Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00024/2017

THE IMMIGRATION ACTS

Heard at Field House
On 25th March 2019

Decision & Reasons Promulgated
On 19th August 2019

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

AS
(ANONYMITY DIRECTION MADE)
Respondent

Representation:
For the Appellant: Ms S Chuna, Home Office Presenting Officer
For the Respondent: Ms S Aziz of Counsel, instructed by Duncan Lewis & Co Solicitors

DECISION AND REASONS

1. The Secretary of State appealed against the decision of First-tier Tribunal Judge Bird promulgated on 25 May 2018 in which AS' appeal was allowed on asylum grounds and also on Article 3 and Article 8 human rights grounds. In a decision promulgated on 25 May 2018, the Upper Tribunal found an error of law in that decision, set it aside and gave directions for the re-hearing of the appeal in the Upper Tribunal. The background to this appeal is set out in the error of law decision annexed and will not be repeated herein save as where necessary. For ease I continue to refer to the parties

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as they were before the First-tier Tribunal, with AS as the Appellant and the Secretary of State as the Respondent.

Immigration Law and Rules Relevant to the Appellant

2. So far as relevant to this appeal, section 32 of the UK Borders Act 2007 states that a foreign criminal is a person who is not a British Citizen, who is convicted in the United Kingdom of an offence and sentenced to a period of imprisonment of at least 12 months. Section 32(5) of that Act requires the Secretary of State to make a deportation order in respect of a foreign criminal unless one of the exceptions in section 33 applies. The first exception is where removal of the foreign criminal would breach his or her rights protected by the European Convention on Human Rights or would place the United Kingdom in breach of its obligations under the Refugee Convention.

Refugee Convention & cessation

3. It is for an Appellant to show that he is a refugee. By Article 1A(2) of the Refugee Convention, a refugee is a person who is out of the country of his or her nationality and who, owing to a well-founded fear of persecution for reasons of race, religion, nationality or membership of a particular social group or political opinion, is unable or unwilling to avail him or herself of the protection of the country of origin.

4. The degree of likelihood of persecution needed to establish an entitlement to asylum is decided on a basis lower than the civil standard of the balance of probabilities. This was expressed as a "reasonable chance", "a serious possibility" or "substantial grounds for thinking" in the various authorities. That basis of probability not only applies to the history of the matter and to the situation at the date of decision, but also to the question of persecution in the future if the Appellant were to be returned.

5. Under the Refugee or Person in Need of International Protection (Qualification) Regulations 2006, a person is to be regarded as a refugee if they fall within the definition set out in Article 1A of the Refugee Convention (see above) and are not excluded by Articles 1D, 1E or 1F of the Refugee Convention (Regulation 7 of the Qualification Regulations).

6. Article 1C of the Refugee Convention provides that the Convention shall cease to apply to any person falling under the terms of section A if *"(5) He can no longer, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality."*

7. Article 11 of Council Directive 2004/83/EC (the Qualification Directive) deals with the same issue as follows:

> *"1. A third-country national or a stateless person shall cease to be eligible for subsidiary protection when the circumstances which led to the granting of subsidiary protection status have ceased to exist or have changed to such a degree that protection is no longer required.*

2. In applying paragraph 1, Member States shall have regard to whether the change in circumstances is of such a significant and non-temporary nature that the person eligible for subsidiary protection no longer faces a real risk of serious harm."

8. Finally, paragraph 339A of the Immigration Rules also deals with this issue in (v) as follows:

"(v) he can no longer, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of nationality."

9. Paragraph 339A goes on to state that, *"In considering (v) and (vi), the Secretary of State shall have regard to whether the change of circumstances is of such a significant and non-temporary nature that the refugee's fear of persecution can no long be regarded as well-founded."*

10. The Court of Appeal in Secretary of State for the Home Department v MA (Somalia) [2018] EWCA Civ 994, further to the CJEU decision in Joined Cases C-175/08, C-176/08, C-178/08, C-179/08, Aydin Salahadin Abdulla, Kamil Hasan, Ahmed Adem, Hamrin Mosa Rashi & Dier Jamal v Bundesrepublik Deutschland, 2 March 2010, concluded that: *"A cessation decision is the mirror image of a decision determining refugee status. By that I mean that the grounds for cessation do not go beyond verifying whether the grounds for recognition of refugee status continue to exist. Thus, the relevant question is whether there has been a significant and non-temporary change in circumstances so that the circumstances which caused the person to be a refugee have ceased to apply and there is no other basis on which he would be held to be a refugee. The recognising state does not in addition have to be satisfied that the country of origin has a system of government or an effective legal system for protecting basic human rights, though the absence of such systems may of course lead to the conclusion that a significant and non-temporary change in circumstances has not occurred."* [paragraph 2(1)].

11. Although in MS (Art 1C(5) Mogadishu (Somalia) [2018] UKUT 196 (IAC) the Upper Tribunal found that the Respondent is not entitled to cease a person's refugee status pursuant to article 1C(5) of the Refugee Convention solely on the basis of a change of circumstances in one part of the country of proposed return; this was before the Court of Appeal's decision in MA (Somalia) referring to the symmetry between a decision determining refugee status and cessation. In AMA (Article 15(c) – proviso – internal relocation) Somalia [2019] UKUT 11 (IAC), the Upper Tribunal found that changes in a refugee's country of origin affecting only part of the country may, in principle, lead to cessation of refugee status, albeit it is difficult to see how in practice protection could be said to be sufficiently fundamental and durable in such circumstances.

Certificate under section 72 of the Nationality, Immigration and Asylum Act 2002

12. Section 72 of the Nationality, Immigration and Asylum Act 2002 applies for the purposes of construction and application of Article 33(2) of the Refugee Convention as to exclusion from protection. Section 72(2) states as follows:

"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 –

(a) convicted in the United Kingdom of an offence, and

(b) sentenced to a period of imprisonment of at least two years."

13. Further to section 72(10), where a Tribunal hears an appeal against a Respondent's certificate under subsection (2) above under section 82 of this Act, it "(a) must begin substantive deliberation on the appeal by considering the certificate, and (b) if in agreement that presumptions under (2) … apply (having given the appellant an opportunity for rebuttal) must dismiss the appeal in so far as it relies on the ground specified in (9)(a)" which relates to an appeal on the grounds that to remove the appellant would breach the United Kingdom's obligations under the Refugee Convention.

14. In accordance with the Upper Tribunal decision in Essa (Revocation of protection status appeals) [2018] UKUT 244 (IAC), where section 72(10) applies, an appeal to the Tribunal must be dismissed even if the Refugee Convention grounds are made out.

Country Guidance

15. The parties are both agreed that the Country Guidance in MOJ & Ors (Return to Mogadishu) Somalia CG [2014] UKUT 00442 (IAC) is applicable to the present appeal and neither party seeks any departure from it. The key findings for the purposes of this appeal as summarised in the headnote, with additional cross-referencing to the original paragraphs numbers in the main body of the decision given in square brackets for ease of cross referencing to relevant paragraphs in later decisions below:

(i) The country guidance issues addressed in this determination are not identical to those engaged with by the Tribunal in AMM and others (conflict; humanitarian crisis; returnees; FGM) Somalia CG [2011] UKUT 445 (IAC). Therefore, where country guidance has been given by the Tribunal in AMM in respect of issues not addressed in this determination then the guidance provided by AMM shall continue to have effect.

