Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/12177/2019

THE IMMIGRATION ACTS

Heard at Birmingham CJC	**Decision & Reasons Promulgated**
On 30 November 2021	**On 07 January 2022**

Before

UPPER TRIBUNAL JUDGE HANSON
DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

AAGY
(Anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Bahja instructed by Duncan Lewis Solicitors.
For the Respondent: Ms Cunha on behalf of the Secretary of State for the Home Department.

DECISION AND REASONS

1. In a decision promulgated on the 24 May 2021 the Upper Tribunal set aside the decision of a Judge of the First-tier Tribunal who dismissed the appellant's appeal on all grounds.
2. The matter comes before us to day to enable us to substitute a decision to either allow or dismiss the appeal.

Background

3. During the course of the hearing, at the end of her submissions, Ms Cunha sought to argue that the appellant should be excluded from the protection of the Refugee Convention on the basis of Article 33 which provides;

> Article 33(1): no contracting state shall expel or return a refugee to the frontiers of a territory where his life or freedom might be threatened on account of a Refugee Convention reason.
>
> Article 33(2) that the benefit of Article 33(1): "May not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

4. The United Kingdom has incorporated into statute the provisions of Article 33 in section 72 Nationality, Immigration and Asylum Act 2002 which reads:

> **72 Serious criminal**
>
> (1) This section applies for the purpose of the construction and application of Article 33(2) of the Refugee Convention (exclusion from protection).
>
> (2) A person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if he is—
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> (a) convicted in the United Kingdom of an offence, and
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> (b) sentenced to a period of imprisonment of at least two years.
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> (3) A person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if—
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> (a) he is convicted outside the United Kingdom of an offence,
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> (b) he is sentenced to a period of imprisonment of at least two years, and
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> (c) he could have been sentenced to a period of imprisonment of at least two years had his conviction been a conviction in the United Kingdom of a similar offence.

(4) A person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if—

(a) he is convicted of an offence specified by order of the Secretary of State, or

(b) he is convicted outside the United Kingdom of an offence and the Secretary of State certifies that in his opinion the offence is similar to an offence specified by order under paragraph (a).

(5) An order under subsection (4)—

(a) must be made by statutory instrument, and

(b) shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(6) A presumption under subsection (2), (3) or (4) that a person constitutes a danger to the community is rebuttable by that person.

(7) A presumption under subsection (2), (3) or (4) does not apply while an appeal against conviction or sentence—

(a) is pending, or

(b) could be brought (disregarding the possibility of appeal out of time with leave).

(8) Section 34(1) of the Anti-terrorism, Crime and Security Act 2001 (c. 24) (no need to consider gravity of fear or threat of persecution) applies for the purpose of considering whether a presumption mentioned in subsection (6) has been rebutted as it applies for the purpose of considering whether Article 33(2) of the Refugee Convention applies.

(9) Subsection (10) applies where—

(a) a person appeals under section 82 of this Act or under section 2 of the Special Immigration Appeals Commission Act 1997 (c. 68) wholly or partly on the ground mentioned in section 84(1)(a) or (3)(a) of this Act (breach of the United Kingdom's obligations under the Refugee Convention), and

(b) the Secretary of State issues a certificate that presumptions under subsection (2), (3) or (4) apply to the person (subject to rebuttal).

(10) The Tribunal or Commission hearing the appeal—

(a) must begin substantive deliberation on the appeal by considering the certificate, and

(b) if in agreement that presumptions under subsection (2), (3) or (4) apply (having given the appellant an opportunity for rebuttal) must dismiss the appeal in so far as it relies on the ground specified in subsection (9)(a).

(10A) Subsection (10) also applies in relation to the Upper Tribunal when it acts under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

(11) For the purposes of this section—

(a) "the Refugee Convention" means the Convention relating to the Status of Refugees done at Geneva on 28th July 1951 and its Protocol, and

(b) a reference to a person who is sentenced to a period of imprisonment of at least two years—

(i) does not include a reference to a person who receives a suspended sentence (unless a court subsequently orders that the sentence or any part of it is to take effect),

(ia) does not include a reference to a person who is sentenced to a period of imprisonment of at least two years only by virtue of being sentenced to consecutive sentences which amount in aggregate to more than two years,

(ii) includes a reference to a person who is sentenced to detention, or ordered or directed to be detained, in an institution other than a prison (including, in particular, a hospital or an institution for young offenders), and

(iii) includes a reference to a person who is sentenced to imprisonment or detention, or ordered or directed to be detained, for an indeterminate period (provided that it may last for two years).

5. Although we raised in discussions with Ms Cunha the fact that the Secretary of State at no point prior to her raising the issue in submissions pleaded or sought to rely upon a section 72 certificate, for which it is not disputed there is no certification in the documentation, this was not a statement by this Tribunal that unless section 72 was pleaded the Secretary of State was not permitted to rely upon it.

6. We are aware of number of decisions concerning section 72 including that of the Court of Appeal in Secretary of State for the Home Department v TB [2008] EWCA Civ 977 in which it was found that where the Secretary of State issues a certificate under Section 72(9)

(b) of the Nationality, Immigration and Asylum Act 2002 that the presumptions under sub-section 72(2) and (4) of that Act apply to an Appellant's claim then by virtue of section 72(10) the Tribunal must begin its "substantive deliberation on the appeal by considering the certificate." The Court of Appeal made it clear that the presumptions apply irrespective of whether the certificate is issued. Once the facts giving rise to the statutory presumptions have been established it would be an error of law for an immigration judge to fail to apply the presumption required by the section. The certificate is simply concerned with the order in which issues are taken.

