

**IMMIGRATION APPEAL TRIBUNAL**

Heard at: Field House  
On: 16 July 2003  
Prepared: 17 July 2003

Determination notified  
29.10.03

Before:

**Mr L V Waumsley (Chairman)**  
**Mr N Kumar JP**

Between

**Appellant**

and

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

**DETERMINATION AND REASONS**

For the Appellant: Ms Y Yeboah of counsel, instructed by Irving & Co, solicitors  
For the Respondent: Mr G Elks, Home Office Presenting Officer

1. The appellant, a citizen of Somalia, appeals with leave against the determination of an adjudicator (Ms A Harrison) sitting at Taylor House, in which she dismissed his appeal on both asylum and human rights grounds against the respondent's decision to refuse his application for asylum, and to give directions for his removal from the United Kingdom as an illegal entrant.
2. The grounds on which the appellant sought asylum in the United Kingdom were that he was a member of the minority Reer Hamar sub-clan from Mogadishu where he lived with his widowed mother, his siblings and his own wife and children. After the civil war broke out in Somalia in 1991, he and his family were harassed by members of the majority Hawiye clan. In about 1991, they took refuge in the home of their neighbours, who were themselves Hawiye, but nevertheless assisted the appellant

and his family. They have remained there ever since, with the exception of the appellant who left Somalia in May 2002.

3. The appellant states that during that lengthy period, he and the other members of his family suffered constant harassment at the hands of members of the Hawiye militia. In particular, in 1996 members of the militia broke into the house, and raped his sisters. Sometime later, between 1996 and 1998, the appellant's brother, Ahmed, was killed on his way to visit his aunt. The appellant believes that he was killed by members of the Hawiye clan.
4. In her determination, the adjudicator accepted the claimant's evidence that he comes from Mogadishu. However, she rejected the evidence given by the claimant himself and by three witnesses called to give oral evidence on his behalf that he is a member of the Reer Hamar sub-clan. She made a specific finding at paragraph 35 of her determination that the appellant is not a member of that sub-clan. On the basis of those findings, the adjudicator dismissed the appellant's appeal on both asylum and human rights grounds.
5. The grounds on which leave to appeal was granted may be summarised as follows. The adjudicator overlooked serious problems experienced by the appellant and his family during the last ten years, she misread the objective evidence which was before her, and overlooked significant matters in the evidence given by the three witnesses called on the appellant's behalf. In addition, she did not appear to have considered the evidence about an upsurge in fighting which had occurred in northern Mogadishu in May 2002.
6. In her submissions on the appellant's behalf, Ms Yeboah based her challenge to the adjudicator's determination on two main limbs. The first was that the adjudicator's determination was flawed and perverse in its findings. The second was that the current security situation in Somalia in general, and in Mogadishu in particular, is such that returning failed asylum seekers generally to Somalia at the present time would in itself amount to a breach of Article 3 (prohibition of torture) of the European Convention on Human Rights.
7. In support of the first of those limbs, Ms Yeboah submitted that the adjudicator had failed to make findings on specific issues, such as the shooting at the appellant's brother, the previous disappearance of his father, and the seizure of the father's three shops. She had also failed to take proper account of the rape of the appellant's sisters in 1996.
8. Furthermore, she submitted that the adjudicator had misconstrued the objective evidence which was before her. She had rejected the oral evidence of the three witnesses called on the appellant's behalf. That was, she submitted, a perverse conclusion for the adjudicator to reach. Taken together, these factors were such as to make the adjudicator's central finding that the appellant was not a member of the Reer Hamar sub-clan one which was seriously flawed. On that basis, she invited us to remit the appeal for rehearsing before another adjudicator.