(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. [paragraph 407(a)]

(iii) There has been durable change in the sense that the Al Shabaab withdrawal from Mogadishu is complete and there is no real prospect of a re-established presence within the city. That was not the case at the time of the country guidance given by the Tribunal in AMM. [paragraph 407(b)]

(iv) *The level of civilian casualties, excluding non-military casualties that clearly fall within Al Shabaab target groups such as politicians, police officers, government officials and those associated with NGOs and international organisations, cannot be precisely established by the statistical evidence which is incomplete and unreliable. However, it is established by the evidence considered as a whole that there has been a reduction in the level of civilian casualties since 2011, largely due to the cessation of confrontational warfare within the city and Al Shabaab's resort to asymmetrical warfare on carefully selected targets. The present level of casualties does not amount to a sufficient risk to ordinary civilians such as to represent an Article 15(c) risk.* [paragraph 407(c)]

(v) *It is open to an ordinary citizen of Mogadishu to reduce further still his personal exposure to the risk of "collateral damage" in being caught up in an Al Shabaab attack that was not targeted at him by avoiding areas and establishments that are clearly identifiable as likely Al Shabaab targets, and it is not unreasonable for him to do so.* [paragraph 407(d)]

(vi) *There is no real risk of forced recruitment to Al Shabaab for civilian citizens of Mogadishu, including for recent returnees from the West.* [paragraph 407(e)]

(vii) *A person returning to Mogadishu after a period of absence will look to his nuclear family, if he has one living in the city, for assistance in re-establishing himself and securing a livelihood. Although a returnee may also seek assistance from his clan members who are not close relatives, such help is only likely to be forthcoming from majority clan members, as minority clans may have little to offer.* [paragraph 407(f)]

(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.* [paragraph 407(g)]

(ix) *If it is accepted that a person facing 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 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.* [paragraph 407(h)]

(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.* [paragraph 407(h)]

(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.* [paragraph 408]

(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 formal 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 prospect of having to live in conditions that will fall below acceptable humanitarian standards.* [paragraphs 424 and 425]

Article 3 of the European Convention on Human Rights

16. In terms of the Article 3 threshold to be applied, the present case is not a "paradigm" case as in MSS v Belgium & Greece 53 EHRR 28. As confirmed by the Court of Appeal in Secretary of State for the Home Department v Said [2016] EWCA Civ 442, Article 3 was intended to protect persons from violations of their civil and political rights, not their social and economic rights. The return of a person who was not at risk of harm because of armed conflict or violence would not in the case of economic deprivation violate Article 3 unless the circumstances were such as those in N v UK [2005] 2 AC 296 (as summarised by Lady Justice Arden in paragraph 34 of MA (Somalia) v Secretary of State for the Home Department [2018] EWCA Civ 994). The main conclusion on this point in Said is at paragraph 18 which states as follows:

> *"These cases demonstrate that to succeed in resisting removal on article 3 grounds on the basis of suggested poverty or deprivation on return which are not the responsibility of the receiving country or others in the sense described in para 282 of Sufi and Elmi, whether or not the feared deprivation is contributed to by medical condition, the person liable to deportation must show circumstances which bring him within the approach of the Strasbourg Court in the D and N cases."*

17. There is some concern expressed by the Court of Appeal in Said as to possible conflation between factors relevant to the assessment of internal relocation, humanitarian protection and Article 3 in MOJ, which need to be set out in full. The discussion is at paragraphs 26 to 31 which states as follows:

> *"26. Paragraph 407(a) to (e) are directed to the issue that arises under article 15(c) of the Qualification Directive. Sub-paragraphs (f) and (g) establish the role of clan membership in today's Mogadishu, and the current absence of risk from belonging to a minority clan. Sub-paragraph (h) and paragraph 408 are concerned, in broad terms, with the ability of a returning Somali national to support himself. The conclusion at the end of paragraph 408 raises the possibility of a person's circumstances failing below what "is acceptable in humanitarian protection terms". It is, with respect, unclear whether that is a reference back to the definition of "humanitarian protection" arising from article 15 of the Qualification Directive. These factors do not go to inform any question under article 15(c). Nor does it chime with article 15(b), which draws on the language of article 3 of the Convention, because the fact that a person might be returned to very deprived living conditions, could not (save in extreme cases) lead to a conclusion that removal would violate article 3.*
>
> …
>
> *28. In view of the reference in the paragraph immediately preceding para 407 to the UNHCR evidence, the factors in paras 407(h) and 408 are likely to have been introduced in connection with internal flight or internal relocation arguments, which was a factor identified in para 1 setting out the scope of the issues before UTIAC. Whilst they may have some relevance in a search for whether a removal to Somalia would give rise to a violation of article 3 of the Convention, they cannot be understood as a surrogate for an examination of the circumstances to determine whether such a breach would occur. I am unable to accept that if a Somali national were able to bring himself within the rubric of para 408, he would have established that his removal to Somalia would breach article 3 of the Convention. Such an approach would be inconsistent with the domestic and Convention jurisprudence which at para 34 UTIAC expressly understood itself to be following.*
>
> *29. Having set out its guidance, UTIAC then turned to consider IDPs, about which each of the experts had given some evidence. It recognised that the label was problematic because there were individuals who are considered as internally displaced persons who have settled in a new part of Somalia in "a reasonable standard of accommodation" and with access to food, remittances from abroad or an independent livelihood. UTIAC considered that the position would be different for someone obliged to live in an IDP camp, the conditions of some of which "are appalling", para 411. It continued by quoting from evidence of armed attacks on IDP camps, of sexual and other gender based violence and the forcible recruitment of internally displaced children into violence, albeit that it did not accept the evidence it quoted. UTIAC also mentioned overcrowding, poor health conditions and (ironically) that the economic improvements in Mogadishu were leading to evictions from IDP camps in urban centres with vulnerable victims being unable to seek refuge elsewhere.*

30. It is immediately apparent that the discussion of this evidence, which is culled from expert reports, understandably touches on concerns about violence, which in article 3 terms would be analysed by reference to the approach in MSS and Sufi and Elmi cases, and aspects of destitution, which would be analysed by reference to the approach in the N and D cases. The conflation continues in para 412:

> *"Given what we have seen, and described above, about the extremely harsh living conditions, and the risk of being subjected to a range of human rights abuses, such a person is likely to found to be living at a level that falls below acceptable humanitarian standards."*
>
> *Having further discussed the contradictory evidence about how many people lived in IDP camps, UTIAC concluded that "many thousands of people are reduced to living in circumstances of destitution" albeit that there was no reliable figure of how many people lived in such destitution in IDP camps. The determination continued:*
>
>> *"420.Whilst it is likely that those who do find themselves living in inadequate makeshift accommodation in an IDP camp will be experiencing adverse living conditions such as to engage the protection of article 3 of the ECHR, we do not see that it gives rise to an enhanced Article 15(c) risk since there is an insufficient nexus with the indiscriminate violence which, in any event, we have found not to be at such a high level that all civilians face a real risk of suffering serious harm. Nor does the evidence support the claim that there is an enhanced risk of forced recruitment to Al Shabaab for those in the IDP camps or that such a person is more likely to be caught up in an Al Shabaab attack …*
>>
>> *421. Other than those with no alternative to living in makeshift accommodation in an IDP camp, the humanitarian position in Mogadishu has continued to improve since the country guidance in AMM was published. The famine is confined to history … The "economic boom" has generated more opportunity for employment and … self-employment. For many returnees remittances will be important …*
>>
>> *422. The fact that we have rejected the view that there is a real risk of persecution or serious harm or ill treatment to civilian returnees in Mogadishu does not mean that no Somali national can succeed in a refugee or humanitarian protection or article 3 claim. Each case will fall to be decided on its own facts. As we have observed, there will need to be a careful assessment of all the circumstances of a particular individual."*

31. I entirely accept that some of the observations made in the course of the discussion of IDP camps may be taken to suggest that if a returning Somali national can show that he is likely to end up having to establish himself in an IDP camp, that would be sufficient to engage the protection of article 3. Yet such a stark proposition of cause and effect would be inconsistent with the article 3

jurisprudence of the Strasbourg Court and binding authority of the domestic courts. In my judgement the position is accurately stated in para 422. That draws a proper distinction between humanitarian protection and article 3 and recognises that the individual circumstances of the person concerned must be considered. An appeal to article 3 which suggests that the person concerned would face impoverished conditions of living on removal to Somalia should, as the Strasbourg Court indicated in Sufi and Elmi at para 292, be viewed by reference to the test in the N case. Impoverished conditions which were the direct result of violent activities may be viewed differently as would cases where the risk suggested is of direct violence itself."

18. Paragraph 422 of MOJ stated:

    "The fact that we have rejected the view that there is a real risk of persecution or serious harm or ill treatment to civilians or returnees in Mogadishu does not mean that no Somali national can succeed in a refugee or humanitarian protection or Article 3 claim. Each case will fall to be decided on its own facts. As we have observed, there will need to be a careful assessment of all the circumstances of a particular individual."

19. The question of whether the risk of deprivation on return would lead to a violation of Article 3 of the European Convention on Human Rights was revisited in MA (Somalia). Lady Justice Arden, being bound by the decision in Said, confirmed that there is no violation of Article 3 by reason of a person being returned to a country which for economic reasons can not provide him with basic living standards. The Respondent in MA contended that the situation in Somalia was brought about by conflict, which is recognised by the European Court of Human Rights as an exception to the analysis. Lady Justice Arden however concluded at paragraph 63 that:

    "… It is true that there has historically been severe conflict in Somalia, but, on the basis of MOJ, that would not necessarily be the cause of deprivation if the respondent were returned to Somalia now. The evidence is that there is no present reason why a person, with support from his family and/or prospects of employment, should face unacceptable living standards."

20. It is well established that in Article 3 cases where the risk to the individual is not from treatment emanating from intentionally inflicted acts of the public authorities in the receiving state or from those of non-State bodies in that country when the authorities there are unable to afford him appropriate protection; it is only in very exceptional circumstances that there would be a violation of Article 3. The principles are summarised by the European Court of Human Rights in N as follows:

    "42. Aliens who are subject to expulsion cannot in principle claim entitlement to remain in the territory of a contracting state in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling state. The fact that the applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the contracting state is not sufficient in itself to give rise to breach of art 3. The decision to remove an alien who is suffering from a serious mental or physical illness to a country where

the facilities for the treatment of that illness are inferior to those available in the contracting state may raise an issue under art 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling. In D v UK … the very exceptional circumstances were that the applicant was critically ill and appeared to be close to death, could not be guaranteed any nursing or medical care in his country of origin and had no family there willing or able to care for him or provide him with even a basic level of food, shelter or social support.

43. The court does not exclude that there may be other very exceptional cases where the humanitarian considerations are equally compelling. However, it considers that it should maintain the high threshold set in D v UK … and applied in its subsequent case law, which it regards as correct in principle, given that in such cases the alleged future harm would emanate not from the intentional acts or omissions of public authorities or non-state bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country.

44. … Advances in medical science, together with social and economic differences between countries, entail that the level of treatment available in the Contracting State and the country of origin may vary considerably. While it is necessary, given the fundamental importance of Article 3 in the Convention system, for the Court to retain a degree of flexibility to prevent expulsion in very exceptional cases, Article 3 does not place an obligation on the Contracting State to alleviate such disparities through the provision of free and unlimited healthcare to all aliens without a right to stay within its jurisdiction. A finding to the contrary would place too great a burden on the Contracting States."

Immigration Rules and Article 8 of the European Convention on Human Rights

21. The requirements where a person claims that their deportation would be contrary to the United Kingdom's obligations under Article 8 of the European convention on Human rights in so far as they are set out in the Immigration Rules and relate to this appeal are:

***"398.** Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and*

(a) …

(b) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or

(c) … the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

***399.** This paragraph applies where paragraph 398(b) or (c) applies if –*

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British Citizen; or

(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case

(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2 of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

***399A.** This paragraph applies where paragraph 398(b) or (c) applies if –*

(a) the person has been lawfully resident in the UK for most of his life; and

(b) he is socially and culturally integrated in the UK; and

(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported."

22. By virtue of section 117A of the Nationality, Immigration and Asylum Act 2002, Part V of that Act applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches Article 8 of the European Convention on Human Rights and as a result would be unlawful under section 6 of the Human Rights Act 1998.

23. Section 117B applies to the public interest considerations in all cases and section 117C applies additional considerations to cases involving foreign criminals. So far as relevant to this appeal, section 117B sets out factors to be considered in all cases and the additional consideration in cases involving foreign criminals provides as follows:

*"**117C. Article 8: additional considerations in cases involving foreign criminals***

(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where –

> *(a) C has been lawfully resident in the United Kingdom for most of C's life,*
>
> *(b) C is socially and culturally integrated in the United Kingdom, and*
>
> *(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.*
>
> *(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh."*

24. In KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53, the Supreme Court considered the test for and factors to be taken into account when assessing the meaning of 'unduly harsh' in paragraph 399A of the Immigration Rules and section 117C(5) of the Nationality, Immigration and Asylum Act 2002. In paragraph 23, Lord Carnworth held as follows:

> *"On the other hand the expression "unduly harsh" seems clearly intended to introduce a higher hurdle than that of "reasonableness" under section 117B(6), taking account of the public interest in the deportation of foreign criminals. Further the word "unduly" implies an element of comparison. It assumes that there is a "due" level of "harshness", that is a level which may be acceptable or justifiable in the relevant context. "Unduly" implies something going beyond that level. The relevant context is that set by section 117C(1), that is the public interest in the deportation of foreign criminals. One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent. What it does not require in my view (and subject to the discussion of the cases in the next section) is a balancing of the relative levels of severity of the parent's offence, other than is inherent in the distinction drawn by the section itself by reference to length of sentence. Nor (contrary to the view of the Court of Appeal in IT (Jamaica) v Secretary of State for the Home Department [2016] EWCA Civ 932, [2017] 1 WLR 240, paras 55, 64) can it be equated with the requirement to show "very compelling reasons". That would be in effect to replicate the additional test applied by section 117C(6) with respect to sentences of four years or more."*

25. Within the Supreme Court's consideration of the specific appeal in KO, further reference is made to the authoritative guidance on the meaning of unduly harsh given in MK (Sierra Leone) v Secretary of State for the Home Department [2015] UKUT 223 (IAC), which held in paragraph 46:

> *"By way of self-direction, we are mindful that 'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context, denotes something more severe, or bleak. It is the antithesis of pleasant and comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher."*

The Appellant's Immigration and criminal history

26. The Appellant left Somalia in 1995 and went to Kenya with other family members due to persecution by Hawiye clan members; which included the Appellant's aunt, brother and grandfather being killed because of their clan affiliation. The Appellant and his family went to a refugee camp in Kenya but continued to be persecuted there due to their ethnicity and over time, family members used agents to travel to the United Kingdom.

27. The Appellant entered the United Kingdom with his brother in December 2004, at the age of nine, having left Somalia at the age of eight. He was granted asylum on 30 May 2005 on the basis that he, along with his other family members, were at risk of persecution in Somali as minority clan members.

28. On 28 January 2011, the Appellant was convicted of robbery and sentenced to a referral order for six months. Whilst on bail for this offence, he was further convicted of a separate offence of robbery on 12 April 2011, for which his referral order was extended and he was ordered to pay compensation £150.

29. On 5 July 2011, the Appellant was convicted of robbery and sentenced on 19 August 2011 to a detention and training order for a period of eight months. He was sentenced on the same date for an offence of battery with a concurrent four-month detention and training order.

30. On 4 May 2012, the Appellant was sentenced to three years' imprisonment for his conviction of four counts of conspiracy to rob.

31. On 19 August 2013, the Appellant was convicted of possession of a controlled drug, namely class B cannabis/cannabis resin and sentenced on 4 September 2013 to a youth rehabilitation order, costs and a victim surcharge.

32. On 23 June 2015, the Appellant was convicted of going equipped for burglary and for an offence of battery, for which he was sentenced on 7 September 2015 to 7 months and a consecutive three months in a Young Offenders Institution, and ordered to pay a victim surcharge. The Appellant was released from this period of custody on 6 June 2016.

33. On 27 April 2017, the Appellant was convicted of three counts of possession of a controlled drug, namely the class A drugs, crack cocaine and heroin, and the class B drug of cannabis/cannabis resin, for which he was sentenced to a conditional discharge of 18 months and subject to payment of costs and a victim surcharge.

34. The Appellant was notified of the Respondent's decision to make a deportation decision on 14 January 2016 and a notice of intention to cease his refugee status was served on him on 13 April 2016. The Respondent's decision to deport and revoke the Appellant's refugee status is dated 27 January 2017.

Explanation for refusal

35. In the decision letter dated 27 January 2017, the Respondent decided to revoke the Appellant's refugee status and refuse his protection and human rights claim. In

relation to revocation of refugee status, the Respondent determined that in accordance with paragraph 339A(v) of the Immigration Rules and Article 1C(5) of the Refugee Convention, the Appellant's refugee status could be ceased because he no longer, because of circumstances in connection with which he had been recognised as a refugee ceased to exist, continue to refuse to avail himself of the protection of his country of nationality. The Respondent stated that there had been a fundamental and non-temporary change in Somalia such that he would no longer risk treatment amounting to persecution on return, essentially that there was no clan-based persecution in Mogadishu.

36. The Respondent indicated that representations on behalf of the Appellant and from the UNHCR have been taken into account within the decision, as was the country guidance in MOJ. The Respondent considered that there would not be a breach of Article 3 of the European Convention on Human Rights, if the Appellant were returned to Mogadishu. The Appellant is a male in reasonable health who assimilated into a foreign culture when coming to the United Kingdom and would be able to re-assimilate to Somali culture on return. The Respondent considered that the Appellant had sufficient ties to his home country, including language, cultural background and social network, to be able to re-adapt to life in Somalia and form an adequate private life in that country. Further, the Appellant's skills gained during his time in the United Kingdom, including in English language, would assist him in gaining lawful employment in Somalia with an enhanced prospect of the same in light of the findings in MOJ.

37. Next, the Respondent considered the presumption in section 72 of the Nationality, Immigration and Asylum Act 2002 and found that it applies to the Appellant as he had been convicted in the United Kingdom of a serious offence, with a sentence of imprisonment of at least two years. Reference is made to the Sentencing Remarks in May 2012. It was not accepted that the Appellant had rebutted the presumption, with the Respondent concluding that the Appellant remained a danger to the community and was likely to reoffend in the future. The Appellant did not qualify for a grant of humanitarian protection and in any event was precluded from such a grant by paragraph 339D(iii) of the Immigration Rules.

38. Finally, the Respondent considered the Appellant's right to respect for private and family life under Article 8 of the European Convention on Human Rights through the prism of the Immigration Rules. The Respondent did not accept that the Appellant had established family life in the United Kingdom for the purposes of Article 8 as there was no evidence of additional dependency beyond normal emotional ties with his mother and adult siblings. It was accepted that the Appellant had established private life in the United Kingdom, having lived here for 13 years, but not that he was socially and culturally integrated here given the extent of his criminality. The nature of the Appellant's offending was regarded as anti-social behaviour against the community which may have caused a serious long-term impact on the victims. It was not accepted that the Appellant's presence in the United Kingdom was an indication of integration and the Appellant had been excluded from society for significant periods during his custodial sentences. The Appellant was not in employment, nor financially independent.

39. Further, the Appellant would not face very significant obstacles to his reintegration to Somalia, where he lived until the age of eight and where he retains knowledge of the culture and customs. The Appellant could use the skills and experience gained in the United Kingdom to seek employment and support himself on return, and there would not be very significant obstacles to his reintegration even if the Appellant has no family ties or connections in Somalia. The Appellant is an adult in good health, is not estranged from the language spoken in Somalia and he is likely to have a network of support on return.

40. In these circumstances none of the exceptions to deportation in paragraph 399A of the Immigration Rules applied and further there were no very compelling circumstances to outweigh the public interest in deportation.

The Appellant's claim

41. In his original statement of evidence form dated 25 April 2005, the Appellant gave his name, date of birth and nationality. He states that he was born in the island of Brava and comes from the Bravanese tribe, a minority clan in Somalia. In Somalia the Appellant lived with his mother, father, four brothers and two sisters but following deaths in the wider family by people from the Hawiye tribe, the Appellants whole family moved in 1995 to Kenyan, where their living conditions were poor and they continued to be persecuted. From 1999 to 2004, the children of the family fled and came to the United Kingdom where they were all granted refugee status. There is no mention of the Appellant's parents after he himself left Kenya at the end of 2004 in the statement, although from later documents it is clear that his mother and two further family members arrived in the United Kingdom in 2006 and in 2013, the Appellant's father's whereabouts were unknown, although he was believed to still be in Kenya.

