Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01672/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 30 June 2015	**On 25 November 2015**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK
DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MOHAMMED HASSAN BARRE
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Ms A. Brocklesby-Weller, Senior Home Office Presenting Officer
For the Respondent: Mr A. Adewoye instructed by Prime Solicitors

DETERMINATION AND REASONS

1 In this decision, we continue to refer to the parties as they were before the First-tier Tribunal. The Appellant, a national of Somalia, appeals against the decision of the Respondent dated 8 July 2013 to make a deportation order against him under s.3(5)(a) and s.5(1) Immigration Act 1971. On 14 August 2013 he filed notice of appeal, out of time, to the First tier Tribunal, but applying for an extension of time which was granted. The Respondent had on 19 August 2013 actually signed a

deportation order against the Appellant, possibly in ignorance of the fact that the Appellant had brought an out of time appeal. We proceed to treat the present appeal as an appeal brought under s 82(1)(j) Nationality, Immigration and Asylum Act 2002 ('NIAA 2002').

2 The Appellant appealed against the decision of 8 July 2013 on asylum and human rights grounds (Articles 2, 3, and 8). The appeal came before Judge of the First tier Tribunal Bennett at Hatton Cross on 23 July 2014, and was allowed, ostensibly on human rights grounds under Article 8 ECHR, finding that the circumstances that the Appellant would have to face in Merka, Somalia, would be unjustifiably harsh [79]. The Respondent sought permission to appeal, which was granted by the Upper Tribunal on 1 December 2014.

3 The error of law hearing came before Upper Tribunal Judge Kopieczek on 30 January 2015. In his decision and directions dated 4 March 2015 (appended to this decision), he ruled that the FtT had materially erred in law, in:

(i) failing to have regard to the considerations set out in Part 5A NIAA 2002 [18];

(ii) its assessment of then-applicable Country Guidance of AMM and others (conflict; humanitarian crisis; returnees; FGM) Somalia CG [2011] UKUT 445 (IAC) ('AMM'); by:

(a) considering only the Appellant's position on return to Merka, rather than also considering his position in Mogadishu [27, 29]; and,

(b) failing, when considering what connections the Appellant may or may not have in Somalia, to take into account the FtT's own earlier finding that the evidence of the Appellant and his family members in the UK was to be treated with the greatest circumspection [27]-[29].

4 Judge Kopieczek adjourned the re-making of the decision, observing that findings of fact made by the FtT were to stand, save for any findings infected by error of law. Directions given were as follows:

"1 At the next hearing the parties must be in a position to make submissions as to what findings of fact are to be preserved, and in relation to the application of the decision in MOJ & Ors (Return to Mogadishu) Somalia CG [20014] UKUT 00442 (IAC)."

5 The matter now comes before the Tribunal as a re-hearing of the Appellant's appeal.

Immigration and offending history

6 The essential elements of the Appellant's immigration and offending history are as follows. The Appellant arrived in the United Kingdom on 19 July 2006 with indefinite leave to enter on family reunion grounds. He has never naturalised as a British Citizen.

7 The Respondent's reasons for making the decision of 8 July 2013 to deport the Appellant are contained within a letter dated 4 July 2013 ('the refusal letter'). The

Appellant has a total of 17 convictions for 27 offences dating from 1 December 2009 to 29 May 2013. These are set out in the record of the Appellant's antecedents as recorded in the Police National Computer ('PNC') print-out and in a table at page 2-3 of the Respondent's letter of 4 July 2013 (Q2-Q3). These include offences for robbery, theft, using or threatening to use abusive or insulting words or behaviour with intent to cause fear or provocation of violence (2 such convictions), handling stolen goods, possession of a class B controlled substance (cannabis) (5 such convictions), battery (2 such convictions), affray, possession with intent to supply a Class B controlled substance, and various offences of failing to comply with previous community orders.

8 The Appellant has been sentenced to detention and training orders ('DTO') on four occasions, amounting to 24 months in total, the last being a DTO of 8 months, arising from his conviction on 22 October 2012 for possession with intent to supply a Class B controlled drug (cannabis), for which he was initially sentenced to a Youth Rehabilitation Order with ISSP (Intensive Supervision and Surveillance Programme). On 28 December 2012 he was convicted of failing to comply with that sentence, and a sentence of an 8 month DTO was imposed. Since that sentence of 28 December 2012, the Appellant has been convicted of one further offence, on 29 May 2013, of possession of Class B drug - cannabis, for which he was fined.