7. In AQ (Somalia) v Secretary of State for the Home Department [2011] EWCA Civ 695 the Court of Appeal held that the conclusion in TB (Jamaica) [2008] EWCA Civ 977 that the s 72 presumption applied regardless of whether the Secretary of State had issued a certificate under s 72(9) was correct. Section 72(9) and (10) provided a self-contained procedural code which reversed the normal course of an appeal in cases where a certificate was issued. The Secretary of State was not under any obligation to issue a certificate in order for the presumption to take effect. The certificate had the limited procedural effect of requiring the Tribunal first to address the certificate and any issue as to the rebuttal of the presumption which was of general application. An appellant could rebut not merely the presumption of dangerousness but also of criminality. The submission that an appellant must be notified of the certificate and its effects was wrong.

8. In Mugwagwa (s.72 – applying statutory presumptions) Zimbabwe [2011] UKUT 00338 (IAC) the Tribunal similarly held that (i) The First-tier Tribunal (Immigration and Asylum Chamber) is required to apply of its own motion the statutory presumptions in s.72 of the Nationality, Immigration and Asylum Act 2002 to the effect that Art 33(2) of the Refugee Convention will not prevent refoulement of a refugee where the factual underpinning for the application of s.72 is present even if the Secretary of State has not relied upon Art 33(2) and s.72; (ii) Equally, the Secretary of State is entitled to take the point before the Upper Tribunal in the event of an appeal; (iii)The obligation of the First-tier Tribunal (or Upper Tribunal) is subject to the common law requirement of fairness. If the Secretary of State has not raised the s.72 point in the refusal letter, then an unrepresented appellant may need to be warned of the statutory provisions which raise the rebuttable presumptions against him and be given the opportunity to deal with them.

9. The Court of Appeal in MS (Somalia) [2019] EWCA Civ 1345 reiterated that it was an error of law for a decision maker to fail to apply the statutory presumption, even if a certificate had not been issued.

10. The issue that arose in this appeal concerning the section 72 certificate was that notwithstanding the entitlement of the Secretary of State to take the point before the Upper Tribunal that point had not been taken until the conclusion of Ms Cunha's submissions. It is

important to note the terms of section 72 which create a rebuttable presumption and the need to make an opposing party aware that the Secretary of State intends to rely upon that presumption in good time and within its proper place within the proceedings to give the foreign criminal an opportunity to call relevant evidence to rebut the presumption if required.

11. The requirements of fairness within litigation and the need to avoid one party effectively ambushing the other by raising an issue not previously relied upon which that other party does not have an opportunity to comment upon is of considerable importance in the administration of justice. Had the Secretary of State's representative been allowed to continue with arguments concerning section 72 it is likely the proceedings would have had to be adjourned, notwithstanding the evidential stage of the case having been concluded which involved the Secretary of State's representative cross-examining the appellant but without raising section 72 issues, to enable a fair opportunity to deal with rebuttal issues and to argue the case. In all the circumstances, and in light of the overriding objectives, it was not considered this was a case in which the Secretary of State's representative should be permitted at this late stage to try and raise a fresh issue and accordingly permission for her to do so was refused.
12. As will be seen below this issue is not, in any event, material.
13. In the decision promulgated on 14 December 2020 the judge of the First-tier Tribunal dismissed the appellant's appeal on the basis it had not been established that he met any of the exceptions within section 33 of the UK Borders Act 2007.
14. Permission to appeal was granted by Upper Tribunal Judge Martin, sitting as a judge of the First-tier Tribunal, on the basis it was said to be arguable that the judge had given inadequate reasons for finding the appellant did not belong to a minority clan and gave no details, given that the claim had been consistent for 15 years and that it was arguable the judge's Article 8 findings are inadequately reasoned as was her rejection of the supporting evidence.
15. In a decision dated 24th May 2021 Upper Tribunal Judge Blundell found an error of law in the earlier decision, the relevant part of Judge Blundell's findings being in the following terms:

> 37. In his submissions before the FtT, Mr Bahja adopted his skeleton argument. He contended, as he had at [5] – [12] of the skeleton, that the appellant was a minority clansman and that this had been a consistent claim since his arrival in the UK. He referred to parts of the CPIN which stated that membership of a clan may be membership of a Particular Social Group for the purposes of the Refugee Convention and that the lives of the minorities continued to be plagued by insecurity.
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> 38. This is the evidential context in which the judge came to make her findings at [30] – [31], therefore. Whilst I can readily comprehend the basis upon which the judge made the observation in the first sentence of [30] (that the appellant provided little detail in support of his claims), I accept Mr Bahja's submission that she fell into legal error in that sentence. The appellant has consistently asserted that he is a minority clansman who was persecuted for that reason, as a child, before he left Somalia with his family. It was clear from

Mr Bahja's skeleton that the appellant sought to rely on his ethnicity/clan membership in pursuit of a claim under the Refugee Convention. Despite the lack of detail in that claim, it presented six questions for the judge at the outset of the hearing:

(i) Whether the appellant's claim on Refugee Convention grounds was a new matter as defined in s85(6) of the Nationality, Immigration and Asylum Act 2002; and, if so
(ii) whether the respondent gave consent for it to be considered
(iii) whether the appellant had established that he was of the Dabarre clan;
(iv) whether the Dabarre clan is a minority clan;
(v) whether the appellant had suffered persecutory ill-treatment in the past;
(vi) whether the appellant would suffer persecutory ill-treatment on return.

39. Although Mr Bahja had confronted the first of these questions in his skeleton argument, the judge did not address it at the hearing or in her decision. It seems from [30] of her decision that she was not satisfied that the appellant was a member of the Dabarre clan although the reasons given for that conclusion were legally inadequate, even when set against the rather sparse information provided by the appellant.

