

Secretary of State for the Home Department v OA

[2021] EUECJ C-255/19

Facts

OA is a Somali national from Mogadishu of the minority Reer Hamar clan. In 2003, OA obtained refugee status in the UK as a dependent of his wife. His wife had obtained refugee status in 2001 as they had suffered serious harm and violence at the hands of the Hawiye militia in Mogadishu on several occasions.

In 2016, the Secretary of State for the Home Department ('SSHD') revoked OA's refugee status on the ground of a change in circumstances in his country of origin. It was deemed he did not qualify for humanitarian protection and his return to Somalia would not place the UK in breach of its obligations under Article 3 of the European Convention on Human Rights ('ECHR'). The SSHD's decision was based on *MOJ & Ors (return to Mogadishu) Somalia CG*,¹ the latest Country Guidance case on Somalia. OA appealed the decision to the First-tier Tribunal that dismissed his appeal. The Upper Tribunal set aside that decision and the appeal was re-heard by the First-tier Tribunal, dismissing the asylum appeal but finding that OA's return would breach art 3 ECHR. The Upper Tribunal again set aside the decision of the First-tier Tribunal and reserved the matter to itself.

Before the Upper Tribunal, the SSHD argued that in accordance with art 11(1)(e) of Council Directive 2004/83 (the 'Qualification Directive'),² there was a non-temporary change of circumstances in his country of origin because minority clans are no longer subject to persecution by majority clans in the Mogadishu region and the State now provided sufficient protection. OA disputed the SSHD's decision to revoke his refugee status and argued that he continued to have a well-founded fear of being persecuted in Somalia because he belonged to a minority clan and the State was unable to provide effective protection. OA also argued that the Country Guidance case of *MOJ* was based on a misunderstanding of State protection because it relied on the availability of protection from family or other clan members, who are private actors rather than State actors.

The Upper Tribunal referred some questions to the Court of Justice of the European Union ('CJEU') related to the meaning of protection in the Convention on the Status of Refugees, as reproduced in the Qualification Directive. In effect, the Upper Tribunal wanted the CJEU to clarify whether:

- i. the requirements in art 7 Qualification Directive for protection also apply to cessation of refugee status in art 11(1)(e) Qualification Directive;
- ii. 'protection of the country of nationality'³ means State protection;

¹ [2014] UKUT 00442 ('*MOJ*').

² Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

³ Qualification Directive, art 11(1)(e) and art 2(e).

- iii. the specific requirements regarding the nature of protection as set out in art 7 Qualification Directive, namely that protection can be provided by the State or ‘parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State’ and that protection is generally provided when these actors ‘take reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection’, applies solely to being unable or unwilling to avail oneself of the protection of that country or whether it also applies to the well-founded fear of being persecuted element of art 2 Qualification Directive; and whether
- iv. the effectiveness or availability of protection is to be assessed solely by reference to the protective acts/functions of State actors or whether regard can be had to the protective acts/functions performed by private (civil society) actors such as families and/or clans.

Held

Firstly, the CJEU found that ‘protection’ for the purposes of cessation of refugee status was to be interpreted in the same way as protection in the definition of a refugee. Accordingly, the requirements of protection in the context of cessation are the same as those in the context of refugee status determination,⁴ more specifically as set out in art 7 Qualification Directive, namely that actors of protection ‘take reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection’.⁵

Secondly, the CJEU held that mere social and financial support ‘is inherently incapable of either preventing acts of persecution or of detecting, prosecuting and punishing such acts and, therefore, cannot be regarded as providing’⁶ protection in accordance with the minimum requirements of the Qualification Directive.

Further, the CJEU concluded that protection in terms of security (as opposed to social and financial support) provided by clans in Mogadishu was not to be taken into account with respect to the effectiveness of State protection because the actors of protection as defined in the Qualification Directive were limited to the State itself or parties of organisations controlling the State or substantial parts of the territory of the State.⁷

Thirdly, the CJEU noted that the two elements of the definition of a refugee⁸ concerning a well-founded fear of being persecuted and protection were ‘intrinsically linked’ because protection means protection from acts of persecution.⁹ These two elements of the refugee definition

⁴ *Secretary of State for the Home Department v OA* [2021] EUECJ C-255/19 (‘OA’) [35].

⁵ *ibid* [37]-[38].

⁶ *ibid* [46].

⁷ *ibid* [52]-[53].

⁸ Qualification Directive, art 2(c).

⁹ *OA* [56].

Please cite as Christel Querton, Case Notes and Comments: *Secretary of State for the Home Department v OA* [2021] EUECJ C-255/19, Journal of Immigration, Asylum and Nationality Law Vol 35(3) 2021, 281-285.

© The Author(s) 2021.

cannot accordingly be subject to a separate criterion of protection and both must be subject to the minimum requirements of art 7(2) Qualification Directive.¹⁰

Therefore, the cessation provision of the Qualification Directive must be interpreted as meaning that any social and financial support provided by private actors (such as clans or families) falls short of what is required to constitute protection. These factors are of no relevance in assessing whether there continues to be a well-founded fear of being persecuted in the context of cessation but also in determining whether protection is effective and available in the context of refugee status determination.¹¹

Comment

The CJEU's finding that the interpretation of cessation provisions should reflect the refugee definition corresponds to the Court of Appeal's 'mirror image' approach set out in *SSHD v MA (Somalia)*¹² as endorsed in *SSHD v MS (Somalia)*.¹³ Thus, although the case of *OA* is a cessation judgment, it also has wider implications for the recognition of refugee status. More specifically, it clarifies the meaning of protection and actors of protection in EU law.