9. Turning to the second main limb, she conceded that, in light of the adjudicator's finding that the claimant was not a member of the Reer Hamar sub-clan, there would be no differential risk in his case on return to Somalia. Nevertheless, she argued that the evidence before the adjudicator showed that on return to Somalia, the appellant would face a real risk of being subjected to treatment in breach of his rights under Article 3 of the Human Rights Convention. In support of that submission, she relied on her skeleton argument and on the various copy documents annexed to it. She also cited from a number of passages in the main objective bundle lodged on the appellant's behalf.
10. Furthermore, she relied on the judgment of the European Court of Human Rights in *Ahmed v Austria* (1996) 24 EHRR 278, [1998] INLR 65, particularly at paragraphs 40 to 49 (inclusive). At paragraph 47, the Court had found:

“It follows that the applicant's deportation to Somalia would breach Article 3 of the Convention (art. 3) for as long as he faces serious risk of being subjected there to torture or inhuman or degrading treatment”.

She submitted that the situation in Somalia is not significantly different now from that which subsisted as the date of the judgment of the European Court of Human Rights in *Ahmed v Austria*.

11. In his submissions on behalf of the Secretary of State, Mr Elks argued that the adjudicator's determination was as sound one. She had looked at all the evidence before her, and had arrived at findings which she was entitled to reach. There was no need for her to deal expressly with all the evidence which was before her. That would have been unnecessary and bureaucratic.
12. As regards the new evidence submitted on the appellant's behalf in the form of the copy documents annexed to Ms Yeboah's skeleton argument, he submitted that in light of the judgment of the Court of Appeal in *Oleed v Secretary of State for the Home Department [2003]* INLR 179, that is not evidence on which he was entitled to rely. Paragraph 32 of the judgment of Lord Justice Schiemann in *Oleed* is clear on the point. This is new evidence which was not before the adjudicator. Her determination does not disclose any arguable error. There is therefore no justification in allowing the appellant to adduce new evidence now.
13. Turning to the second main limb relied on by Ms Yeboah, he submitted that the objective evidence discloses that the current situation in Somalia is not such that the appellant's return would expose him to a real risk of treatment in breach of his rights under Article 3 of the Human Rights Convention. If that were the case, all failed asylum seekers from Somalia would succeed on human rights grounds. He invited as to dismiss the appeal.
14. In reply, Ms Yeboah conceded that an adjudicator cannot be expected to cover every single point in his or her determination. Nevertheless, she argued that in the present instance, the adjudicator had failed to consider material evidence. Her determination was therefore flawed, and should not be allowed to stand.

15. She submitted that the most substantial objective evidence which was before the adjudicator was a copy of the Report of the Joint British, Danish and Dutch Fact-finding Mission to Nairobi, Kenya (17 to 24 September 2000), a copy of which appears at pages 96 to 161 (inclusive) of the appellant's main bundle. She argued that the general security situation in Somalia is constantly changing, and that the new evidence submitted on the appellant's behalf, in the form of the annexures to her skeleton argument, is relevant evidence which should be taken into account.
16. She invited us to find that, even on the evidence which was before the adjudicator, her conclusion that the appellant's return to Somalia would not breach his rights under Article 3 of the Human Rights Convention was flawed. That evidence alone showed that the appellant would be at significant risk on return. The fact that the same would apply to other Somalis generally is not material. The conditions which the appellant would face on return would reach the high threshold needed to constitute a breach of Article 3.
17. As stated above, Ms Yeboah's challenge to the adjudicator's determination is based on two separate limbs. The first is that the adjudicator's specific findings relating to the appellant himself are flawed. The second is that the general security situation in Somalia is still so bad that, notwithstanding the adjudicator's rejection of the appellant's claim to be a member of the Reer Hamar sub-clan, his return to Somalia at the present time would *per se* amount to a breach of his rights under Article 3. We will therefore deal with each of those limbs in turn.
18. As regards the first limb, namely the challenge to the adjudicator's specific findings, it is clear from the determination read as a whole that the adjudicator gave careful consideration to the evidence before her, including the oral evidence given by the appellant and the three witnesses who were called on his behalf. Having done so, she made clear findings of fact on the material issues.
19. In particular, in a careful and thorough determination, she rejected the evidence given by the appellant and his three witnesses that he is a member of the Reer Hamar sub-clan. She also rejected the appellant's evidence of the various events which he had described as having taken place in Mogadishu between the start of the civil war in 1991 and his departure from Somalia in May 2002. She has given cogent reasons in her determination for rejecting that evidence. That is a conclusion which was properly open to her on the evidence before her. Despite Ms Yeboah's able submissions on the appellant's behalf, we are satisfied that there are no arguable grounds for interfering with the adjudicator's findings on the evidence.
20. It is also clear from the determination that the adjudicator was aware of, and duly applied, the correct legal principles to her findings when arriving at her conclusions on both the asylum and human rights claims. Once again, they are conclusions which were properly open to her on the basis of her findings. There is no arguable basis for interfering with them. The first limb on which Ms Yeboah based her challenge to the adjudicator's determination therefore fails.