40. The appellant had, as Judge Martin observed in granting permission, asserted membership of the same clan for the past fifteen years or so. That claim had never been the subject of extensive evaluation by the respondent or a judge. The appellant had provided some details of what was said to have happened to him as a young Dabarre child in Somalia and he had answered the judge's questions about the clans lineage at the end of his oral evidence. The respondent had asked no questions about his clan membership. This was a scant evidence base upon which to consider this important question but it was nevertheless incumbent upon the judge to confront it and to resolve it. If that required further oral or documentary evidence, it was open to the judge to require one or both parties to adduce that evidence. What did not suffice, in my judgement, was for her to conclude that the lack of detail alone resulted in the appellant failing to discharge the burden upon him.

41. The judge's resolution of the fourth question above has given me considerable pause for thought, since there was no background material before her to show that the Dabarre is a minority clan. Indeed, the Tribunal authority to which I have referred above suggests quite clearly that it is not. As I listened to the oral argument before me, I was at one stage disposed to conclude that the brevity of the judge's conclusion in relation to the appellant's clan membership was immaterial. If she had concluded for proper reasons that the appellant had not established that the Dabarre was a minority clan, then it might not have mattered that she had given legally inadequate reasons for concluding that he was not a member of that clan. In the final analysis, however, I do not consider that this would be a safe conclusion. The appellant's clan membership and the status of that clan are evidently important considerations in any such claim but the judge was ultimately also required to consider the fifth and sixth questions above. She had to reach findings of fact about the appellant's account of historical persecution at the hands of the Hawiye militia and, if she accepted that account, she was required (by paragraph 339 K of the Immigration Rules) to treat that ill-treatment of being probative of the treatment the appellant was likely to receive on return to Somalia.

42. It is for those reasons that I come to the clear conclusion that [30] of the judge's decision represents a legally inadequate resolution of his claim to be at risk on return to Somalia as a minority clansman. And I do not consider that

> the reasoning which appears at [31]-[34] of the judge's decision suffices nevertheless to provide a complete answer to the appellant's protection claim. The judge purported, in those paragraphs, to find that the appellant could safely and reasonably relocate to Mogadishu. As Mr Bahja submitted before me, however, these findings were not truly reached in the alternative to the primary conclusion that the appellant was not a member of a minority clan. That remained an important consideration in the assessment of the appellant's ability to relocate reasonably to Mogadishu, as should have been clear from the parts of the CPIN to which Mr Bahja referred in his skeleton argument before the FtT. It is not at all apparent that this point was borne in mind by the judge in her assessment of internal relocation and I do not accept that her consideration of that issue suffices to remedy the obvious deficiencies in the remainder of her short analysis of the appellant's protection claim. It follows that the assessment of the protection claim - such as it is - cannot stand and is set aside.

16. It was not found the First-tier Tribunal Judge erred in her resolution of the appellant's claim to enjoy a genuine and subsisting parental relationship with his daughter leading to it being concluded that although the First-tier Tribunal Judge had erred in her resolution of the protection claim she had not in the resolution of the Article 8 ECHR claim. The decision in relation to the former was therefore set aside with the other aspects of the decision being preserved.
17. The factual background shows the appellant, a citizen of Somalia, entered the United Kingdom on a date which had not been established and applied for asylum on 27 October 2005; claiming to face a real risk in Somalia on account of his membership of a minority clan and to have suffered difficulties on that account since birth. That application was refused on 28 November 2005 on the basis the Secretary of State did not accept the appellant had given a truthful account of events in Somalia or Kenya. Rather than removing the appellant he was granted a period of Discretionary Leave to Remain until 27 November 2008 as an Unaccompanied Asylum-Seeking Child.
18. The appellant applied for Indefinite Leave to Remain before the expiry of his discretionary leave which was granted outside the Immigration Rules under the Legacy programme on 10 January 2013.
19. The appellant was convicted of robbery and handling stolen goods at Redbridge Juvenile Court on 6 October 2009 and continued to offend thereafter including on 18 September 2014 being convicted at Snaresbrook Crown Court of theft from a person and failing to surrender to custody at the appropriate time, for which he was sentenced to 9 months imprisonment. The final offence, taken together with the other offending, led to the Secretary of State issuing the appellant with a notice of liability for his deportation on conducive grounds issued on 20 November 2014.
20. The appellant continued to offend which included three weeks after he was released on immigration bail in December 2014 his being arrested for possessing a drug of Class A with intent to supply for which he was held on remand and a deportation decision issued against him on 6 February 2015 whilst he was in prison. On 29 May 2015 the appellant was convicted of possessing a drug of Class A with intent to supply

and received a 24-month suspended sentence and a 12-month supervision order.

21. Following the conclusion of his sentence the appellant was held in immigration detention until 30 March 2016 when he was given temporary admission with reporting restrictions although he continued to offend including on 20 March 2017 receiving various non-custodial sentences for offences of destroying or damaging property, theft, resisting a constable, failing to surrender, and possession of a drug of Class B. On 4 January 2018 the appellant was remanded in custody pending trial for further drug offences and on 20 March 2018 at Wood Green Crown Court, the appellant was convicted of theft and possessing a drug of Class A with intent to supply and sentenced to a total of 28 months imprisonment.

22. The appellant maintains an entitlement to an exception to be found in section 33 of the Borders Act 2007 namely that his deportation from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention.

