counsel

DECISION AND REASONS

1. The application for permission to appeal was made by the Secretary of State but nonetheless hereinafter I shall refer to the parties as they were described in the First-tier Tribunal.

2. The Secretary of State appealed with permission against the decision of First-tier Tribunal Judge Rhys-Davies promulgated on 10th March 2020 in which the judge allowed the appellant's appeal against the decision to revoke his refugee status, allowed his appeal on human rights grounds

(Article 3 European Convention on Human Rights) and dismissed his appeal on humanitarian protection grounds.

3. The appellant is a citizen of Somali born on 4th February 1981 (38 years old at the date of the hearing) and he was granted refugee status on 21st October 1998 on the basis he was a member of the minority Ashraf clan. He was also given indefinite leave to remain owing to his refugee status.

4. The respondent revoked the appellant's indefinite leave to remain on 3rd September 2009 because he had committed criminal offences. The judge recorded that there was no PNC printout of the appellant's history of convictions but the appellant admitted that he had committed offences. Nonetheless he was granted discretionary leave to remain in place of his indefinite leave valid until 4th October 2012. On 16th December 2012 he was served with a notification IS151A notifying him that he was now an overstayer and given temporary admission. He then absconded. On 20th December 2019 the respondent decided to cease the appellant's refugee status and explained in her letter that there had been significant changes in the general country conditions in Somalia and ordinary civilians returning to Mogadishu after a period of absence would in general not face a real risk of persecution or risk of harm such as to require protection under Article 3 of the European Convention on Human Rights. There was no indication that the appellant was liable to or had been served with a certificate under Section 72 Nationality, Immigration and Asylum Act 2002.

5. The appellant made submissions that his removal to Somalia would be in breach of the UK obligations under the 1951 UN Geneva Convention and contrary to the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 as well as a breach of his human rights.

6. The judge made the following recordings and findings:

   i. The judge noted that the Court of Appeal held in **Said [2018] EWCA Civ 442** that there was 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.

   ii. The appellant lived with his parents and nine siblings in Mogadishu and contracted polio when he was 3 and has mobility issues and uses crutches. He has two brothers and a sister in the United Kingdom but they are not in contact and he has no contact with his family in Somalia since he left in 1997 and no idea of their whereabouts.

   iii. The judge recorded that the appellant spoke Somali but was not as fluent as those who had always lived there.

   iv. The judge did not find the argument that the appellant could contact his family in Somalia persuasive. The appellant did not leave Somalia recently but over 22 years ago. The judge accepted that the appellant was not in contact with anyone in Somalia now and it was speculative to find the contrary.

v. The judge accepted that the siblings in the UK could not provide the appellant with support. He had given a detailed account of having been sleeping rough or at friends' homes since his benefits were stopped.

vi. The appellant did have polio as a child and suffered as a result of reduced mobility. The appellant attended the appeal on crutches and his medical records referred to the same. The appellant is not fit for physical labour.

vii. The appellant has no apparent useful skills or any employment history.

viii. He has no employment history and it is not disputed that he was a member of the Ashraf clan.

7. The judge cited **MOJ and Others (Return to Mogadishu) Somalia CG [2014] UKUT 00442 (IAC)** particularly the paragraph 407 and made the following findings:

> "47. I have considered the country guidance set out in ***MOJ and Others*** and note that it includes the following (at paragraph 407):
>
> *"(a) Generally, a person who is "an ordinary civilian" (i.e. not associated with the security forces; any aspect of government or official administration or any NGO or international organisation) on returning to Mogadishu after a period of absence will face no real risk of persecution or risk of harm such as to require protection under Article 3 of the ECHR or Article 15(c) of the Qualification Directive."*
>
> *"(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 assist 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".*
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> 48. I note that this guidance does not state that clan membership is no longer important in Somalia. Indeed, it acknowledges it. Further, I find that the Respondent's CPIN for January 2019 confirms the ongoing significance of clan membership, even in Mogadishu (3.1.1).
>
> 49. Further, the CPIN [Country Policy Information Note] goes on to quote various reports at as follows:
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> a. "[the lives of minorities] *in the capital's informal settlements continue to be plagued by insecurity, sexual violence and*

discrimination, making it almost impossible for them to make ends meet" (at 5.1.2);

b. *"Members of minority clans often lack vital protection and suffer pervasive discrimination ... Somali ethnic Bantus, as well as some other minority clans, reportedly continue to be highly vulnerable to discrimination, severe poverty, exclusion and marginalisation, and are reportedly disproportionately subjected to killings, torture, rape, kidnapping for ransom, forced recruitment, bonded labour, as well as looting of land and properly with impunity"* (5.1.3);

c. *"Minority groups, often lacking armed militias, continue to be disproportionately subjected to killings, torture, rape, kidnapping for ransom ... by faction militias and majority clan members, often with the acquiescence of federal and local authorities"* (5.1.4);

d. *"Members of non-dominant clans and groups are potentially more vulnerable to criminal acts such as robbery and rape, including in the encounter with government forces. However ... there is no information to suggest that people who do not belong to one of the dominant clans in the city are systematically subjected to violence in Mogadishu today"* (5.1.6)