9 Upon considering that offending history, the Respondent held in her refusal letter that the Appellant's deportation would be conducive to the public good (refusal letter, Q1) and that he was a persistent offender whose offences had caused serious harm, and was therefore a person to whom paragraph 398(c) of the Immigration Rules applied (refusal letter, Q5-Q6). The Respondent's decision of 8 July 2013 to deport the Appellant was therefore made under s.3(5) and 5(1) Immigration Act 1971, rather than s.32 UK Borders Act 2007.

Relevant law

10 As a consequence of the Appellant's offending history, the following provisions are relevant:

11 s.3(5)(a) Immigration Act 1971:

> "(5) A person who is not a British citizen is liable to deportation from the United Kingdom if —
>
> (a) the Secretary of State deems his deportation to be conducive to the public good;
>
> ..."

12 s.5(1) Immigration Act 1971:

> "5. — Procedure for, and further provisions as to, deportation.
>
> (1) Where a person is under section 3(5) or (6) above liable to deportation, then subject to the following provisions of this Act the Secretary of State may

make a deportation order against him, that is to say an order requiring him to leave and prohibiting him from entering the United Kingdom; and a deportation order against a person shall invalidate any leave to enter or remain in the United Kingdom given him before the order is made or while it is in force."

13 Part 5A NIAA 2002 (ss.117A-D):

"Article 8 of the ECHR: public interest considerations

117A Application of this Part

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard—

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

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.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

117D Interpretation of this Part

(1) In this Part—

"Article 8" means Article 8 of the European Convention on Human Rights;

"qualifying child" means a person who is under the age of 18 and who—

(a) is a British citizen, or

(b) has lived in the United Kingdom for a continuous period of seven years or more;

"qualifying partner" means a partner who—

(a) is a British citizen, or

(b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 — see section 33(2A) of that Act).

(2) In this Part, "foreign criminal" means a person—

(a) who is not a British citizen,

(b) who has been convicted in the United Kingdom of an offence, and

(c) who—

(i) has been sentenced to a period of imprisonment of at least 12 months,

(ii) has been convicted of an offence that has caused serious harm, or

(iii) is a persistent offender.

(3) For the purposes of subsection (2)(b), a person subject to an order under—

(a) section 5 of the Criminal Procedure (Insanity) Act 1964 (insanity etc),

(b) section 57 of the Criminal Procedure (Scotland) Act 1995 (insanity etc), or

(c) Article 50A of the Mental Health (Northern Ireland) Order 1986 (insanity etc),has not been convicted of an offence.

(4) In this Part, references to a person who has been sentenced to a period of imprisonment of a certain length of time—

(a) do not include a person who has received a suspended sentence (unless a court subsequently orders that the sentence or any part of it (of whatever length) is to take effect);

(b) do not include a person who has been sentenced to a period of imprisonment of that length of time only by virtue of being sentenced to consecutive sentences amounting in aggregate to that length of time;

(c) include a person who is sentenced to detention, or ordered or directed to be detained, in an institution other than a prison (including, in particular, a hospital or an institution for young offenders) for that length of time; and

(d) include a person who is sentenced to imprisonment or detention, or ordered or directed to be detained, for an indeterminate period, provided that it may last for at least that length of time.

(5) If any question arises for the purposes of this Part as to whether a person is a British citizen, it is for the person asserting that fact to prove it."

14 Immigration Rules, Part 13:

"A362. Where Article 8 is raised in the context of deportation under Part 13 of these Rules, the claim under Article 8 will only succeed where the requirements of these rules as at 28 July 2014 are met, regardless of when the notice of intention to deport or the deportation order, as appropriate, was served.

...

Rights of appeal in relation to a decision not to revoke a deportation order

396. Where a person is liable to deportation the presumption shall be that the public interest requires deportation. It is in the public interest to deport where the Secretary of State must make a deportation order in accordance with section 32 of the UK Borders Act 2007.

397. A deportation order will not be made if the person's removal pursuant to the order would be contrary to the UK's obligations under the Refugee Convention or the Human Rights Convention. Where deportation would not be contrary to these obligations, it will only be in exceptional circumstances that the public interest in deportation is outweighed.