Discussion

23. The questions posed for the tribunal to consider are those referred to by Upper Tribunal Judge Blundell at [38] of the error of law findings set out above. The appellant, in answering the first question whether he is a member of the Dabarre clan refers to the fact that he has been consistent throughout the 15 years he has been in the United Kingdom when communicating with the Secretary of State regarding the substance of his protection claim and also places reliance upon a country expert report dated 3 October 2021 prepared by Professor Mario Aguilar who writes at [49] –[51] :

> 49. Appellant's clan: clan belonging is a very serious matter to Somalia because it is their personal identity and dictates all personal and social relationships. Therefore, I cannot assume deception in the case of clan membership. The appellant claims to be a Debarre, thus he is a member of a minority clan.
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> 50. The appellant has outlined his fear of return because of his belonging to the Debarre minority clan, and to the fact that he doesn't have a family in Somalia. The Appeal Number: PA/12177/2019 [4]: the appellant has explained in his witness statement at [10] that "I fear returning to Somalia due to my ethnicity and also due to the fact that I [belong] to Debarre clan. I have no family in Somalia and it will be unduly harsh to return me to Somalia [AB/5]"
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> 51. Conclusion 1: the appellant claims to belong to the Dabarre, a minority clan. Thus, his narrative of persecution in Somalia and his fear of returning is consistent with the evidence of violence against minority clans by majority clans and by Al-Shabab on account of their liminality regarding power Somalia and their history of protection of majority clans. In the case of the Dabarre, they were protected by the Hawije and association they were considered Hawije during the Civil War and suffered many casualties. They were left without clan protection after the end of the Civil War. Therefore, the appellant is a member of a minority clan will be at risk of persecution by the clans and by Al-Shabab if returned to Somalia.

24. It is correct to say that the appellant has maintained throughout his dealings with the Secretary of State concerning his status in the United Kingdom that he is a member of the Dabarre clan. We note the statement by Professor Aguilar that because this appellant claims to be from a particular clan group this must mean he is from that group, but find such comment needs to be considered against all the available evidence, especially in the field of asylum law where experience shows a considerable number from Somalia entering the United Kingdom claiming to be from persecuted minority clans when a detailed examination of their case shows that they are not as claimed, and their claim in the alternative has been as a means of trying to secure a right to remain in the United Kingdom that they or an agent believes shall be granted to them if they say they are from a minority clan group.
25. What is true, however, is the statement made in the report concerning the importance of clan identity within Somalia and the importance of the person knowing and being able to identify with a particular clan group within Somali society whilst living in Somalia.
26. As noted above the appellant claimed asylum on entering the United Kingdom and in the Reasons for Refusal dated 28 November 2005 the Secretary of State's representative wrote:

> 8. You claim that you belong to the minority Debare clan. You live with your father and aunt as your mother died when you were six months old as a result of being beaten by Hawiya tribesmen. Your father faced many problems with the Kenyan police and was arrested more than once. You returned to Somalia twice thinking it was safe for you to return but you faced many problems with the Hawiya major clans and then returned to Kenya. Although you were a small child you were beaten at the age of 8 and as a result you broke your arm and your father was nearly killed. No one was able to look after you so you fled Somalia at the age of 10.
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> 9. You state the situation in Kenya was also bad so your father made arrangements for you to leave Kenya and travel to the United Kingdom with an agent. You left Kenya on 22/10/2005 and travelled directly to the United Kingdom. You claimed asylum on 27/10/ 2005 at Asylum Screening Unit (ASU) Croydon. You fear that if you are returned to Somalia you will be mistreated due to your ethnicity.
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> 10. Your claim has been considered but for the reasons given below it is being concluded that you do not qualify for asylum or Humanitarian Protection. However, it has been decided to exercise discretion in your favour and grant you limited leave to remain in the United Kingdom in accordance with the published Home Office Asylum Policy Instruction on Discretionary Leave because you are an unaccompanied child for whom we are not satisfied that adequate reception arrangements in your own country are available.
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> 11. It is noted that in your statement of evidence form (B 27) you have stated that your mother was killed when you were 6 months old and that you broke your arm when you were 8 years old. However, in your statement of additional grounds (B 32) you have stated that your mother died when you were 2 years old and you broke your arm when you were 5 years old. The fact that there are differences between your accounts severely diminishes your claim for asylum protection within the United Kingdom. Furthermore it is considered that this is not the action of a genuine asylum seeker in need of international protection.

> 12. You claim that if you were returned to Somalia you will be targeted by the majority clan because you are from the Digil minority clan. It is however, noted from Somalia Country Report 2005 that the clan structure comprises the four major "noble" clan families of Darod, Hawiye, Issac and Dir. In this sense refers to the widespread Somali belief that members of the major clans are descended from a common Somali ancestor. Two further clans, the Digil and Mirifle (also collectively referred to as Rahanweyn), take an intermediate position between the main Somali clans and the minority groups. Large numbers of ethnic Somalis also live in neighbouring Ethiopia, Kenya and Djibouti. Therefore, it is believed that if you are returned to Somalia you will be able to move to an area where your clan stays.

27. What is clear from the above text is that the Secretary of State does not reject the appellant's claim to be a member of the Digil clan but rather argues that even if he is a member of that clan group, he will face no real risk on return to Somalia.
28. The first question for us to consider is whether the appellant had established that he is a member of the Dabarre clan. In light of the evidence we have, including any inability to substantially shake the appellant's account as to his clan membership in cross examination, the expert report, a lack of challenge in the 2005 reasons for refusal letter, we are satisfied to the lower standards that the answer to this question has to be "yes".
29. The second question for us to consider is whether the Dabarre is a minority clan. In addressing this question Professor Aguilar writes:

