

[Home](#) > UK - MSM (Somalia) v Secretary of State for the Home Department, 2015 UKUT 00413 (IAC)

UK - MSM (Somalia) v Secretary of State for the Home Department, 2015 UKUT 00413 (IAC)

Country of Decision:

United Kingdom

Country of Applicant:

Somalia

Date of Decision:

05-06-2015

Citation:

MA (Somalia) v Secretary of State for the Home Department, [2015] UKUT 413

Court Name:

Upper Tribunal (Immigration and Asylum Chamber)

Keywords:

Inhuman or degrading treatment or punishment

Non-state actors/agents of persecution

Persecution (acts of)

Persecution Grounds/Reasons

Political Opinion

Refugee Status

Well-founded fear

Relevant Legislative Provisions:

International Law

International Law > [1951 Refugee Convention](#) [1]

Council of Europe Instruments > [EN - Convention for the Protection of Human Rights and Fundamental Freedoms](#) [2] > [Article 2](#) [3]

Council of Europe Instruments > [EN - Convention for the Protection of Human Rights and Fundamental Freedoms](#) [2] > [Article 3](#) [4]

European Union Law > [EN - Charter of Fundamental Rights of the European Union](#) [5] > [Article 10](#) [6]

European Union Law > [EN - Qualification Directive, Directive 2004/83/EC of 29 April 2004](#) [7] > [Art 9](#) [8]

European Union Law > [EN - Qualification Directive, Directive 2004/83/EC of 29 April 2004](#) [7] > [Art 10](#) [9]

Headnote:

There is a real risk that by virtue of his predicted employment in the media sector the Appellant will be persecuted for political opinion and/or that a breach of his rights under Articles 2 and 3 ECHR will occur.

The Appellant is not to be denied refugee status on the ground that it would be open to him to seek to engage in employment other than in the journalistic or media sector.

Facts:

The case related to a 29 year old Somali national who arrived in the UK in October 2013. The appellant was a journalist by profession and had previously worked as a qualified teacher. He intended to continue working as a journalist if returned to Somalia. The appellant claimed a threat to life from Al-Shabaab and risk of ill treatment by the Government. He asserted solely the ground of political opinion for his asylum status.

The appellant's claim for asylum was rejected by the Home Office as was his appeal before the First Tier Tribunal on 18 March 2014. Permission to appeal to the Upper Tier Tribunal was granted and the Tribunal held on the 29 May 2014 that there had been an error of law (in not deciding whether the Appellant would continue to work as a journalist on return). The Tribunal preserved findings of fact namely that the appellant had never been targeted or threatened by Al-Shabaab and neither were any of his colleagues at the radio station where he worked. His wife had not relocated to a safe place and that the initial reason for becoming a journalist was increased income. By reason of admission of fresh evidence the Tribunal adjourned a preliminary ruling to look, specifically, at whether the appellant intended to continue his career as a journalist on return and whether former journalists, no longer pursuing their occupation, would be in need of protection in light of relevant country evidence.

Decision & Reasoning:

1. The risk question

To answer, Tribunal considered:

1. whether, from the perspective of risk, a distinction is to be made between journalists working for a pro-government media organisation and those who do not.
2. whether only certain types of workers in the media sector are at risk.
3. whether any distinction is to be made between Mogadishu and the rest of Somalia.

Tribunal's findings, on the basis of Home Office Country Guidance, UN reports and more:

1. Appellant's profession will involve expression or imputation of political opinions. Pro-government or anti-Al Shabaab political opinions are attributed to all those who work for media organisations. No distinction is to be made as regards risk.
2. No basis for distinction between journalists and ?media workers?. Members of the endangered group are not strictly confined to journalists.
3. No basis for distinction between Mogadishu and other areas of Somalia.

Tribunal rejects, however, the claim that the Appellant will suffer persecution from State actors. The supporting evidence (detention of a small number of journalists for unspecified reasons and for short periods, followed by release etc) falls short, both quantitatively and qualitatively.

Conclusion on 1.: There is a real risk that by virtue of his predicted employment in the media sector the Appellant will be persecuted for political opinion and/or that a breach of his rights under Articles 2 and 3 ECHR will occur.

2. Change of conduct issue

The Tribunal asserts the following principle (based partially on case law from the CJEU, namely joined cases C-71/11 and C-99/11 Y and Z and Joined cases C-199-201/12 X, Y and Z): that the asylum seeker who could avoid persecution on his return, but who (however unreasonably) would not do so is in principle a refugee. The Tribunal, therefore, disagrees with the Home Office's submission, based on HJ (Iran) v SSHD, that a compulsory adjustment of a person's behaviour in order to avoid persecution will not constitute persecution unless it entails the forfeiture of a fundamental human right.

According to the Tribunal, the reason for the persecution is political opinion, which engages the right of freedom of expression. Protection of the right in question must prevail; this is achieved by the grant of refugee status. The effect of such grant is to enable the person concerned to exercise the right freely in the country of refuge.