Deportation and Article 8

A398. These rules apply where:

(a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention;

(b) a foreign criminal applies for a deportation order made against him to be revoked.

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) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;

(b) the deportation of the person from the UK is conducive to the public good and in the public interest 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 deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law,

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."

15 Relevant authorities include (but are not limited to):

15.1 Chege (section 117D-Article 8 approach-Kenya) [2015] UKUT 165 (IAC), the Headnote to which reads as follows:

"The correct approach, where an appeal on human rights grounds has been brought in seeking to resist deportation, is to consider:

i is the appellant a foreign criminal as defined by s117D (2) (a), (b) or (c);

ii if so, does he fall within paragraph 399 or 399A of the Immigration Rules;

iii if not are there very compelling circumstances over and beyond those falling within 399 and 399A relied upon, such identification to be informed by the seriousness of the criminality and taking into account the factors set out in s117B.

Compelling as an adjective has the meaning of having a powerful and irresistible effect; convincing.

The purpose of paragraph 398 is to recognize circumstances that are sufficiently compelling to outweigh the public interest in deportation but do not fall within paragraphs 399 and 399A.

The task of the judge is to assess the competing interests and to determine whether an interference with a person's right to respect for private and family life is justified under Article 8(2) or whether the public interest arguments should prevail notwithstanding the engagement of Article 8.

It follows from this that if an appeal does not succeed on human rights grounds, paragraph 397 provides the respondent with a residual discretion to grant leave to remain in exceptional circumstances where an appellant cannot succeed by invoking rights protected by Article 8 of the ECHR."

The hearing

16 The documents before the Tribunal include the Respondent's bundle prepared on 19 August 2013, and the Appellant's bundle prepared for this re-hearing in the Upper Tribunal, which contained witness statements of the Appellant, his father Hassan Halane Barre, his mother Shukri Xaaji Nuur Ali, and his sister Sabrin Mohamed, all dated June 2015. These statements contained for the most part the same evidence as was set out in their statements before the FtT, but had been brought up to date with some additional information. An additional witness who had given evidence before the FtT had been the Appellant's older brother Noor Hassan Barre, but he was tragically killed in a stabbing incident on 31 October 2014.

17 However, the only witnesses actually attending the hearing to give evidence before us were the Appellant and his father. The Appellant's father later gave evidence explaining the absence of the Appellant's mother and sister at the hearing. There was no application for an adjournment to facilitate the attendance of any additional witnesses.

18 Ms Brocklesby-Weller sought to rely on a further document, being an updated PNC print-out of the Appellant's arrests and convictions. She sought to rely on information contained at the rear of the recent print out that on 23 May 2015 the Appellant had been arrested and remanded on Police Bail on condition that he not enter certain streets in Harrow, and that he appear before the Police again on 3 July 2015. The suspected offence for which he was arrested is not stated.

19 We admitted this document in evidence. We return to our assessment of it, below.

20 The Appellant gave evidence in English. He adopted his witness statement of 25 June 2015. In relation to questions from Mr Adewoye regarding the Appellant's recent arrest, the Appellant accepted that he and two friends had been arrested whilst out walking because the police had found a bag of cannabis near them. The police had found nothing on the Appellant upon being searched. He has been released on bail. The Appellant stated that he no longer smoked or dealt cannabis.

21 The Appellant said that he had not been to Somalia since arriving in the UK, and had no particular skills that he could use there. He left school in 2010, at year 11.

22 Cross examined by Ms Brocklesby-Weller, the Appellant stated that he currently lived with his father in rented accommodation owned by the Council. When asked who paid for his food and clothing, the Appellant stated that his father helped him financially, as did other family members - his mother, sister, and little brother. His father did not look after any other family member. Regarding his recent arrest, the Appellant repeated the account given earlier. He and his friends had not run away when stopped. His friends did not smoke cannabis.

23 There was no re-examination.

24 In response to questions from the Tribunal, the Appellant confirmed he had been arrested in Harrow, in the area where he lived, mid-evening. The offence for which they were arrested was suspicion of possession of cannabis. The Appellant believed that the police intended to carry out fingerprint checks on the bag and wanted him back in July.