> 52. Is Dabarre clan part of Digil/Mirifle also known as Rahanweyn Clan?
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> The Dabarre are part of the Rahanweyn clan, clan that most probably has 38% of all Somali. While the Rahanweyn are a majority clan, their linguistic made allows for a great flexibility in membership. It must be remembered by the courts, that minority clans have sought protection from majority clans through Somali history and therefore the actual sub-clans can change according to period of Somali history. Thus, the factual confusion that can follow one international report and another has pointed to me by the appellant's solicitors.
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> 53. I note for example at paragraph 36 – 37 of my report that The first written reference to the Hawiye dates back to a 12th- century document by the Arab geographer, Ibn Sa'id, who described Merca at the time as the "capital of Hawiye country". The 12th-century cartographer Muhammad al-Idrisi may have referred to the Hawiye as well, as he called Merca the region of the "Hadiye", which Herbert S.Lewis believes is a scribal error for "Hawiye", as do Guilliani, Schleicher and Cerulli, and that along with Rahanweyn, Hawiye clan also came under the Arujun Empire control in the 13th century that governed much of southern Somalia and eastern Ethiopian, with its domain extending from Hobyo in the north, to Qelafo in the West, to Kismayo in the south.
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> 54. Throughout the Somali Civil War and the nine battles of Mogadishu (1993 – 2011) groups of warlords and transitional forces fought Islamic PRM and Hawiye, always in the areas surrounding the Baraka market of Mogadishu (for example, Battle of Mogadishu 2007). Majority clans changed roles and as a result were attacked by others with the result that minority clans were protected by some and attacked later by others. This is the clearest sense of the flexible protection sought by minority clans in changeable difficult times around Mogadishu.

55. Therefore, if one examines the Dabarre they sit historically as protected and therefore part of the Rahanweyne majority clan, and at times during the Civil War as protected and supporting the Hawiye.

56. The Rahanweyne who were able to keep the stability of southern Somalia during the Civil War are divided into the Digil and Mirifle, and the sub clans are plentiful because of the Rahanweyne's stability, and the protection granted to mainly agriculturalists sub clans throughout the formation of political parties in Somalia.

    Digil: Geledi, Begedi, Dabare, Tunni, Jiddu, Garre.
    Mirifle: divided into Sagaal and Sideed.
    Sagaal: Jilible, Gasaargude, Gawaweyn, Geeladle, Luwaay, Hadame, Yantaar, Hubeer, and Eeyle.
    Sideed: Haraaw, Harilin, Eelay, Jiroon, Waanjel, Leysaan, Maalin weyn, Disow, Eemid, Qoomaal, Yeledle, qamdi, Garwaale, E=Reer Dumaal, and Helledy.

57. Conclusion 2: the Dabarre clan is part of the sub clan Digil/Mirifle of the Rahanweyne clan by protection and through historical links through the Somali Civil War.

58. If so, are Dabarre/Rahanweyne minority or a majority clan in Somalia?
    The Rahanweyne are a majority clan while the Dabarre are a minority clan, both enemies of the Hawiye until protection shifted in Mogadishu by Hawiye during the period of the nine battles of Mogadishu.

59. Conclusion 3: the Dabarre are a minority clans that throughout the Civil War was under the protection of the majority clan Rahanweyn.

30. This clan division is supported by the Secretary of States CPIN where it is written:

3.1.1 The European Asylum Support Office (EASO) Country of Origin Information report, South and Central Somalia Country Overview, published in August 2014, (EASO report August 2014), described the clan system and majority clans: 'According to a renowned expert on Somalia and professor of anthropology: "The clan system is the most important constituent social factor among the nomadic pastoralist Somalis". The clans function as sub ethnicities of the Somali nation. Clan affiliation is the main identity providing factor within the Somali nation. The clan system matters for all functions of society, even for the structure of the government. Somalis usually know their exact position within the clan system, including in urban Mogadishu. 'The clan system is patrilinear and hierarchically structured. It can be differentiated into several levels: clan family, clan, sub-clan (sometimes also sub-sub-clan), primary lineage and mag or diya paying group. Clans are led by leaders and elders. On higher levels, these leaders are called suldaan, ugaas or issim. Their role is mainly judicial and representative. Elders (oday) on lower levels (mag paying groups) regulate access to shared resources and are involved in conflict resolution. Due to the absence of functioning state structures in parts of Somalia, the clans and their elders have regained a political function and a substantial influence on the organisation of society. However, clans have no centralised administration or government. During the civil war, clan elders increasingly became targets of violence, which eroded their power. Nevertheless, they still have a significant influence on society and politics. 'The "noble" clan families trace their origin back to a mythical common ancestor called Samaal, who is said to be descended from the Prophet Mohammed. These groups are nomadic pastoralists. The clan family is the

highest level of clanship. Its members can count up to 30 generations back to a common ancestor.

The four "noble" (Samaale) clan families are the following:

- 'The Darod are usually divided into three major groups: Ogaden, Marehan and Harti. The Harti are a federation of three clans: the Majerteen are the main clan in Puntland; the Dulbahante and Warsangeli live in the disputed border areas between Puntland and Somaliland. The Ogaden are the most important Somali clan in Ethiopia, but also quite influential in both Jubba regions, while the Marehan are present in South and Central Somalia.
- 'The Hawiye mainly live in South/Central Somalia. Their most influential subdivisions are the Abgal and Habr Gedir, which are both dominant in Mogadishu.
- 'The Dir settle mainly in western Somaliland and in some pockets of South/Central Somalia. The main clans are the Issa, Gadabursi (both in Page 14 of 40 Somaliland and bordering regions of Ethiopia and Djibouti) and the Biyomaal (in southern Somalia).
- 'The Isaaq are the main clan family in Somaliland. According to some [social] scientists and Somalis, they are considered part of Dir clan family. 'A further clan family, the Digil and Mirifle/Rahanweyn, trace back their ancestry to Saab, another alleged descendant of Prophet Mohammed. The term "Rahanweyn" is sometimes used to describe a separate clan family, as identical to both Digil/Mirifle. In contrast to the Samaale, the Saab clans are mainly (but not exclusively) sedentary clans working in agriculture. They mainly live in the fertile valleys of Shabelle and Jubba Rivers and the lands in between (mainly Bay and Bakool regions). The Saab speak Maay- tiri, a dialect quite distinct from Maxaa-tiri, the dialect used by the other clan families. Sometimes, the Saab clans are considered as a separate caste below the Samaale because of a more "mixed" descent. However, there is no systematic discrimination of the Saab and both Saab and Samaale are to be considered "noble" castes, whose members are allowed to carry weapons.'