50. I apply the individualised approach as set out in ***MA (Somalia)*** (paragraphs 49ff) and find that even if members of non-dominant clans are not *"systematically"* subjected to violence on account of their minority status, the country background material, considered in conjunction with the guidance in ***MOJ and Others*** and the Appellant's particular circumstances, demonstrates that the he would continue to be at risk of persecution in Mogadishu and that there would not be a sufficiency of protection, such that there has not been a durable change in circumstances for him.

51. I find that the Appellant is a vulnerable individual, given his reduced mobility. He is from a minority clan and will be returned to a city he has not known for 22 years, where he has no family or support network. His disability, lack of skills and minority clan status mean that he is hardly likely to be able to make the most of the economic opportunities on offer. Instead, he is disproportionately at risk of significant ill-treatment that would amount to persecution."

8. The judge added at paragraph 53:

"If I am wrong about the revocation appeal I nevertheless find that the appellant's return to Mogadishu would amount to a breach of Article 3 ECHR. Given his circumstances as set out above, I find the Appellant is reasonably likely to end up in a camp for internally displaced persons."

9. The Secretary of State appealed on the following grounds.

Ground 1. The Secretary of State asserted that the judge erred. The factors that the judge took into account at 41 to 51 in assessing the issue of cessation of refugee status did not arguably speak to whether

there had been a durable and non-temporary change in Somalia and specifically in relation to the issue of "persecution". He was granted refugee status simply as being a member of a minority clan. Such factors as his length of absence, his apparent lack of employability and lack of family ties were not directly relevant. Those factors related to a claim for humanitarian protection. **MO**J was not a case which was looking at claims for refugee status but rather it was a case concerned with Article 15(c) of the Qualification Directive.

Ground 2. The judge allowed the appeal under Article 3 in the alternative and it was respectfully submitted that there was no self-direction as to the requisite standard which must be that of **N v SSHD [2005] UKHL 31** and the conclusion on this was unsound.

10. As stated in the judgment of **Secretary of State for the Home Department v Said [2016] EWCA Civ 442** at paragraph 31,

> "*An appeal to Article 3 which suggests that the person concerned would face impoverished conditions of living on removal to Somalia should, as the Strasbourg Court indicated in* ***Sufi and Elmi*** *at paragraph 292, be viewed by reference to the test in the* ***N*** *case. Impoverished conditions which were the result of violent activities may be viewed differently as would cases where the risk suggested is of direct violence itself.*"

11. It was not suggested that the appellant would end up in an IDP camp because of the prevalence of violence and as such the appropriate test was that of **N v UK** as modified by the Supreme Court in **AM (Zimbabwe) [2020] UKSC 17).** This was a stringent test and the Secretary of State submitted in which the facts of this appeal plainly did not reach.

12. Permission to appeal was granted on grounds 1 and ground 2 and refused on a further ground in relation to credibility.

13. The grant of permission stated in relation to ground 1, that it was arguable that the First-tier Tribunal erred in its approach to the issue of cessation albeit that the appellant is disabled and therefore me (sic) [may] be more at risk than others. On ground 2, the grant observed that there was less merit given the findings as to the appellant's disability and other findings as to his likely circumstances on return. The factors found in this case were significantly different from those in **Said [2018] EWCA Civ 442** (see paragraph 19 thereof) but there was arguably a failure properly to explain the conclusions given in **SB (refugee revocation; IDP camps) Somalia [2019] UKUT 358 (IAC)**.