25 The Appellant's father, Hassan Halane Barre, gave evidence. He adopted his witness statement of 24 June 2015. His attention was drawn to the letter at page 55 of the bundle from Julius Rutherford Cleaning Services regarding his employment with them at 2.15 hours per day, being paid at £142.97 per fortnight. He was asked if he had any bank account which showed payment of those wages. The witness produced a statement from a Nationwide bank account in the name of H H Barre for the period 31 December 2014 to 30 March 2015. We admitted this document into evidence. We note that the account shows a series of fortnightly credits in the sum of £144.80. The witness explained that a payment into the account on 4 February 2015 of £1,980 was a funeral payment from income support in respect of the recent death of his oldest son (Noor Hassan Barre, for whom there is a death certificate at page 54 of the Appellant's bundle showing that he died on 31 October 2014 from a stab wound to the chest.)

26 He gave evidence that he was divorced from his wife. She had not attended because his daughter informed him that her mother (the witnesses' ex wife) was sick. The witnesses' daughter could not come to give evidence because she was pregnant (4 months) and not feeling well.

27 Cross examined, Mr Barre confirmed that he has worked as a cleaner from February 2015 to present. He worked 2.15 hours a day, but sometimes did overtime when the school was closed and he did deep cleaning. He was not expecting to get more hours

of work, unless he got another job. He was not looking for another job at the moment. He stated that he rented a Housing Association home. He received some benefit - £16 per week from the job centre, paid fortnightly. This was job seekers allowance. He stated that nobody supported the Appellant financially except him. The Appellant's mother and sister did not help out. The Appellant stays at home with him.

28 He denied that the Appellant's mother and sister give any money to the Appellant. When Ms Brocklesby-Weller put to the witness that the Appellant himself had previously said that his mother and sister sometimes helped him, the witness said maybe, he did not know. His daughter was pregnant and not working. Her husband worked. He was aware that the Appellant had been arrested in May. The Appellant had not told him the reason for the arrest. He confirmed that the Appellant still lives with him. They did not travel together to court today - he came by train; the Appellant came by car with friends. When asked if these were friends that the Appellant had had for a while or if he knew the Appellant's friends, the witness said that he had no idea. He described that the Appellant comes to the house at night, sleeps and then goes. He did not know what his son did in the day. He said that the Appellant goes out at about 1.30-2.00 but he did not know where the Appellant goes. He comes home at about 11 - 12 o'clock; sometimes 9 o'clock. Later at the weekends.

29 Asked if the Appellant was still using cannabis, the witness said that he had not seen it. He agreed that it was fair to say that he did not know. His friends do not come to the house. He was aware that the Appellant does not go to certain places but the Appellant had not told him the conditions of bail.

30 In re-examination the witness said that he did not know the smell of cannabis, but that he had not smelt any strange odours on the Appellant. He did know if the Appellant took cannabis.

31 In response to questions from the Tribunal, the witness did not know the details of his daughter's husband's job. The witness had not seen the Appellant smoking cigarettes. As to the help he gave the Appellant - he did not give the Appellant money, but they ate together in the house. If he needed money for clothes or the bus, he will buy things or give the Appellant money. The Appellant does not get any government money - immigration said that he was not allowed.

Submissions

32 Ms Brocklesby-Weller argued that in assessing the risk of harm to the Appellant on return, the findings at [66] of the FtT decision remained relevant:

> "... I view the remainder of [the Appellant's parents'] evidence about their circumstances in Somalia, including their lack of family there, with the greatest circumspection because they have shown themselves to be untruthful in a core aspect of their claim and willing to say whatever they think will further their cause. I do not therefore accept their claim to come from minority clans, even at the lower standard."

33 With reference to the paragraphs of the headnote in MOJ & Ors (Return to Mogadishu) Somalia CG [2014] UKUT 00442 (IAC) ('MOJ'), the Appellant would be returning as an ordinary civilian and would not be at risk of treatment contrary to Article 3 ECHR or at risk under Article 15(c) of the Qualification Directive (ii); there would be no risk of forced recruitment into Al Shabaab (vi). Return would be to Mogadishu and the Appellant had not shown that he could not go there. There has been a durable change since AMM. Whereas the Appellant asserts he has no family in Somalia, the Tribunal should treat that assertion with caution given previous adverse credibility findings, and we should proceed on the basis that the Appellant has some family in Somalia, perhaps even extensive family networks.