42. In his written statement signed and dated 23 April 2018, the Appellant updates the position from his previous statement. He states that he has not reoffended since February 2017 and has been clean from drugs for the previous six months because he wanted to change his life. The Appellant realises the harm that his drugtaking and criminal behaviour has done to other people and he is truly sorry for this.

43. The Appellant has been in a relationship since September 2017 with a Somali national who has refugee status in the United Kingdom and leave to remain here until October 2018. The Appellant's partner was at the date of the statement pregnant and he would like to marry her once in a position to do so.

44. At the age of 12 or 13, the Appellant started hanging out with a gang of older boys who encouraged him to do petty crime such as robbery, from which he was given a small part of the proceeds. The Appellant started taking drugs around the age of 15, influenced by those around him who were also all taking drugs and he became stressed and in need of money. The Appellant stated that he was not a danger to the community and the United Kingdom. His conviction in 2012 was because he acted as a spotter and although he did not personally harm anyone he accepts that people were injured because of his actions, for which he is sorry. The Appellant's convictions after 2012 were, he says, because he was mixing with sorts of people,

which he accepts is no excuse, but he is also sorry for these offences as well. The Appellant has not had contact with these people for over a year and he has no intention of communicating with them further.

45. The Appellant claims to be at risk on return to Somalia because his skin colour is lighter than most Somalian's and because of his clan affiliation. The Appellant speaks a little bit of Bravanese but he has no contacts or family in Somalia having left there at the age of eight. The Appellant's brother gives him money for essentials but neither he nor any of his other family members would be able to support him in Somalia and they would not be able to return there either. The Appellant thinks that he is unlikely to get a job on return because he doesn't speak the language and would be too afraid to approach anyone for work or accommodation to avoid becoming a target. The Appellant has no work experience and no relevant qualifications for employment. The Appellant considers that he would be a stranger in Somalia and treated with suspicion there. He is fully integrated into British society having not been in Somalia since 2004/2005.

46. The Appellant attended the oral hearing, adopted his written statements and gave oral evidence in English. He stated that his son was born on 19 September 2018 and he sees him every day, being involved in all aspects of his care and having been present for his birth. The Appellant's son lives with his partner and he lives separately with his brother, partly because that is the address to which he is bailed and partly because the couple do not want to live together until the Appellant has sorted out his immigration status and employment. The Appellant's partner has just been granted indefinite leave to remain and hopes to apply for British citizenship after a year. She is not able to return to Somalia.

47. The Appellant stated that his family would not be able to provide him with any financial support on return to Somalia as they are already struggling financially.

48. For the past 18 months the Appellant has been clean from drugs. He stated that he has changed his life and is now looking for a chance to prove himself and be a proper role model to his son.

49. In cross-examination, the Appellant stated that he has been in a relationship for about two years. His partner is Somalian and has been in the United Kingdom since 2009, having arrived with her mother and siblings and has no family remaining in Somalia. The Appellant was not sure whether his partner was a refugee (although his written statement says that she is) or precisely when she obtained indefinite leave to remain, other than it was after their son was born. The Appellant's partner had not attended the oral hearing because she was with the baby and had prepared a statement for the last hearing only. The Appellant has met his partner's family, with his partner translating for him to speak to her mother as she only speaks Somali.

50. The Appellant has not returned to Somalia since he left. In the United Kingdom he has all of his mother's family, including his maternal uncle and no family remaining in Somalia. The Appellant last spoke to his father about eight years ago and has not seen him since he left Somalia. The Appellant's mother speaks Bravanese at home rather than Somali and the Appellant's Bravanese is failing.

51. The Appellant is not currently able to provide any regular financial support for his partner or child, who are themselves supported by public funds. The Appellant would not be able to support them from Somalia either as he does not think that he would be able to survive or seek employment there.

52. I asked the Appellant further questions. He stated that he was from Brava in Mogadishu and his father remained in Somalia when he left. As to his offending, the Appellant stated that he would not reoffend as his mentality had changed. He no longer speaks to people he used to hang around with and his focus is now on his family, to make his mum proud and be a good role model for his son. The Appellant is trying to change his life and learn more about his religion.

Closing submissions

53. On behalf of the Respondent, Ms Chuna relied on the reasons for refusal letter dated 27 January 2017.

54. In relation to the section 72 certificate, the Appellant is someone who has been convicted of a sufficiently serious crime to give rise to the presumption that he poses a risk to the public. His offences were for drugs and robbery; he is a persistent offender and continued offending despite an earlier guilty plea. It was submitted that the Appellant showed a total disregard for the criminal law and his local community. There is no reason why the Appellant is no longer a risk to the public, a recent lack of reoffending is not sufficient of itself to show that the presumption has been rebutted. The Deportation Order is a current deterrent against further offending.

55. As to whether the Appellant continued to pose a risk to the public, the Respondent relies specifically on the latest sentencing remarks. The Appellant was trained for professional robbery at a young age and continued offending with an increasing severity of offences. The offending was so serious that a custodial sentence was required, which reflects the threat posed to the community. The Appellant remains in the same environment as before, has shown willingness and capacity to commit offences and reoffend, such that his deportation is conducive to the public good.

56. The Appellant's last offence was for drugs and there were previous serious offences over a lengthy period during which he had multiple opportunities to reform. He stated that he wanted to change when pleading guilty to an offence in 2012 but carried on offending. The Appellant's history shows that he reoffends when incentives such as custody or bail are removed. It was submitted that he poses a continuing risk to the public and has a propensity to reoffend. The Appellant is subject to a current incentive not to offend, being the Deportation Order. Although it is accepted that the Appellant has family in the United Kingdom now, his previous offending has been for money, as a choice rather than from gainful employment and despite the fact he's already been subject to lengthy periods of custody and risk of deportation, he previously failed to address his offending behaviour. It is not accepted that his current family life would prevent further offending, given that the Appellant's support from family members, including his uncle, was not sufficient previously.

57. The country guidance in the case of MOJ was relied upon, in which it was shown there had been significant changes in Mogadishu since 2006. The Appellant has no links to the security system of administration in Somalia, he identifies as a Somali man, with increasing involvement in his religion maintaining Islamic integrity and on return to Somalia would not be seen as an outsider given that he speaks Bravanese and understands Somali. The country guidance confirmed that Al-Shabaab no longer poses a threat to civilians in Mogadishu and the Appellant is not at risk on return of forcible recruitment, nor on the basis of clan membership.

58. The Appellant's evidence in relation to whether his girlfriend could return to Somalia to continue family life with him there is unclear and no documents have been produced in relation to her or this issue. There is in particular no written statement from her and no evidence to show that they are in a genuine and subsisting relationship. There is also a lack of evidence as to the Appellant's child's status in the United Kingdom and unclear whether he holds indefinite leave to remain or some other form of leave as a dependent of his mother. In any event, it would be not be unduly harsh on either the Appellant's partner or his son to remain in the United Kingdom without him and there are no very compelling circumstances to outweigh the very significant public interest in deportation of the Appellant.

