Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/10261/2019**

THE IMMIGRATION ACTS

Heard at Field House	**Determination & Reasons Promulgated**
On 1st December 2021	**On 10th December 2021**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MAJ
(ANONYMOITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer
For the Respondent: No appearance

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing MAJ's appeal against the respondent's decision to refuse his protection and human rights claim further to a decision to deport him under section 32(5) of the UK Borders Act 2007.

2. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the respondent and MAJ as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant is a citizen of Somalia, born on 2 June 1986. He entered the UK at the age of 9 years on 7 July 1995 with his mother and sisters (whom he claims to be his adoptive family and not his biological family) and was granted leave as his mother's dependant until 20 January 1999 followed by a grant of indefinite leave to remain on 2 July 2002. Between 21 November 2007 and 1 April 2011, he was convicted on 10 occasions of 12 offences including burglary and theft, destruction or damage to property, breach of community orders, battery, possession of a controlled drug Class A crack cocaine with intent to supply and a failure to comply with requirements.

4. On 8 April 2011 the appellant was convicted of assault occasioning bodily harm for which he was sentenced to 18 months' imprisonment, as a result of which the Secretary of State issued him with a notice of liability to deportation on 14 September 2011. He responded on 16 September 2011 raising human rights grounds on the basis of his family and private life as well as his mental health. A deportation order was signed against the appellant on 5 June 2014, and he was issued with the signed deportation order and a deportation decision notice on 17 June 2014.

5. The appellant lodged an appeal against the decision on 18 November 2016 and made further representations on 21 December 2016 in relation to Articles 3 and 8 of the ECHR. The appeal was heard by First-tier Tribunal Judge Black on 29 January 2018, by which time the appellant had been convicted of a further offence, of battery, on 11 December 2017, for which he received a custodial sentence of 2 months, suspended for 12 months. The appellant's appeal was dismissed by Judge Black in a decision promulgated on 9 February 2018 and he became appeal rights exhausted on 26 February 2018. He was detained under immigration powers on 29 May 2019 and removal directions were set for 20 July 2019. However, removal was deferred when the appellant made further representations and submitted an asylum claim. That claim was refused on 15 October 2019 and the appellant's appeal against that decision, heard by First-tier Tribunal Judge Frantzis on 4 January 2021, has given rise to these proceedings.

6. It is relevant at this point to summarise the decision of Judge Black and her reasons for dismissing the appellant's appeal on 9 February 2018, since her findings informed the decision made by Judge Frantzis.

7. In the absence of any appearance by or on behalf of the appellant, Judge Black proceeded on the basis of the evidence before her, which included witness statements from the appellant and his partner and some medical evidence, in which it was claimed that the appellant had British twins born on 3 August 2010 from a former relationship, that he was currently in a relationship with his partner LW with whom he had two young children, all British, that he was mentally ill and suffered from anxiety and depression, that he relied on his partner to assist him because he suffered from PTSD following an incident in February 2014 where he was the victim of a stabbing, and that he had no family in Somalia and did not speak Somali properly.

8. Judge Black found that the medical evidence, which dated back to 2015, was not sufficient for her to make a finding that the appellant currently suffered with a mental illness which impacted on his daily life, or which required treatment. She did not accept that the appellant had no ties to Somalia and considered it unlikely that his mother and aunt had no contacts there despite having left the country 20 years previously. She found that he would have some practical support from friends of the family, if not actual family members, on return, and further that he was able to speak the Somali language despite his claim to the contrary. She considered that he had been educated in the UK and had attended university here and thus had skills and experience which he could utilise on return to find employment. She found that the appellant had not, therefore, demonstrated that he was at risk of serious harm on return to Somalia or that his removal would breach Article 3. The judge found further that the appellant had no contact with his former partner and his children from that previous relationship and concluded that, in light of an order excluding him from contacting his current partner LW, their relationship had broken down. She did not accept that the appellant was socially and culturally integrated in the UK, and she did not find that there would be very significant obstacles to his integration in Somalia. As for Article 8 outside the immigration rules, the judge concluded that there was no evidence of family life in the UK, that the appellant presented a risk to LW and that his deportation was proportionate.

9. The appellant's subsequent claim for asylum was based upon his conversion to Christianity and his baptism in July 2019. He claimed to have changed his name by deed poll on 20 July 2019 and was now known as Elijah Samuel King. He claimed never to have met his biological parents but to have been brought up by his foster mother in Somalia. He claimed that his sisters all lived in the UK and that his foster mother died in 2014 in the UK. He claimed not to remember living in Somalia and not to know his clan or tribe as he was so young when he left. He claimed that he was at risk of being given the death penalty in Somalia because of his conversion from Islam to Christianity and because he had tattoos all over his body which was forbidden by sharia law. He feared the government, sharia law and his foster family. He feared being a target because he grew up in the UK, he had children before marriage, he had married a white British non-Muslim and had converted to be a Catholic like his wife and because he had tattoos. He claimed further that he had been sexually abused by his uncle in Somalia when he was a child, and he was beaten up when he tried to tell his family about it. As a result, he lost faith in everything. He claimed to have lost touch with his family in the UK and that he was in touch only with an 'aunt' who had looked after him. He had converted to Christianity whilst in prison and had problems with the Muslim inmates as a result. He would not be able to practise his faith in Somalia. He had no means of support there and could not speak the language. He lived with his wife and children and suffered from PTSD and severe anxiety, following an incident in 2014 when he was stabbed. He could not get a job or disability allowance and as a result his relationship collapsed, and he became depressed and suicidal. He had become an alcoholic and was schizophrenic.