34 Even if the Appellant did not have family in Somalia, this would not result in a risk of serious harm by way of destitution because the Appellant has not established that there was no real prospect of obtaining a livelihood (xi). Ms Brocklesby-Weller referred to MOJ [411], and [421], and argued that returnees from the west might be seen in a positive light in terms of employment. She argued that there was no reason to suppose that the Appellant could not be financially supported from his relatives in the UK - the Appellant's father had supported him; there was inadequate evidence as to the financial position of the Appellant's sister and her husband, and of his mother.

35 The Appellant would be able to take advantage of the economic boom in Mogadishu (MOJ [349-350]). A prolonged absence from Mogadishu was not a sufficient basis for finding that a risk of harm would result (MOJ, [477]), and Ms Brocklesby-Weller referred us to the outcome for the appellant 'SSM', in MOJ, who failed to establish a risk of harm by reason of long absence. She argued that there would not be a real risk of the Appellant finding himself in an internally displaced persons' camp.

36 Addressing the issue of the Appellant's rights under Article 8 ECHR, Ms Brocklesby-Weller addressed the Tribunal on Part 5A NIAA 2002 and the relevant immigration rules. She averred that the Appellant was a 'foreign criminal' as defined by s.117D(2) NIAA 2002, on the grounds that he has been convicted of an offence that has caused serious harm, or that he is a persistent offender. S.117C(3) provides that the public interest requires deportation unless exception 1 or 2 applies. Ms Brocklesby-Weller did not make any submissions as to Exception 1 under s.117C(4), but her later submissions on para 399A addressed the same issues.

37 Exception 2, under s.117C(5) did not apply; the Appellant does not have a partner, and does not have any children.

38 As to the Appellant's propensity to re-offend generally, Ms Brocklesby-Weller noted the observations of the FtT which did not share the family's confidence that the Appellant would not re-offend; this was little more than a hope [73]. Since then he has been arrested again, although not convicted. She queried the role that the Appellant's father could or did take in taking care of the Appellant; he did not know the details of why the Appellant had been arrested; did not know the terms of bail; he came to court separately. He does not know if the Appellant is still using drugs.

39 As to the length of the Appellant's residence in the UK, and addressing the case of Maslov v Austria [2008] ECHR 546, Ms Brocklesby-Weller argued that the Court's observation in Maslov (i.e. that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country very serious reasons are required to justify expulsion - [75]) was not a free-standing test, and she referred to SSHD v AJ (Angola) [2014] EWCA Civ 1636 (17 December 2014) [45] –[46]:

> "45. Moreover, as a consequence of its error, the Upper Tribunal did not make a proper assessment of the impact of the judgment of the Grand Chamber of the Court of Human Rights in Maslov v Austria. At para. [46] of its decision, the Upper Tribunal highlighted para. [75] of the judgment of the Grand Chamber, in which it says that in relation to a settled migrant of the kind described there, "very serious reasons are required to justify expulsion". The Upper Tribunal did not attempt to integrate this guidance within the framework of the new rules, but rather treated it as a free-standing matter of assessment for itself in relation to which it appears to have regarded the relevant approach to be one which imposed a heavy onus on the Secretary of State to show "very serious reasons" justifying expulsion.
>
> 46. In my view, the Upper Tribunal should have approached the assessment of the claim under Article 8 by application of the new rules, and in particular (since the appellant could not bring himself within paragraphs 399 and 399A of the new rules) by asking itself whether there were very compelling reasons, within the "exceptional circumstances" rubric in paragraph 398, to outweigh the strong public interest in deportation in the appellant's case. In addressing that question, the Upper Tribunal should, of course, have given due respect to the guidance from the Grand Chamber in Maslov at para. [75] of the judgment (reading it in the context of the general guidance given by the Grand Chamber at paras. [68]-[76] of the judgment), but as a matter to be brought into the overall assessment and balanced against the strong public interest in deportation to which the UK Borders Act 2007 and the new rules give expression. On a proper approach under the new rules, in relation to a person assessed to have active ties to his country of citizenship, without a relevant family life in the United Kingdom and whose serious offending had occurred when he was an adult, I think the more natural conclusion would be that deportation would be found to be justified in a case like this."