21. We now turn to the second limb, namely Ms Yeboah's submission that the security situation in Somalia in general, and in Mogadishu in particular, is so bad that the appellant's return to Somalia at the present time would in itself constitute a breach of his rights under Article 3 of the Human Rights Convention. In that regard, as stated above, Mr Elks invited us to exclude the additional evidence submitted on the day of the hearing in the form of the copy documents annexed to Ms Yeboah's skeleton argument. He submitted that in light of the clear statement of principle which appears at paragraph 32 of the judgment of Lord Justice Schiemann in *Oleed*, that is evidence which the appellant is not entitled to ask us to take into account. The material passage in Lord Justice Schiemann's judgment read as follows:

"However, in the present case in my judgment there was nothing wrong with the Adjudicator's determination, there was therefore no reason to appeal it and it would be wrong for the Home Secretary, on the back of an appeal which has been dismissed, to seek to re-examine the threat to the refugee with reference to a date later than the adjudicator's determination. To permit this would merely encourage appeals by a party who has no ground for appeal but hopes that the situation would change sufficiently to enable him to advance different arguments on different facts on appeal. Such procedures would not be in anyone's interest".

22. We are bound to say that we see the force of Mr Elks' submission. Nevertheless, we have considered *de bene esse* the additional evidence lodged by Ms Yeboah, and as we have come to the conclusion that it does not affect our decision on this issue, we do not find it necessary to make a ruling on Mr Elks' submission.

23. In support of her submission that the general security situation in Somalia is such that the appellant's return would constitute a breach of his rights under Article 3, Ms Yeboah relied on a number of passages from the appellant's bundle of objective material, details of which are duly recorded in our record of proceedings. In addition, she relied on the judgment of the European Court of Human Rights in *Ahmed v Austria* (above), including in particular paragraph 47 which is set out above.

24. However, that is a judgment which was handed down as long ago as 17 December 1996. As Ms Yeboah herself submitted during her arguments before us, the general security situation in Somalia is changing constantly. For that reason, we have to say that we found the judgment in *Ahmed v Austria* and the objective evidence relied on by Ms Yeboah of limited assistance in arriving at our conclusion on this issue.

25. On the other hand, we derive considerably more assistance from the Home Office Country Information and Policy Unit Assessment relating to Somalia issued as recently as April 2003. We do of course take account of the fact that this is a document which has been prepared by a Unit within the Home Office itself. Clearly, it therefore cannot be regarded as comprising *independent* evidence. Nevertheless, it is clear from its terms that it is well-researched and fully sourced throughout. It attempts to provide a balanced assessment of the current position in Somalia, drawing for its information on a number of normally reliable and impartial sources. We are therefore satisfied that it provides a reliable, reasonably impartial and up-to-date assessment of the current general position Somalia.

26. The Assessment contains at paragraphs 6.127 to 6.130 (inclusive) a section dealing with the issue of returning refugees. At paragraphs 6.131 to 6.146 (inclusive), it contains a detailed section dealing with the current security situation in various parts of Somalia. The overall position in the country is conveniently summarised at paragraph 6.131 in the following terms:

“According to the US State Department report covering events in 2002 security conditions improved in many parts of the country. However, in its review of 2002 the UN Integrated Regional Information Network reported that Somalia saw an escalation of fighting and violence. In April 2003 the UN Resident Representative and Humanitarian Co-ordinator commented in an interview that “probably much more than 50 percent of the country is actually at peace and people get on with their lives”.