14. At the hearing before me Ms Cunha submitted that the judge had not considered the 'rules' around a cessation, did not apply the 'rules' and did not deal with the events of how the appellant achieved refugee status. There were inadequate reasons. The case law had emphasised that such cases should be looked at through the "mirrored approach". The judge failed to give sufficient reasons and materially erred. Further the loser is

entitled to know why. In relation to ground 2 and Article 3 the judge did refer to **Said** but failed to identify paragraph 20 of **Said**. In **Said** the Court of Appeal found the test for Article 3 was different when looking at destitution. **Said** was endorsed by **MS (Somalia) [2019] EWCA Civ 1345**. When looking at **MOJ** and destitution it was wrong to conclude that it led to serious harm in breach of Convention obligations by virtue of Article 3. The judge had referred to **SB** but had not mentioned it at his findings and had just applied **MOJ** ignoring that **MOJ** must be distinguished.

15. It was clear that the judge failed to apply the correct approach to **MOJ** and elevated to the threshold of **N** or now **AM (Zimbabwe)** the appellant's circumstances which did not meet the threshold.

16. **MA (Somalia)** at paragraphs 24 to 33 explained how cessation should interplay.

17. Ms Bayati relied on her Rule 24 submissions in that the judge did not approach cessation incorrectly and noted the test for cessation and the test for Article 3. There was still an individual approach required. It was evident how the appellant had been granted refugee status and there were important individualised considerations in relation to this appellant. The judge sets out his findings of fact and the circumstances in the first instance and set out the law finding specifically a risk of ill-treatment. The judge applied the mirrored approach finding a non-temporary change for this particular appellant. In relation to ground 2 and the approach to Article 3 the judge set out the law at paragraphs 10 to 17 and appreciated the correct test when considering Article 3. It was not simply that the living standards were below the acceptable level. The judge considered the appellant's vulnerability and he did not make a finding on the basis that the general conditions in the IDP camp reached a certain threshold.

18. The Tribunal in **SB** addressed the question of cessation and endorsed what was said by **MS (Somalia)** on Article 3.

19. Ms Cunha reiterated that the judge had not taken into account **Said** and paragraphs 30 to 31 was not where the rationale comes in. The judge failed to give reasons and conflated considerations in relation to Article 3 and misapplied **MOJ**. Paragraph 307 should be departed from as it is not a breach of Article 3. The judge failed to consider the person would avail himself of clan support and get money from the Secretary of State.

Analysis

20. In relation to ground 1 and whether the judge had taken into account in assessing the issue of cessation whether there had been a durable or non-temporary change in Somalia, specifically in Mogadishu, in relation to the issue of persecution, it is clear that the judge at paragraphs 10 to 19 set out the law and in particular noted at paragraph 14 that the burden of proof was on the respondent to the normal civil standard of the balance of

probabilities. When directing himself the judge at paragraph 15 stated, "*"Ceasing to exist"* requires there to have been a durable change, though it is not necessary for the durable change to have occurred throughout the country in question." That reference to cessation is given separately from considerations in relation to Article 3.

21. Arden LJ in **MA (Somalia)** confirmed that there was a symmetry between the grant and cessation of refugee status and albeit that '*A cessation decision does not involve the question whether Article 3 would be violated' this does not preclude a requirement for the individualised approach*'. The judge was clearly aware of the authority as it was cited and with particular reference to paragraph 49 which states as follows

> *'Another way of putting the point is that the Refugee Convention and the QD are not measures for ensuring political and judicial reform in the countries of origin of refugees. The risks which entitle individuals to protection are risks which affect them personally and individually. It is an individualised approach. Just as it is no answer to an asylum claim that there is a legal system which might in theory be able to protect them, so conversely the absence of such a system is not an answer to a cessation decision if it is shown that the refugee has sufficient, lasting protection in other ways or that the fear which gave rise to the need for protection has in any event been superseded and disappeared'.*

22. There is nothing to suggest that the judge failed to apply **MA (Somalia)** and separately, in relation to Article 3, the judge correctly directed himself citing **Said [2018] EWCA Civ 442** which held, "*There is no violation of Article 3 by reason only of a person being returned to a country for which economic reasons cannot provide him with basic living standards".* The judge specifically referred to this at paragraph 18 of his decision.

23. Albeit that the "mirrored approach" applies, it is for the Secretary of State to show that there has been a fundamental change in the conditions prevailing in the given country such that this particular appellant can now live there without a well-founded fear of persecution. It was argued by Ms Bayati, and I agree, that this requires both an assessment of the conditions to which the appellant will return and a consideration of the personal characteristics to determine whether he still has a well-founded fear of persecution. It is the case that the appellant's claim is no different from that of his previous claim in that he was granted refugee status as being a member of a minority clan but that said the appellant's circumstances (he has had polio since the age of 3 and mobility issues and used crutches ever since) were part of the circumstances when the appellant claimed asylum were evident at that time. This the judge noted at paragraph 23 of the decision when recording the appellant's case.