and also to the Court of Appeal's judgment in SSHD v MA (Somalia) [2015] EWCA Civ 48 (05 February 2015), [25](iii):

> "iii) In its consideration of the guidance in Maslov v Austria, the tribunal made the same error as occurred in the case of the appellant AG (Gambia) in AJ (Angola) (see paragraph 21 above). In paragraph 33 of its determination the tribunal said that "there need to be very serious reasons to justify expulsion", but it treated that as a free-standing matter of assessment rather than integrating it within the framework of the new rules and asking itself whether there were very compelling reasons to outweigh the public interest in deportation.

40 As regards Immigration Rules 398-399A, the Appellant had no partner or child (399) and in relation to para 399A, the Appellant had not been lawfully present for most of his life; and he was not socially and culturally integrated in the UK, given his offences involving drugs, robbery, threatening behaviour, and various failures to comply with sentences.

41 Further, in terms of any comparisons to the facts of Maslov, that individual had committed his offences at the age of 14-15 years, whereas the Appellant had offended for a longer period - 15- 17 years. She invited us to dismiss the appeal.

42 For the Appellant, Mr Adewoye addressed the Tribunal first on the risk of harm issue. He argued that some elements of AMM still applied, as was stated in Headnote (i) of MOJ. Some individuals could succeed in an Article 3 ECHR claim on the grounds of their vulnerability. The Appellant was vulnerable because of his age, and lack of experience in living in Somalia. We also note the argument in the Appellant's skeleton argument (para 12(vii)) that it should be a preserved finding from the FtT decision that the Appellant will be expected to complete the transition to life as a fully independent adult in very difficult circumstances in view of his age and lack of experience of life as an independent adult.

43 On the issue of whether the Appellant can be expected to take advantage of the economic boom: the examples of persons who had successfully done so at [225] of MOJ were generally people who had money to invest. The first three months after return were crucial (referring to evidence set out at [96] of MOJ). Further, survival still depended on the availability of a nuclear family: MOJ [341]-[342], and headnote paras (ix)-(x). The Appellant had not lived in Mogadishu. As regards remittances from the UK; he could not be forced to rely on a distant relative such as his brother-in-law, who in any event did not have enough money to support his own family. The Appellant's mother similarly did not have funds to send the Appellant. The Appellant was not likely to gain any employment; he has no particular skills. He would not be able to secure accommodation for himself and would end up in an IDP camp. The Appellant would not know which areas of Mogadishu to avoid in order to lessen the risk to him of being caught up in an attack (MOJ [387]-[388]. He would be at risk of serious harm.

44 Addressing the Tribunal on Article 8 ECHR, Mr Adewoye argued that the Appellant did not 'fall foul of' s.117B NIAA 2002; he was not in receipt of public finds. His private life was established when he had ILR, and therefore not at a time when his status was precarious. His criminality was not the most serious; most of his convictions were for breaches of community sentences and possession of cannabis. Although there was a robbery conviction the Appellant had not received a single sentence of 12 months or more - only when sentences were served consecutively.

45 At this point of submissions, the Tribunal pointed out evidence in the Respondent's bundle which we had noted during the course of submissions as to the Appellant's origins, bearing in mind that the submission being made was that the Appellant had not lived in Mogadishu. Although within application forms set out at K3 and O4, it was suggested that the Appellant's mother was born in Merka, evidence at K5 suggested that the Appellant's maternal grandmother was born in Mogadishu, and that the Appellant's mother was married in Mogadishu. Further at H1 and O3, it was indicated that Mogadishu was the birth place of both the Appellant and his father, and was the place where the Appellant last lived in Somalia. Mr Adewoye thought that some of these forms might have been completed by the Appellant's Social

Worker who may not have had a complete understanding of Somali geography. He did not invite us to hear any further evidence from the Appellant or father as to any of these issues. He invited us to allow the appeal.

Discussion

46 We preserve the following findings of fact as accurately representing the Appellant's circumstances at the time of the FtT's decision, and not being vitiated by error of law (although we comment further below as to the current strength of the Appellant's family life with his parents).