27. Turning now to Mogadishu in particular, the Assessment discloses:

- “6.134 Scores of civilians were indiscriminately killed during fighting between rival clans and factions in May 2001 and July 2001 in Mogadishu. During 2002 the violence continued unabated, incidents of abductions, car-jackings, armed robberies and general banditry reportedly increased. In February in (sic) 2002 twelve people were reportedly killed and an unknown number injured during fighting in Medina district. This was between militias loyal to Mogadishu faction leader Musa Sude and supporters of Omar “*Finish*”, his former deputy. Omar “*Finish*” had joined forces with factions who had signed a peace agreement with the TNG.
- 6.135 Reportedly the worst violence occurred in May 2002, between 24 and 28 May 2002 alone more than 60 persons were killed and hundreds injured in clashes between militia loyal to Musa Sude and TNG forces. Hospital sources said most of the casualties were civilian non-combatants, including women and children, injured by indiscriminate fire. Clashes between Musa (sic) Sude and Omar “*Finish*” again flared up in July 2002 ahead of the peace talks in Kenya, this time 30 people were killed and 50 wounded.
- 6.136 In December 2002 Mogadishu fighting between members of the Abgal sub-clans in the Bermuda area of South Mogadishu resulted in the death of 10 militiamen and injury to a further 20. Fighting spread to both the K-4 area and Medina district of the city where an unspecified number of civilian casualties were reported. Although Elders were successful in establishing a temporary ceasefire more than 20 people were killed in a minibus attack on 24 December 2002. Frequent kidnappings have also been reported in Mogadishu. In spite of the signing of the Eldoret Declaration and subsequent agreements in December 2002 the seaport and airport remain closed.

6.137 On 27 February 2003 a further violation of the ceasefire agreement signed in Eldoret occurred when fighting again erupted in Medina district between the rival militia of Muse Sude and Omar "*Finish*"; seven people were reported to have been killed and hundreds fled their homes. On 29 March 2003 the TNG, faction leaders Qanyareh and Ali Ato, and representatives of the JVA and RRA reportedly agreed on measures to bring peace to the capital in a process outside the talks in Kenya. Following a visit to assess the humanitarian and security situation the UN Resident Representatives and Humanitarian Co-ordinator noted that the current situation in Mogadishu was problematic and severely affected the ability of the international community to do anything very meaningful. However, he noted that security in the city was "*good in some areas and not so good in others*"

28. It is clear from this evidence that the current situation in Mogadishu is far from settled or satisfactory. Fighting between rival clans and factions still breaks out from time to time, and innocent civilians who find themselves in the wrong place at the wrong time are at risk of being killed or injured in the crossfire. There are some signs of hope, such as the Eldoret Declaration and the subsequent agreements signed in December 2002, but clearly much remains to be done to restore normality to the city.
29. Nevertheless, it is settled law that a high threshold has to be reached before Article 3, which confers absolute, not qualified rights, is engaged. In light of the objective evidence before us, particularly that which is contained in the passages from the Country Information and Policy Unit Assessment set out above, we have come to the conclusion that the general security situation in Mogadishu at the present time, unsatisfactory as it undoubtedly is, is not such that it may properly be said that the appellant's return to the Mogadishu would *per se* would constitute a breach of his rights under Article 3 of the Human Rights Convention, or indeed any of the other Articles contained in that Convention.
30. We therefore find against the appellant in relation to the second limb on which he seeks to rely. We are satisfied that the adjudicator was right to conclude that his return to Somalia would not constitute a breach of his rights under the Human Rights Convention.
31. This appeal is dismissed.

Signed

Dated

**L V Waumsley**  
**Vice President**