The judgment provides guidance likely to impact pervasive approaches to interpretation of the refugee definition in the UK. Although the UK is no longer bound by the Qualification Directive since the end of the transition period on 31 December 2020, the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 SI No. 2525 that were adopted to transpose the Qualification Directive into domestic law constitute EU-derived domestic legislation¹⁴ and the judgment is relevant to their interpretation.¹⁵

The CJEU in *OA* established that the question of protection cannot be dissociated from the notion of actors of protection as defined in art 7(1) Qualification Directive. The nature of protection is thus inherently linked to the relevant actors of protection. The CJEU highlighted that by their very nature, private or non-State actors cannot offer the type of protection envisaged by the Qualification Directive. The reasoning of the CJEU is based on the distinction between understanding protection in terms of safety against persecution and serious harm and protection in terms of social support mechanisms, such as financial assistance to re-settle in the country of origin, which ensures the returnee's living conditions do not fall below the minimum standard. As State and non-State actors perform inherently different functions, the protective acts of the two types of entities cannot be assimilated or combined into an assessment of sufficiency of protection.

¹⁰ *ibid* [61]-[62].

¹¹ *ibid* [63].

¹² [2018] EWCA Civ 994, [2(1)].

¹³ [2019] EWCA Civ 1345, [47].

¹⁴ European Union (Withdrawal) Act 2018, s 2.

¹⁵ Withdrawal Agreement, arts 86 and 89 (given effect in domestic law by section 7A European Union (Withdrawal) Act 2018) provide that CJEU judgments, including preliminary rulings in requests made before but handed down after the end of the transition period, 'shall have binding force in their entirety on and in the United Kingdom'. Thus, in addition to retained EU law (European Union (Withdrawal) Act 2018, s 6), UK courts will also have to take into account the CJEU's decision in *OA*.

Insofar as it is inconsistent with the binding authority of *OA*, the Upper Tribunal's Somalia country guidance on sufficiency of protection in *MOJ* is no longer authoritative as it relied on the availability of clan and/or close family 'protection'.¹⁶ As acknowledged by Upper Tribunal Judge Storey when rejecting the SSHD's objection to the reference to the CJEU, 'in assessing whether a well-founded fear of being persecuted exists, one element that has to be factored in is whether there is available protection; the protection inquiry is a "holistic" one'.¹⁷ The Upper Tribunal in *MOJ* relied heavily on the existence, and reliance by State authorities themselves, on the protective acts and functions performed by private actors to conclude that there was effective protection.¹⁸ The Upper Tribunal found that although 'ordinary' civilian residents of Mogadishu did not have the benefit of an efficient and effective police force to meet their protection needs,¹⁹ police protection may be available depending on clan membership and/or support from nuclear family.²⁰ It also found that those living in IDP camps at or close to levels of destitution, may also be more likely to demonstrate an absence of sufficiency of protection given the level of abuses experienced in some IDP camps.²¹ Depending on the circumstances of each case, the case of *OA* is likely to affect the outcome of many cases regarding return to Somalia where the SSHD or Tribunal might otherwise have relied on support from clans or family members.

More generally, the judgment is likely to have a wider impact on other Upper Tribunal's country guidance determinations that have included support from non-State actors in the assessment of risk on return. The example of NGO shelters and 'a supportive family' for women victims of trafficking in Nigeria²² or male family members for Sikh or Hindu women in Afghanistan are cases in point.²³ Finally, as the European Court of Human Rights' approach to non-State actors weighed in the Upper Tribunal's decision to refer the questions to the CJEU in the first place, it is hoped that it will take note of the judgment to address its unwarranted reliance on male relatives/networks as protection mechanisms for women at risk of gender-based violence in their countries of origin.²⁴

Dr Christel Querton

Wallscourt Fellow in Law, University of the West of England

¹⁶ Practice Direction for the Immigration & Asylum Chamber of the First-tier and the Upper Tribunal, at part 12 (para 12.2).

¹⁷ *Secretary of State for the Home Department v OA*, 22 March 2019, Appeal Number: RP/00137/2016, [51].

¹⁸ [2014] UKUT 00442, it noted that "access to protection for a citizen of Mogadishu is a composite issue", [361].

¹⁹ [355].

²⁰ [360].

²¹ [364].

²² *HD (Trafficked women) Nigeria CG* [2016] UKUT 00454 (IAC), [97], [146], [151], [163], [166]-[168], and [174].

²³ *TG and others (Afghan Sikhs persecuted) Afghanistan CG* [2015] UKUT 00595 (IAC), [93], [119(iii)(a)] and [135].

²⁴ For a critique of this approach, see Christel Querton, 'The Role of the European Court of Human Rights in the Protection of Women Fleeing Gender-Based Violence in their Home Countries' (2017) 7(2) *Feminists@Law* (Multimedia).