59. On behalf of the Appellant, the skeleton arguments which have been submitted over the course of these appeal proceedings were relied upon. First, in relation to the section 72 certificate, the Appellant has consistently stated that at a young age he was caught up in a criminal gang with criminal activity and although he tried to move away from this, he didn't manage to do so. The Appellant has shown a high level of remorse for a long period of time and other than a caution for possession of drugs in 2017, his last sentence was imposed in 2015. The Appellant has been clean of drugs and has not reoffended since 2017, showing that he is, as claimed, a reformed character. The Appellant now has established family life with a girlfriend and son and wants to pursue family life as part of a unit with them. The Appellant wants to get married and says that having a son has changed his life. In these circumstances, it has not been shown that the Appellant continues to be a risk to the public given the lack of any recent offending and his life changes since.

60. Secondly, in relation to the Respondent's decision to revoke the Appellant's refugee status, the Appellant maintains that he is a member of a minority clan and as such would be targeted and persecuted on return. He would be identified as Bravanese by his skin colour and language spoken. The Appellant left Somalia in 2004, has not returned since, and he has no family and no support there. Although the Appellant's bundles and earlier skeleton arguments included reference to and copies of background evidence in relation to Somalia, no specific reliance was placed on any of its contents by Counsel during oral submissions. It was confirmed by Counsel on behalf of the Appellant that the country guidance in MOJ is applicable to this appeal and that the Appellant was not seeking any departure from it, by reference to the background material submitted or otherwise. It was accepted that the Appellant was from Mogadishu and would not be at risk on return there.

61. Thirdly, in relation to Article 3 of the European Convention on Human Rights, the Appellant relies on the risk of destitution and inhumane treatment on return to Somalia on the basis that he has no contacts or family there, he has been absent since 2004, he does not speak Somali (although it is accepted that he speaks Bravanese and English) and would be homeless on return.

62. Finally, in relation to Article 8 of the European Convention on Human Rights, the Appellant relies on the relationship with his partner and child in the United Kingdom, his partner being a refugee from Somalia (said to have derived her status from her mother) and who has since been granted indefinite leave to remain. It was submitted that she would be unable to return to Somalia with the Appellant and if he was returned it would be difficult for her to even visit there which would cause significant problems in their relationship and would prevent the Appellant from being a father to his son. The likely lack of resources available to the Appellant on return would make even maintaining communication with his family in the United Kingdom difficult. Overall, it was submitted that taking into account the best interests of the child and the Appellant's partner's and child's right to family life, that the grave impact of removal on all of the family would amount to very compelling circumstances to outweigh the public interest in deportation in the present case.

Findings and reasons

63. Although a Tribunal is normally required to begin the determination of an appeal with substantive consideration of the certificate under section 72 of the Nationality, Immigration and Asylum Act 2002; given that the circumstances of this case involve a decision on cessation of Refugee status, I begin with that part of the decision before going on to deal with the certificate.

Refugee Convention & Cessation

64. As a starting point, it is necessary to be clear on where the Appellant is from in Somalia so as to assess risk and whether there has been a significant and non-temporary change in his home area and/or to determine whether internal relocation is an option, for example to Mogadishu if that is not the home area.

65. In his screening interview, the Appellant stated that he said he did not know where he was born, albeit in his statement of evidence form he stated that he was born on the Island of Brava and that his last address in Somali was in Mpayi, Brava. Later, in his questionnaire in response to the Respondent's request for information on 20 June 2013, prior to making a decision on whether the Appellant should be deported, the Appellant stated that he was born in Mogadishu, as were his mother and father. In submissions dated 22 April 2016, it is said that the Appellant was not aware that Brava and Mogadishu were separate places, thinking Mogadishu was another name for Somalia and the Appellant has little knowledge of the geography in Somalia. At this point, he stated that he was born in Brava. However, at the oral hearing, Counsel's submissions were on the accepted basis that the Appellant was from Mogadishu.

66. Although the Appellant's position has been inconsistent over time as to where he was originally from or where he was last living in Somalia, I find on the basis of

Counsel's submissions at the oral hearing that the Appellant is from Mogadishu, or at least was last living in Mogadishu before he left Somalia. Counsel's submission and my finding is reinforced by the nature of Counsel's submissions that followed in relation to the application of MOJ to the Appellant returning to Mogadishu (rather than on the basis of internal relocation there) and submissions made on conditions there in relation to Article 3 of the European Convention on Human Rights (rather than on the basis that it would be unduly harsh to internally relocate).

67. Counsel for the Appellant further accepted that the Appellant would not be at risk on return to Mogadishu for a Convention reason. This submission is wholly consistent with the findings in MOJ that a person who is an ordinary citizen would not be at risk on return to Mogadishu by reason of absence abroad, the general security situation there, from forced recruitment by Al-Shabaab or for any reason relating to clan membership.

68. In MOJ, the Upper Tribunal found that there had been durable change in Mogadishu, in the sense that the Al-Shabaab withdrawal was complete and there was no real prospect of a re-established presence within the city and further that the significance of clan membership in Mogadishu has changed. At the time of that decision, it was found that there are no clan militias in Mogadishu, there was no clan violence and no clan-based discriminatory treatment, even for minority clan members. These are the findings in 2014 based on evidence from the preceding years, which remain binding today, five years later, and neither party has suggested any departure from the country guidance case. In these circumstances, I find that there has been a significant and non-temporary change in circumstances, at least in Mogadishu, such that the circumstances which caused this Appellant to be a refugee (that he was the member of a minority clan) have ceased to apply and there is nothing in the country guidance or otherwise to suggest any other basis on which he would be at risk on return to Mogadishu. In these circumstances, the Appellant's appeal against the cessation of his refugee status is dismissed.

Section 72 certificate

69. The next issue to address is whether the certificate issued by the Respondent under section 72 of the Nationality, Immigration and Asylum Act 2002 stands, or whether the Appellant has rebutted the presumptions contained therein. The Appellant accepts that he has been convicted of a particularly serious crime and therefore the first presumption has not been rebutted. The second question is whether the Appellant is also a danger to the community. The Appellant's claim is that he no longer poses a danger to the community and will not reoffend; on the basis that he no longer has contact with those he was previously involved in offending with; that he has been free from drug use now for some 18 months; now has a partner and child with a fresh focus on family life and his own responsibilities within that; has a renewed focus on his religion and essentially has grown up, realising the error of his past ways.

70. The Appellant's claim is based on his own written and oral evidence and save for a copy of the birth certificate of his son, is not supported by any other witness or documentary evidence. In particular, there is no OASys or other probation evidence,

such that there is no formal assessment of any risk of reoffending risk of harm in the future; no evidence of completion of any drugs or victim awareness courses or the like whilst in detention; no written or oral evidence from any members of the Appellant's family in the United Kingdom, which includes his mother and numerous adult siblings, nor from his current partner.