31. At [41] of the error of law finding Judge Blundell wrote *"The judges resolution of the fourth question above has given me considerable pause for thought, as there was no background material before me to show that the Dabarre is a minority clan. Indeed, the Tribunal authority to which I have referred above suggests quite clearly that it is not"*. The fourth question was whether the Dabarre is a minority clan.

32. The case refers to above appears to be a reference to MM (Risk-Return-Tunni) Somalia CG [2003] UKIAT 00129 in that decision which was considering the position of a member of the Tunni claim it was found:

41. At Annex B of that Country Assessment, there is a list of major Somali clan families, derived from the Minority Group Report and also the Netherlands Situation in Somalia Report. Under 'Digil' are to be found the following subclans:-

Dabarre
Jiddu
Tunni
Geledi

Garre

42. From this, the Tribunal considers that it is apparent that the predominant view (including that of the UNHCR, notwithstanding the view of the Special Rapporteur) is that the Tunni, whilst originating from Brava, where there are also to be found the Benadiri peoples, belong to the Digil clan-family. The Digil are, in turn, part of (or, at the very least, closely associated with) the Rahanweyn.

43. None of this material demonstrates that the Tunni are a minority clan, currently persecuted in Somalia by other, majority clans or groups.

33. In this appeal there is a similarity as the Dabarre are part of the Digil clan who form part of the Rahanweyn. The clan tree including this sub clan reads:

Rahanweyn

Digil

i. Geledi
ii. Begedi
iii. Dabare
iv. Tunni
v. Jiddu
vi. Garre
vii. Shanta Alemo

34. We find, whilst noting the appellant's assertion and the submission in the skeleton argument that the sub clans of the Rahanweyn clan change in accordance with the period of Somali history, that it is clear that the clan group as a whole is classified as one of the major clans.

35. Whilst it is accepted the Rahanweyn did suffer during the course of the civil war in Somalia that is considering the position in the historical context rather than the position as at the date of this appeal hearing.

36. We do not accept that MM has been incorrectly decided and, to be fair to Mr Bahja, he specifically avoids it being suggested that this is his submission. What he does in the skeleton argument is seek to distinguish the decision in MM at [20]. In relation to the specific points raised we comment as follows; whilst MM may deal with the status of the Tunni rather than the Dabarre clan what is clear by the reference at [41] of MM and the considerable volume of material dealing with this issue that both subclans form part of the Digil clan. Whilst it is correct that the tribunal in MM did not have the report from Professor Aguilar the basis on which it is stated in that report the appellant is of the clan he claims to be is noted and there is a considerable volume of evidence supporting the position as found in MM and its equal relevance in this appeal, which is not undermined by the evidence available in this case. The argument that if the tribunal in MM had had Professor Aguilar's report they may have come to a different

conclusion in relation to the Tunni clan membership issue is mere speculation. The third point raised there was evidence of a genealogical linkage or blood connection between the Rahanweyn and Tunni in MM as opposed to a mere blood connection and association does not arguably undermine the conclusion in MM.

37. In an Immigration Refugee Board of Canada report entitled Somalia: Information on the Dabare Waqbare sub-clan, including distinguishing features, locations, occupations and position in the clan hierarchy; treatment, including the ability of members to live in Mogadishu (2014-October 2017), it is written:

> However, a report authored by Guido Ambroso, a UNHCR field/repatriation officer, based on information taken from I.M. Lewis's *Blood and Bone: The Call of Kinship in Somali Society*, states that the Mirfle is also known as the Rahanwein, which translates into "'the large crowd'" (Ambroso Mar. 2002, 12). According to Ambroso, the Digil and Mirfle/Rahanwein originate "from a legendary common ancestor" (Ambroso Mar. 2002, 12).
>
> An article by the Integrated Regional Information Networks (IRIN) [at the time under the auspices of the United Nations (UN)] also mentions that the Dabare sub-clan is part of the "larger Digil-Mirifle group" (UN 17 Aug. 2004). According to Ambroso, the Dabare are a "small clan" that is a part of the Digil clan, along with the Tunni, the Jiddu and the Dubdere (Ambroso Mar. 2002, 12). The IRIN article describes the Dabare as "indigenous to the Dinsoor area" [southwestern Somalia] (UN 17 Aug. 2004). Ambroso indicates that the Digil "are located in the Lower Shebelli region between Merka and Brawa" (Ambroso Mar. 2002, 12). According to the High Court of Australia decision, the Rahanwein are "based in southern Somalia" (Australia 26 Oct. 2000).

38. There is clear evidence of the genealogical linkage by reference to origin from common ancestors equally applicable to this appellant’s clan group.

39. Mr Bahja also asserts the decision of the High Court of Australia in Minister for Immigration and Ethnic Affairs v Ibrahim [2001] I.N.L.R 228 is of little assistance as the issue of whether the Dabarre was the subclan of the Rahanweyn was settled by the tribunal and that the question of whether the Dabarre was a minority clan was not an issue before the High Court. Whilst the reading of the decision of the High Court does clearly identify the issues that were being considered that does not undermine the weight of evidence from all sources establishing the link between the appellant’s subclan and the Rahanweyn.