10. The respondent, in refusing the appellant's claim, noted contradictions in his account of his reasons for converting to Christianity, including the fact that he claimed to have undergone an Islamic marriage with his partner on 3 April 2015 despite claiming to have adopted her religion. The respondent did not accept the appellant's claim to be a genuine convert to Christianity. It was considered that he could access treatment for his medical problems in Somalia and that he could re-establish himself in Somalia. It was not accepted that he was at any risk on return. The respondent considered that the appellant was excluded from humanitarian protection because of his criminal offending. It was not considered that his removal to Somalia would be in breach of Article 3 as there was support and medical care available to him there. As for Article 8, the respondent did not accept that the appellant had a genuine and subsisting relationship with LW or their children but considered in any event that it would not be unduly harsh for them to be separated from him upon his deportation. The respondent did not accept that the requirements of paragraph 399(a) and (b) or 399A of the immigration rules were met or that there were any very compelling circumstances outweighing the public interest in deportation.

11. In her decision allowing the appellant's appeal, Judge Frantzis recorded that the appellant did not give evidence because of his mental health issues but that she was not drawing any adverse inference from that since the respondent accepted that he suffered from complex PTSD, severe depression and psychosis with suicidal ideation. The appellant's partner, LW, gave oral evidence. The judge accepted the appellant's claim never to have practised as a Muslim and accepted that there was a proper explanation for him nevertheless having undergone an Islamic marriage, since that was the only way he could marry his partner. It was not in dispute that the appellant had visible tattoos. He claimed to have had those since the age of 15 and the judge considered that to be further evidence to corroborate his claim never to have followed the Islamic faith. The judge accepted the evidence of LW in regard to the appellant's lack of commitment to the Muslim faith. As to the appellant's claim in regard to his conversion to Christianity, the judge found that he had been baptised into the Christian faith and that he had read his bible whilst he was in prison but noted the lack of evidence of current commitment to the faith or current desire to practice the faith. She did not accept that the appellant would wish to openly practice his Christian faith on return to Somalia, but she accepted that he would not wish to practice Islam.

12. Judge Frantzis rejected the appellant's claim to have no contact with any family in the UK and considered that they would provide him with some financial support on return to Somalia. However, she placed weight on the two psychiatric reports from Dr Syed Zia Ali in regard to the deterioration in the appellant's mental health. She concluded that, whilst the appellant was considered to have retained ties to Somalia, it was not likely that any family or friends in Mogadishu would be willing to support him given his unwillingness to practice the Muslim religion and also given his mental health issues. She considered that he would be vulnerable, that he would be unable to function on any meaningful level and that he would not be able to find any work in

Mogadishu. The judge found that as a result of the combined factors of the appellant's lack of support in Mogadishu, his mental health presentation, the fact that he was clearly westernised and the fact that he would not practice Islam but would read his bible, he would be at risk of persecution. She found that the appellant would be at risk of punishment for apostacy and that he would have no protection in Mogadishu or elsewhere. She accordingly allowed the appeal on protection grounds and found that the exception to deportation was met on that basis.

13. Permission to appeal against that decision was sought by the respondent on the grounds that the judge had failed to give adequate reasons for finding that the appellant was at a real risk of persecution and, in particular: that the judge had failed to give adequate reasons for departing from Judge Black's finding on family contacts in Somalia; that the judge had failed to give adequate reasons as to why the appellant would be denied support from family and friends as a result of his mental health problems; that there was no basis for the judge's finding that the appellant would come to the attention of Al-Shabab as an apostate or that they would be aware he was not practising Islam; and that the judge, in considering the fact that the appellant had been 'westernised' as a reason for persecution, had failed to have regard to the guidance in MOJ & Ors (Return to Mogadishu) Somalia CG [2014] UKUT 00442.

14. Permission was granted in the First-tier Tribunal on 1 March 2021. The appellant did not produce a rule 24 response, despite being required to do so in accordance with the Tribunal's directions. Mr Kotas, on behalf of the respondent produced a skeleton argument supplementing the grounds and submitting that the judge had conflated a number of issues and had erred by finding that the appellant had genuinely converted to Christianity, given the paucity of evidence in that regard.

15. The matter then came before me. There was, again, no appearance by or on behalf of the appellant. I noted that his previous legal representatives had informed the Tribunal on 12 May 2021 that they were no longer representing him and that a hearing listed for 10 September 2021 had been adjourned on the day owing to an absence of material documents, taken together with the absence of the appellant himself. Directions were made by the Upper Tribunal requiring the appellant to inform the Tribunal whether he intended to defend the First-tier Tribunal decision and whether he wished to instruct solicitors and requiring the production of the missing evidence. The appellant did not respond to the directions. I checked with Mr Clarke the records of the appellant's last known address and it was apparent that the notice of hearing had been served on the address held by both the Upper Tribunal and the Home Office. There was therefore no reason for the appellant not to be in attendance and no reason not to proceed with the hearing, given in particular that the appellant had already been given a further opportunity to attend.