24. In relation to the cessation of refugee status, the judge specifically noted that **MOJ and Others (return to Mogadishu) Somalia CG [2014]**

UKUT 00442 showed that there was no longer a real risk of persecution for minority clan members in Mogadishu. The judge found, however, at paragraph 48 that the guidance did not state that clan membership was no longer important in Somalia. He had noted **MOJ and Others** as follows:

> *"47. (a) Generally, a person who is "an ordinary civilian" (i.e. not associated with the security forces; any aspect of government or official administration of any NGO or international organisation) on returning to Mogadishu after a period of absence will face no real risk of persecution or risk of harm such as to require protection under Article 3 of the ECHR or Article 15(c) of the Qualification Directive."*

25. The judge noted that the significance of clan membership in Mogadishu had changed and that **MOJ** identified that there were no clan militias in Mogadishu and no clan violence, and no clan based discriminatory treatment even for minority clan members. The key passage in the decision, however, comes at paragraph 48 where the judge finds that this guidance does not state that clan membership is no longer important in Somalia and, the judge was obliged, as part of the overall and up to date evidence, to consider the Country Policy Information Note on Somalia dated as recently as January 2019, which postdates **MOJ and Others**, (decided in 2014), and which at 3.1.1, confirmed the ongoing significance of clan membership even in Mogadishu.

26. It is open to the judge to depart from country guidance decisions on very strong grounds **SG (Iraq) v SSHD [2012] EWCA Civ 940** but I am not even persuaded that in this case there was even such a departure when considering an 'ordinary civilian'. The judge quoted at paragraph 59 from the CPIN specifically with reference to minority clans as follows

> "*Members of minority clans often lack vital protection and suffer pervasive discrimination ... Somali ethnic Bantus, as well as some other minority clans reportedly continue to be highly vulnerable to discrimination".*

27. It is clear that the element of discrimination on clan grounds could still be present and thus could still, in particular circumstances, form part of persecution. The judge correctly directed himself to apply the individualised approach required and set out in **MA (Somalia)** at paragraph 49 when reaching his conclusions at paragraph 50. The judge clearly focuses on the point that although it is accepted that non-dominant clans are not systematically subjected to violence because of their minority status, on the appellant's particular circumstances he would continue to be at risk of persecution in Mogadishu. The judge states as follows,

> "50. I apply the individualised approach as set out in ***MA (Somalia)*** (paragraphs 49ff) and find that even if members

> of non-dominant clans are not *"systematically"* subjected to violence on account of their minority status, the country background material, considered in conjunction with the guidance in ***MOJ and Others*** and the Appellant's particular circumstances, demonstrates that the he would continue to be at risk of persecution in Mogadishu and that there would not be a sufficiency of protection, such that there has not been a durable change in circumstances for him."

The judge made a specific finding at paragraph 51 that cumulatively the appellant's own personal characteristics together with the fact that he was from a minority clan, rendered the appellant "disproportionately at risk of significant ill-treatment that would amount to persecution."

28. The judge had correctly directed himself to the law and proceeded to consider the applicable country guidance and the relevant case law from the Court of Appeal, assess the up-to-date background evidence with reference to minority clans and reached the conclusion that this particular individual appellant having regard to his minority clan together with his own particular circumstances would continue to be at risk and that there would be no durable change in circumstances similar to those of which the appellant continued to endure.

29. The judge specifically and expressly addressed whether there had been durable and non-temporary risk of situations in Somalia in relation to whether the appellant was still at risk of persecution. There is no doubt that an individualised approach is still required as made clear by the Court of Appeal in **MA (Somalia)**.

30. In relation to this ground I find no error as specifically stated at paragraph 51 as follows.

31. Ms Cunha accepted that if there had been no error in relation to the consideration of persecution that the arguments in relation to Article 3 fall away. Bearing in mind my findings above I will spend less time addressing ground 2 but note that it was clear from the findings made by the judge that he considered having regard to all material factors that the appellant was at risk of treatment contrary to Article 3 and those findings are not simply based on a general assessment of conditions in the camp but a consideration of conditions and the individualised risks posed to this appellant which included his disability.

32. Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge, **Shizad (sufficiency of reasons: set aside)** [2013] UKUT 00085 (IAC)

33. I conclude that the judge explained the central tenets of his thinking and adequately explained his reasoning.

Notice of Decision

I find no error of law and the decision of the First-tier Tribunal will stand.

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

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 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.

Signed *Helen Rimington* Date 5th November 2020
Upper Tribunal Judge Rimington