40. We do not find that the appellant has established that he is a member of a minority clan from Somalia. The clan tree clearly shows that the subclan of which he is a member falls within the Digil clan that is part of the Rahanweyn.

41. In SH (Rahanweyn not a minority clan) Somalia CG [2004] UKIAT 00272 it was found as the header suggested that the Rahanweyn is not a minority clan. The evidence before us does not warrant a different finding.

42. We do not find the appellant has made out his claim to be a member of a Particular Social Group, as a member of a minority clan from Somalia.

43. The third issue we have been asked to consider is that even if it was found the Dabarre is a major clan whether they would be viewed as a minority clan in Mogadishu.

44. The Secretary of State intends to deport the appellant to Mogadishu which is the basis for this specific question having been asked of Professor Aguilar. During the section of the report at which this question is considered [64] – 67] there is reference to the Dabarre clan originating from Southern Somalia and particularly the South Shabelle region being viewed as a minority clan who had moved under the protection of the majority clan in the city. Professor Aguilar was specifically asked whether there was any evidence of persecution of members of the Dabarre in Mogadishu by members of the majority clan given that the Abgal and Habr Gerib, a subclan of Hawiye, are both dominant in Mogadishu. There is reference at [65] to an academic argument raised by Professor Aguilar but an acceptance that the Hawiye remain dominant in Mogadishu. There is a discussion relating to inter-clan killings in Mogadishu in a more generalised sense and a reference to a 2010 bomb attack. Professor Aguilar writes:

> 67. Conclusion 5: a minority Somali such as the appellant may be at risk of violence from the majority clans, as well as from other minority clans who consider Debarre as alien to Mogadishu, and potentially from Al Shabab.

45. The submission that if the Dabarre are a minority clan in Mogadishu then the appellant is entitled to succeed based on the CPIN of January 2019 is noted but not accepted per se. If the argument is the Dabarre in isolation are a minority clan this has been considered above and the report of Professor Aguilar is not as clear as it perhaps might have been, if the evidence supported the appellant's case was available, in speaking of real risk rather than a possibility from major clans or others. The evidence does not support a finding that the appellant will, to the lower standard applicable on appeal of this nature, suffer in Mogadishu at the current time as a result of his clan identity; which we discuss in further detail below.

46. That leads us to the core issue in this case which is with the question of whether the appellant can settle within Mogadishu or alternatively relocate to another part of Somalia. In terms of his travelling to another place it was not suggested to us this was a viable alternative as Al Shabab are present outside Mogadishu and in southern Somalia with no evidence that the appellant has extended family outside Mogadishu and with no evidence of support and protection if he sought to relocate outside the capital.

47. In relation to the question of protection within Mogadishu and availability of accommodation etc Professor Aguilar writes between [69] – [85]:

> 69. Is state protection available to AG on return to Mogadishu?
>
> The appellant belongs to a minority clan and therefore is at risk of attacks from other clans. Further, he has no experience of living in Mogadishu as an adult or extended family to help him. Therefore, he will not be able to live on

his own in Mogadishu. At the same time, he doesn't have any clan to protect him.

70. I note that the appellant left Mogadishu as a minor from a minority clan, thus with no chance of protection within the city, no family living there and no sense of where he could go to stay within the city. In my opinion he cannot be returned to Mogadishu, and he cannot be returned outside Mogadishu where Al-Shabab is currently present and active. I note the country guidance case AMM and others [2011] UKUT 445(IAC).

71. Indeed, my argument would be that a Somali without an extended family in Mogadishu would not be able to survive the violence and the financial destitution. He will not receive state funds to restart a life in Mogadishu and will end up in a refugee camp, a dire conclusion by itself.

72. Conclusion 6: the Appellant cannot be returned to Mogadishu as he never lived there as an adult will have no family and no protection available.

73. As I have outlined in my ethnographic work for this report there are no minority groups in Somalia but minority clans. They are defined as Somalis who belong to clans that are considered outcasts and not part of the majority clans due to historical roots of connection with Islam and with traditional Somali society. Minority clans are considered not eligible for leadership and their occupation and jobs are the lowest within Somalia. Thus, for example, the majority groups of Somalia are nomadic pastoral herders rather than the Benadiri who are agriculturalists and fishermen. The treatment of minority clans is discriminatory by majority clans and a persecution by Al-Shabab because they are classified as not really Muslims by the leadership of Al-Shabab.

74. Therefore he will be asked about his activities abroad and his possible involvement with Al-Shabab.

75. Somalia is a failed state where minority clans such as Dabarre do not have state protection. Thus, the appellant as a member of a minority clan who cannot expect state protection or any help to start his life in Somalia. A returning Dabarre South of Somalia were Al-Shabab is present. Evidence suggests a presence of Al-Shabab in southern Somalia and an ongoing battle between government forces and Al-Shabab.

76. A young Somali who left Somalia at a young age, a member of a minority clan and who has not lived in Somalia during his adult life will face persecution from majority clans, particularly Hawije, from Al-Shabab and other militia groups. They will target him for being westernised on the one hand, and they would try to recruit him on the other. He would be extremely vulnerable on return without a family to protect him.

77. Protection in Somalia comes from clans rather than the police who have been unable to control the attacks by Al-Shabab and other ethnic attacks blamed on Al-Shabab.

78. Regarding issues of security or insecurity in Mogadishu today, a member of a minority clan is at risk of being considered as a lapsed Moslem by the Islamists and will suffer under the majority clans because of the perception of centrality of clans that can trace their lineage to the Profit of Islam. Thus, without clan protection and family protection the appellant would be at risk of being recruited by Al-Shabab if he moves back to Mogadishu.

79. A minority clan does not refer to numbers but to those clans that have been protected by the majority clans who owned resources, arms and property and had control over the wells.