16. A preliminary issue arose from the reference, in the Upper Tribunal's written Order and Directions of 10 September 2021, to a concession by the presenting officer at that time, Mr Lindsay, that only paragraphs 1, 4, 5 and 6

of the grounds were being pursued (and thus that paragraphs 2 and 3 were not being pursued). Mr Clarke, however, withdrew the concession in regard to paragraph 3 and advised me that he was pursuing that ground, which was the judge's failure to give adequate reasons as to why the appellant would be denied support from family and friends as a result of his mental health problems. With regard to paragraph 2 of the grounds, Mr Clarke agreed with Mr Lindsay's concession since Judge Frantzis had not departed from Judge Black's finding on family contacts in Somalia.

17. Mr Clarke submitted that the country expert report from Dr Hoehne, as relied upon by the appellant and the judge, should not have been accorded weight as it had proceeded on the basis that the appellant had no family or other contacts in Somalia, whereas the finding of Judge Black was that he would have retained such contacts. With regard to the judge's finding at [75] that the appellant would be denied support from his family and friends as a result of his mental health problems and his unwillingness to practice Islam, Mr Clarke submitted that he could find nothing in the evidence or in the report from Dr Hoehne to support such a finding. There was no evidence to show that families ostracised someone who did not practice Islam. He submitted further that the judge's findings at [48] to [51] about the appellant's limited practice of the Christian faith were that he had an invisible profile and there was therefore no reason why he would be at risk on that basis. The judge was reading between the lines in regard to the background evidence quoted at [70] and [71] as there was nothing to say that Sharia law required a person to attend the mosque. The judge was wrong to find that the appellant would be at risk from Al-Shabab when they were not present in Mogadishu and the evidence did not show that they had targeted Christians. Mr Clarke conceded that the evidence in relation to treatment for those with severe mental health problems in Somalia was bleak.

Discussion.

18. Although not raised by Mr Clarke in his submissions, it seems to me that the skeleton argument from Mr Kotas identifies a material flaw in the judge's decision, in that she conflated various issues of which some were not relevant to the question of whether the appellant faced a real risk of persecution. That is apparent in the judge's findings at [81]. Indeed, a large part of the judge's decision was in relation to the appellant's vulnerability as a result of his mental health problems and his lack of support in Mogadishu. It was in that context that Mr Clarke conceded, in his submissions, that the background evidence painted a bleak picture of the treatment of people presenting with severe mental health problems in circumstances where there was a lack of family and other support in accessing treatment. However, as Mr Kotas submitted in his skeleton argument, the judge did not make any finding that the appellant faced a breach of Article 3 in the context of a medical claim. The actual basis upon which the judge allowed the appeal was that the appellant would face persecutory treatment linked to his religion contrary to the UK's obligations under the Refugee Convention.

19. The judge's conclusion in that regard appears to have been based upon the risk of the appellant facing punishment for apostacy from Al-Shabab. I refer to the judge's findings at [81] and [82] in that respect. However, as Mr Clarke submitted, such a conclusion was a huge leap from her observation at [49] that there was a lack of evidence of the appellant's commitment to his Christian faith or his desire to practice it and her finding at [51] that the appellant would not wish to practice his Christian faith openly in Somalia. The judge appears to have made that leap by finding at [78] that because the appellant would not wish to practice Islam, he would be perceived to have changed his religion and at [81] that relatives and informants would inform on him to Al-Shabab. However, I have to agree with Mr Clarke that there is no basis for such findings in the evidence. There was nothing in the evidence before the judge to suggest that failing to practice Islam actively was against Sharia law or that it would lead to a perception of having converted to another faith such as Christianity and would lead to the appellant coming to the adverse attention of Al-Shabaab, or indeed that the appellant would be ostracised by his family on such a basis.

20. It is therefore difficult to understand precisely why and on what basis the judge allowed the appeal and as a result her decision is materially flawed and cannot stand. The decision has to be re-made. I have to agree with Mr Kotas' observation at [18] that, in light of the judge's findings about the lack of evidence of the appellant's commitment to his Christian faith it is not clear why she concluded that he was a genuine convert, if that was indeed her finding. As such, it seems to me that there needs to be a complete re-hearing of this case, in order for clear findings of fact to be made.

21. I therefore set aside the decision in its entirety. The appropriate course is for the matter to be remitted to the First-tier Tribunal to be heard afresh, with no findings preserved.

DECISION

22. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside. The appeal is remitted to the First-tier Tribunal pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(b), to be heard before any judge aside from Judge Frantzis.

Anonymity

The First-tier Tribunal made an order pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. I continue that order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed: S Kebede

Upper Tribunal Judge Kebede Dated: 3 December 2021