71. I note that the Appellant, when faced with the possibility of deportation after one of the earlier offences, made similar representations as he has done in the course of the current proceedings, that he is no longer in contact with individuals with whom he has committed offences, that it is been sometime since the previous offence and that he no longer poses a danger to the community. Representations made on his behalf in a letter dated 27 December 2013 contain the following statement:

> *"[The Appellant] also points to the fact that after 2011 (aged 14) he has not committed any further criminal acts. It is now December 2013 and he is now 17 years. [The Appellant] is not in contact with those individuals with whom he has committed criminal offences. He fully intends not to resume his association with those individuals and not to commit any further offences. [The Appellant] now fully understands the consequences of his actions and feels he has been rehabilitated and does not feel that he is a danger to the community."*

72. At the time that statement was made to, the Appellant had already in fact committed a further criminal offence and as we now know went on to commit further serious offences and did in fact pose a continuing danger to the community at that time. Whilst I accept that there has been a further passage of time and that the Appellant is now in a relationship and has a young son, there is little further difference between his circumstances and statements now as there were in 2013.

73. Following his conviction on 23 June 2015 for going equipped for burglary and an offence of battery, for which he received consecutive sentences of seven and three months respectively in a Young Offenders Institution; he was released from custody on 6 June 2016. Since his release, the Appellant's only conviction was on 27 April 2017, for three counts of possession of a controlled drug, which he states was for personal use only. The Appellant relies on his lack of offending since release from detention, save for the last offence in 2017.

74. Whilst I accept that the Appellant's circumstances have changed since his last conviction which received a custodial sentence, specifically by the relationship with his partner and birth of his son, and that some time has passed since his release from custody and his last conviction, I do not find that the Appellant has rebutted the presumption in section 72 that he continues to pose a danger to the community. The Appellant has a significant criminal history, albeit mostly as a minor, at a time when he was in the United Kingdom with immediate family members and with their support and in circumstances where he has previously failed to take the opportunities given to him to reform, as reflected in the Sentencing Remarks for the latest custodial sentence and in the Respondent not previously pursuing deportation against him. In the context of this Appellant's history, there has been only a relatively short period without offending, which again continued after his release from the last custodial sentence, (albeit a less serious offence without the imposition

of a custodial sentence); and no supporting evidence of the Appellant's current position, i.e. as to family support or the strength of family relationships.

75. For these reasons and in accordance with the Upper Tribunal decision in Essa, I am also obliged to dismiss the appeal on asylum grounds due to the application of section 72(10) of the Nationality, Immigration and Asylum Act 2002.

Article 3 of the European Convention on Human Rights

76. In the alternative to his asylum grounds, the Appellant separately relied upon his removal to Somalia being a breach of Article 3 of the European Convention on Human Rights, on the basis that he would be at risk of destitution and inhumane treatment on return to Mogadishu, because he has no contacts or family there, due to the length of his absence from Somalia and the fact that he does not speak Somali.

77. As set out above, the Court of Appeal in Said and MA (Somalia) confirmed that the test to be applied in relation to Article 3 in cases such as the present, is that set out in N, such that it is only in very exceptional circumstances that there would be a violation of Article 3 and there would be no such violation by reason of a person being returned to a country which for economic reasons cannot provide him with basic living standards.

78. Whilst the factors in paragraphs 407(h) and a 408 of MOJ may have some relevance to an assessment of Article 3, the Court of Appeal in Said made it clear that if a Somali national were able to bring him or herself within the rubric of paragraph 408 of MOJ, that that of itself would establish a breach of Article 3.

79. In the present appeal, the Appellant's claim, even taken at its highest, falls far short of the high threshold set out in N for a breach of Article 3. Even if one were to consider those factors in paragraphs 407(h) and 408 of MOJ, I would not in any event find that the Appellant would be destitute on return to Mogadishu nor be forced to live in makeshift accommodation within an IDP camp. Although the Appellant has been absent from Mogadishu since 2004 and there is nothing to suggest he has any family support there elsewhere in Mogadishu (the whereabouts of his father being unknown and his remaining family in the United Kingdom), no any established clan support, he has not shown that there is any reason why he would not be able to access the economic opportunities that have been produced by the economic boom in Mogadishu, particularly in light of the evidence that returnees are taking jobs at the expense of those nationals who have remained in Somalia. The Appellant has been educated in the United Kingdom, he speaks English fluently and also retains at least some Bravanese which would be of benefit in securing a livelihood.

80. The Appellant claims that he would not receive any financial support from family members in the United Kingdom because of their limited means, but there is no evidence from them directly on this point and they are currently supporting him in the United Kingdom, even if only to a limited extent through the provision of accommodation, basic necessities and small amounts of cash. There is no reason as to why the Appellant's family members who currently support him would not continue to do so on return to Somalia, at least in the short-term to assist him to re-

establish himself there, even if the support is relatively modest by standards in the United Kingdom.

81. For these reasons, the Appellant's appeal is dismissed under Article 3 of the European Convention on Human Rights.

Private & family life, Article 8 of the European Convention on Human Rights

82. Finally, the I deal with the Appellant's claim relying on family and private life in the United Kingdom under Article 8 of the European Convention on Human Rights and the expression of the same in paragraph 398 and following of the Immigration Rules and in particular in section 117C of the Nationality, Immigration and Asylum Act 2002.

83. In relation to family life, the Appellant claims to be in a relationship with his partner, a Somali citizen with refugee status in the United Kingdom. However, the only evidence in support of this relationship is the birth certificate naming the Appellant and his partner as parents of a son born on 19 September 2018. There is no other evidence at all about this relationship, whether it is continuing and what the effect, if any, would be on the Appellant's partner if the Appellant were to be deported. The only evidence is in the Appellant's own statement that he does not currently live with his partner, but would do so and would intend to marry her once he is in a position to do so, by which he means his immigration matters are resolved and he is in employment. There is no written statement from the Appellant's partner and no reasonable explanation for the lack of such a statement of her attendance at court in support of the Appellant. There is further no evidence or her refugee status or grant of indefinite leave to remain to show the basis upon which she is in the United Kingdom.

84. In circumstances where there is almost a complete lack of evidence of any relationship, I do not find that the Appellant has established that he is in a genuine and subsisting relationship in United Kingdom with a qualifying partner such that he cannot meet this exception to deportation in paragraph 399(b) of the Immigration Rules, nor the second exception in section 117C(5) of the Nationality, Immigration and Asylum Act 2002. In any event, there is nothing to suggest that the effect of the Appellant's deportation on his claimed partner would be unduly harsh.

85. In relation to family life between the Appellant and his son, the birth certificate produced shows that the Appellant does have a son born in September 2018, but again there is no further evidence, save for that given orally by the Appellant that he has daily involvement in his son's life, as to the nature of his relationship with his son or the possible effect on him if the Appellant were to be deported. Again, it is highly relevant that there is no written statement at all from the Appellant's partner/the mother and the child's nationality is unknown, although it appears that he is not a British citizen on the Appellant's evidence that the mother was granted indefinite leave to remain after his birth. In these circumstances, it has not been established that the Appellant's son is a qualifying child, nor that in any event the effect of the Appellant's deportation on him would be unduly harsh such that he cannot meet the exception to deportation paragraph 399(a) of the Immigration Rules,

nor the second exception in section 117C(5) of the Nationality, Immigration and Asylum Act 2002.