80. The appellant cannot safely live in Mogadishu because he needs an extended family and members of a majority clan who can protect him. Due to his history he came to the UK as a child and has not lived in Mogadishu. Further, he has no contact with his extended family.

81. Conclusion 7: it is my conclusion that a returning Somali from a minority clan who does not have family or clan support and who has already lived abroad as a refugee would be considered a refugee and will be located in an IDP camp. Conditions in the IDP camps have been extremely dangerous for refugees as majority clans have raided these camps and Al-Shabab have also recruited male refugees. I note that the appellant belongs to a minority clan.

82. The prospects of finding long-term accommodation and employment without an extended family in Somalia are not very promising.

83. Conditions and availability of refugee camps for returnees: refugee camps in Mogadishu have existed since 2011, sponsored and manned by the UNHCR but also managed by groups of refugees who have continued into clan strife and the raping of women. Conditions are dire and difficult and reports of January 2020 speak of 13 people who died of starvation. The displacement has also come because of natural disasters and the presence of Al-Shabab so that the 2020 Human Rights Watch report on Somalia stated the following:

The humanitarian crisis in the country continued due to the ongoing conflict, violence, and increasingly frequent drought. The UN explicitly linked the humanitarian situation to climate change, among other factors. It declared that 2.1 million Somalis face acute food insecurity, as of late September, many of them children and internally displaced.

The UN and Norwegian Refugee Council also reported that over 300,000 people had been newly displaced as of September. These individuals face serious abuses, including sexual violence, forced evictions, and limited access to basic needs such as food and water. According to humanitarian agencies, over hundred and 73,255 people had been evicted, most forcibly, by August 2019, primarily in Mogadishu.

84. While the situation in the IDP camps will be difficult for most Somalia this would most likely be a very difficult situation for a westernised Somali who has not lived as an adult in Mogadishu being a westernised Somali.

85. Conditions in the refugee camps are life-threatening, particularly for women and girls, and for men who become targets of forced recruitment by Al-Shabab. Lack of food, order, and ongoing fights are common while at the same time attacks on other clans are common. It's degrading treatment will be especially harsh for the appellant as a member of a minority clan who will be expected to have resources because if returned to Somalia he will be coming from Europe.

48. The appellant's evidence that his mother was killed when he was six months old, that he himself was attacked and suffered abuse, and that there is no one available to protect him, is subject to comment in the earlier refusal letter where some discrepancies were identified.

49. We have taken note of the psychiatric and scarring report prepared by Dr Zafar which refers to a scar and the appellant's arm appearing

twisted in shape and lacking full-strength which is stated to be consistent with the appellant's account although causation could have resulted from accidental falls with no appropriate treatment.

50. What does not appear to be in dispute is the length of time the appellant has been in the United Kingdom, his age when he arrived, and his lack of any connection to Mogadishu including no experience of having lived in that city.

51. The Secretary of State in the reasons for refusal letter of 2005 claimed the appellant could move to another area but that does not specifically engage with the country conditions relevant at the date of the appeal hearing.

52. The current country guidance case of MOJ & Ors (Return to Mogadishu) Somalia CG [2014] UKUT 00442 (IAC) examined the position in Somalia at that time. Headnote (ii) reads:

> *(ii) 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. In particular, he will not be at real risk simply on account of having lived in a European location for a period of time of being viewed with suspicion either by the authorities as a possible supporter of Al Shabaab or by Al Shabaab as an apostate or someone whose Islamic integrity has been compromised by living in a Western country.*

53. The appellant is an "ordinary citizen" as defined.

54. At headnote(vi):

> *(vi) There is no real risk of forced recruitment to Al Shabaab for civilian citizens of Mogadishu, including for recent returnees from the West.*

55. In relation to any statement in the alternative in the expert's report we prefer to rely upon the findings and MOJ. Whilst noting the chronology of both documents we do not consider that the report of Professor Aguilar enables us to depart from the decision in a country guidance case on the basis of the available material.

56. The assertion in the country report of the risk of clan violence, referred to in the context of an academic discussion, is contrary to the finding in SMO at head note (viii) where it is written:

> *(viii) 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.

57. What is of particular reference in MOJ is the following section of the head note:

(ix) 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:

- *circumstances in Mogadishu before departure;*
- *length of absence from Mogadishu;*
- *family or clan associations to call upon in Mogadishu;*
- *access to financial resources;*
- *prospects of securing a livelihood, whether that be employment or self employment;*
- *availability of remittances from abroad;*
- *means of support during the time spent in the United Kingdom;*
- *why his ability to fund the journey to the West no longer enables an appellant to secure financial support on return.*

(x) Put another way, it will be for the person facing return 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.

(xi) 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.

(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.

58. We accept the appellant's submissions, supported by the evidence, that it has not been made out to the lower standard that he will have the support and assistance of a majority clan within Mogadishu, that it has not been made out he has any experience of ever having lived in Mogadishu as an adult, that there is no evidence of the appellant having any former links to the city, no real evidence of access to funds, and no real evidence of any other form of clan family or social support available to him in Mogadishu. We find it established on the facts that the reality of the appellant's situation is that he will have to live in makeshift accommodation within an IDP camp where there is a real risk, especially in light of current conditions, that the appellant will be subjected to conditions that will fall below acceptable humanitarian standards.
59. On this basis alone we conclude that the appellant has discharged the burden upon him to the required standard to show that an exception to the Secretary of State's obligation to deport him from the United Kingdom is made out and accordingly we must allow the appeal.

Decision

60. We allow the appeal.

Anonymity.

61. The First-tier Tribunal made an order pursuant to rule 13 of The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014.

    We make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed……
Upper Tribunal Judge Hanson

Dated 5 January 2022