The Tribunal finds MSM will become a journalist and not take the requested avoiding action. Even with the avoiding behaviour, which it is not accepted can be demanded, the risk of persecution would remain. While there is no right to pursue a particular profession, the Appellant's protected characteristic arises inevitably from his profession.

The Tribunal also rejects an asserted distinction between conduct forming a 'core' or 'marginal' expression of the Convention ground in question. This would not be practicable in terms of a quantitative assessment, and neglects the intrinsic nature of the right, which permits and protects the unconstrained expression of a political opinion at any time, at the choice of the individual, as frequently or infrequently as may be desired, subject only to limitations which do not arise in this appeal.

There is no hierarchy of Convention grounds.

Conclusion on 2.: The Appellant is not to be denied refugee status on the ground that it would be open to him to seek to engage in employment other than in the journalistic or media sector.

Obiter: documents such as the CIG, the COI etc should not be forensically construed by the kind of exercise more appropriate a contract, deed or other legal instrument. They are written by laymen, in layman's language, to be read and understood by laymen. Thus courts and tribunals must beware an overly formal or legalistic approach in construing them. They must be evaluated and construed in their full context, which includes previous and related reports.

Outcome:

Appeal allowed.

Subsequent Proceedings :

MSM & Ors (wasted costs, effect of s.29(4)) [2016] UKUT 62 (IAC) (15 January 2016).

Observations/Comments:

The case turns on an interesting point of international refugee law, namely whether a person can be denied protection status on the ground that it is reasonable to expect said person to change their conduct in order to avoid being persecuted. As a result the case raises a possible tension between domestic case law (HJ(Iran)) and European jurisprudence (Germany v Y and Z and Netherlands v X, Y and Z). The dissonance arises as to whether it is permissible to take into account the avoidance or modification of conduct on the part of the person concerned which is voluntary. The former jurisprudence may possibly allow for voluntary change in behaviour whereas the latter rules this out completely. Given the supremacy of EU law the Tribunal aligns itself with Y and Z and X, Y and Z in confirming that modification of behaviour related to the right which is engaged is irrelevant and such a possibility must be disregarded.

The case also touches upon the Tribunal's inquisitorial jurisdiction. In response to the request of the Home Office to withdraw a letter conceding to the fact that journalists are at a risk of persecution in Somalia, the Tribunal notes that this would not fall within its public law remit. As part of its duties to judicially examine evidence the Tribunal is bound to assess all relevant evidence, of which fairness to the litigant will be an obligatory factor to take into consideration.

Lastly, it is noted that the UNHCR intervened in this case.

For further commentary on this case:

[Upper Tribunal finds Somali journalist cannot be expected to change profession to avoid persecution](#) [11], Colin Yeo.

[Link asserts](#) [12] that "*journalists cannot be reasonably expected to change profession to evade persecution. Importantly, notes that as a matter of European law, the voluntary discretion test in HJ (Iran), is no longer to be followed (paragraphs 43 to 48)*"

This case summary was written by Ben Wild, a trainee solicitor with an MA in International Law from UN University for Peace in Costa Rica.

Attachment(s):



[00413 ukut iac 2015 msm somalia - political risk, journalists.pdf](#)[13]

Other sources cited:

Home Office's Country of Origin Report on Somalia of August 2013

BBC report of July 2012

Freedom House report of September 2012

Danish Norwegian fact finding mission (May 2013)

Home Office Report, entitled 'Country Information and Guidance' dated December 2014

2013 Home Office publication entitled 'Country Information and Guidance: Somalia'

Links:

[1] <http://www.asylumlawdatabase.eu/en/content/1951-refugee-convention>

[2] <http://www.asylumlawdatabase.eu/en/content/en-european-convention-protection-human-rights-and-fundamental-freedoms-echr>

[3] https://www.asylumlawdatabase.eu/node/195#toc_4

[4] https://www.asylumlawdatabase.eu/node/195#toc_12

[5] <https://www.asylumlawdatabase.eu/node/453>

[6] https://www.asylumlawdatabase.eu/node/453#toc_53

[7] <http://www.asylumlawdatabase.eu/en/content/qualification-directive>

[8] <http://www.asylumlawdatabase.eu/en/content/qualification-directive#Art%209%20QD>

[9] <http://www.asylumlawdatabase.eu/en/content/qualification-directive#Art%2010%20QD>

[10] https://www.asylumlawdatabase.eu/node/453#toc_221

[11] <https://www.freemovement.org.uk/upper-tribunal-finds-somali-journalist-cannot-be-expected-to-change-profession-to-avoid-persecution/>

[12] <http://www.no5.com/barristers/barrister-cvs/s-chelvan-immigration-asylum-and-nationality/>

[13] https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/00413_ukut_iac_2015_msm_somalia%20-%20political%20risk%2C%20journalists.pdf