86. Although the Respondent accepts that the Appellant has established some form of private life in the United Kingdom due to the passage of time that he has been living here, it has not been suggested that he meets any of the exceptions to deportation on the basis of private life under paragraph 399A of the Immigration Rules or exception 1 in section 117C(4) of the Nationality, Immigration and Asylum Act 2002.

87. As the Appellant does not meet any of the stated exceptions to deportation, the only remaining consideration is as to whether the public interest in deportation is outweighed by very compelling circumstances over and above the express exceptions. The circumstances relied upon by Counsel for the Appellant are the Appellant's family life with his partner and son, taking into account the best interests of the latter in accordance with section 55 of the Borders, Citizenship and Immigration Act 2009. It was submitted that if the Appellant were returned to Somalia, he could not continue to undertake his role as a father as it would be difficult for family to visit him and his likely lack of finances on return would prevent him from even maintaining communication with his family.

88. Whilst I take into account the accepted position that it is generally in the best interests of a child to be brought up by both parents in the same country, the almost complete lack of evidence in relation to the Appellant's partner and child mean that no further substantive assessment of the best interests of the child can realistically be undertaken on the evidence available in this case. There is further nothing to suggest that the Appellant's son could not continue to be adequately cared for by his mother, as is the current situation, in the United Kingdom. I do not find that even taken at its very highest, the Appellant's claims to family life with his partner and child could amount to a very compelling circumstances sufficient to outweigh the considerable public interest in his deportation, such that he also cannot meet paragraph 398 of the Immigration Rules, nor section 117C(6) of the Nationality, Immigration and Asylum Act 2002.

89. For all of these reasons, the Appellant's appeal on human rights grounds is dismissed.

<u>Notice of Decision</u>

For the reasons set out in the attached error of law decision, the making of the decision of the First-tier Tribunal did involve the making of a material error of law and as such it was necessary to set aside the decision.

The decision is remade as follows:

The appeal is dismissed on asylum grounds.

The appeal is dismissed on human rights grounds.

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

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 26th July 2019

Upper Tribunal Judge Jackson

ANNEX

IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00024/2017

THE IMMIGRATION ACTS

Heard at Field House
On 7 December 2018

Decision & Reasons Promulgated

……………………………….…

Before

UPPER TRIBUNAL JUDGE GLEESON
UPPER TRIBUNAL JUDGE JACKSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AS
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr E Tufan, Home Office Presenting Officer
For the Respondent: Ms E Umoh, Duncan Lewis & Co Solicitors (Harrow Office)

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

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

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DECISION AND REASONS

1. The respondent appeals with permission against a decision of First-tier Tribunal Judge Bird promulgated on 25 May 2018 in which the appellant's appeal was allowed on asylum grounds and also on Article 3 and Article 8 grounds. The appellant is a national of Somalia who had applied on human rights grounds to revoke a Deportation Order made against him on 18 January 2016, which was refused by the respondent in a decision dated 27 January 2017. For ease we refer continue to refer to the parties as they were before the First-tier Tribunal, with Mr AS as the appellant and the Secretary of State as the respondent.

2. The respondent appeals on three primary grounds. The first is in relation to the finding that the First-tier Tribunal made that the Section 72 certificate was rebutted. The second is on the basis that there were no reasons given by the First-tier Tribunal for departing from the country guidance case of MOJ & others (Return to Mogadishu) Somalia CG 2014 UKUT 00442 (IAC) in relation to the cessation of refugee status, and the third is in relation to Article 8 grounds that only a cursory consideration was given with no obvious weight attached to, or consideration given to, the public interest when allowing the appeal on those grounds as well.

3. We deal in most detail with the first ground of appeal on the basis that a finding on that potentially infects the other findings that follow in the decision.

4. In relation to the certificate pursuant to section 72 certificate of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act"), subsection 2 states:

   "(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 -

   (a) convicted in the United Kingdom of an offence, and

   (b) sentenced to a period of imprisonment of at least two years."

5. Section 72(6) of the 2002 Act shows that a presumption is that a person convicted of a particularly serious crime constitutes a danger to the community that is rebuttable by that person and in particular, section 72(9) and (10) apply to the Tribunal when looking at the presumption. That is a statutory presumption which applies in cases such as the present one, rebuttable only by the appellant.

6. In the First-tier Tribunal's decision references are made in paragraphs 44 and 47 in particular, that the presumption has been rebutted because in paragraph 44, "the respondent has failed to provide evidence to show that the appellant continues to be a risk to the general community", and in 47:

   > "The courts have consistently held that the burden of raising the presumption under section 72 (Article 33(2)) is on the respondent. As there is no evidence provided by the respondent to show that the appellant presents a continuing danger to the community now, I find that the presumption under section 72 is rebutted."

7. That clearly puts the burden on the wrong party in this appeal. It is a statutory presumption that can only be rebutted by the appellant. It is not for the respondent to show evidence of a continuing risk or danger to the community. That error of law is material and if the burden of rebutting the presumption had been made the other way around the conclusion may well have been different.

8. The Upper Tribunal was also concerned in this case that the full offending history of the appellant has not been set out or considered either in the background section or in the section in relation to the section 72 certificate comprehensively and it is of concern that it therefore has not been fully taken into account when looking at whether the presumption is rebutted.

9. There is also, because the burden of rebutting the presumption was the wrong way around, no reasons given as to why the appellant has rebutted it, given the short passage of time since his last offending in February 2017. That error of law, which is material, goes on to infect the findings that were made in relation to cessation under the Refugee Convention (from which the Appellant is excluded if the presumption is not rebutted and the certificate remains) and also carries through to some extent in the Article 8 assessment, which is allowed essentially for the same reasons already given, having found a breach of Article 3 and allowing the appeal under the Refugee Convention.

10. We would also add in relation to Article 8 that it is a material error of law in paragraph 75 for the First-tier Tribunal to have made no express findings for the required balancing exercise being undertaken to determine the proportionality of removal. In the final sentence the First-tier Tribunal simply says: "In his particular circumstances any removal under Article 8 of the ECHR would cause a breach of his right to continue to exercise his private life in the United Kingdom and any removal is therefore disproportionate in the circumstances." That does not indicate any consideration at all of the public interest to be balanced against the appellant's right to respect for private life nor does it take into account the statutory factors that a tribunal is required to when considering the public interest part of the proportionality exercise in section 117B and 117C of the Nationality, Immigration and Asylum Act 2002.

Notice of Decision

11. There are clear errors of law in this decision such that it must be set aside and we do set it aside. In light of the fact that this appeal has already been through the First-tier Tribunal on two occasions, we reserve the decision to the Upper Tribunal for a further hearing to remake it.

Signed Date 17th December 2018

Upper Tribunal Judge Jackson