(i) "... I view the remainder of [the Appellant's parents'] evidence about their circumstances in Somalia, including their lack of family there, with the greatest circumspection because they have shown themselves to be untruthful in a core aspect of their claim and willing to say whatever they think will further their cause. I do not therefore accept their claim to come from minority clans, even at the lower standard." [66];

(ii) "I am satisfied that [the Appellant's parents] are committed to the Appellant and that they have a genuine parental relationship with him..." [66]; " ... he probably has a family life with his parents. Family life does not automatically end on a child's eighteenth birthday. The Appellant has just turned nineteen but appears to have been detained since before his eighteenth birthday. He was living with his father as part of his father's household up until the time that he was detained and was in contact with his mother. He had not become independent of his parents. This family life is nevertheless likely to end soon irrespective of whether he is allowed to remain here because he is likely to become independent of his parents in the foreseeable future" [67];

(iii) The family's confidence that the Appellant would no re-offence was little more than a hope [73].

(iv) The Appellant will speak the Somali language and will be familiar with Somali culture from his parents [75].

(v) The circumstances prevailing in 2014 in Merka would not justify a grant of humanitarian protection [78].

47 We do not preserve any findings as to whether the Appellant's proposed removal to Somalia would result in unjustifiably harsh consequences for the Appellant; such findings cannot stand in light of the errors of law found by this Tribunal on 4 March 2015.

48 We consider first whether the Appellant would be at any risk of harm upon return to Somalia.

49 Mr Adewoye appears to argue at paragraph 48 of the Appellant's skeleton argument that an element of the Country Guidance contained in AMM which continues to apply is headnote (ii) of the Country Guidance, ie:

> "The armed conflict in Mogadishu does not, however, pose a real risk of Article 3 harm in respect of any person in that city, regardless of circumstances. The humanitarian crisis in southern and central Somalia has led to a declaration of famine in IDP camps in Mogadishu; but a returnee from the United Kingdom who is fit for work or has family connections may be able to avoid having to live in such a camp. A returnee may, nevertheless, face a real risk of Article 3 harm, by reason of his or her vulnerability."

50 Although headnote (i) of MOJ does indicate that the country guidance issues addressed in that determination are not identical to those engaged with by the Tribunal in AMM, and that therefore, where country guidance has been given by the Tribunal in AMM in respect of issues not addressed in MOJ, then the guidance provided by AMM shall continue to have effect, we find that the matters considered in AMM which were not revisited in MOJ are matters concerning the situation in Somalia outside Mogadishu. The comprehensive review of conditions in Mogadishu set out in MOJ results in none of the observations in AMM about conditions there having any continuing application.

51 Further, we observe in any event that AMM gave an example of persons who might still be at risk of a breach of their rights under Article 3 ECHR upon return to Mogadishu, based on the evidence before the Tribunal at that time:

> "369 Conversely, a returnee could face real risk of a violation of Article 3, by reason of his or her vulnerability. For example, a woman with children returned without any family and without family support in Mogadishu from those already there, may well suffer treatment proscribed by Article 3, regardless of any financial assistance provided by the United Kingdom Government, given her increased susceptibility to opportunistic attack."

52 The Appellant clearly does not fit the example given.

53 Rather, we find the starting point in the assessment of any risk of harm to the Appellant is the Country Guidance set out in MOJ. Although the FtT considered the circumstances then prevailing in Merka, we are of the view that there is no reason to restrict our consideration to that town. The Appellant's return will take place to Mogadishu. If (which neither we nor the FtT found to be established) there would be any risk of harm to the Appellant in Merka, we consider whether he could reside in Mogadishu. The headnote of MOJ appears as an Appendix to this decision.

54 Applying the guidance in MOJ, we find that the Appellant, as an 'ordinary civilian' (i.e. not associated with the security forces; any aspect of government or official administration or any NGO or international organisation) 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. There is no real prospect of a re-established presence of Al-Shabaab in

Mogadishu. The present level of civilian casualties arising from armed conflict does not amount to a sufficient risk to ordinary civilians such as to represent an Article 15(c) risk. We find that there is no reason why the Appellant would not within a short period of time be able to identify areas and establishments that are clearly identifiable as likely Al Shabaab targets, such as the Bakara market or other areas described at para 387 of MOJ. There is no real risk of forced recruitment to Al Shabaab for civilian citizens of Mogadishu, including for recent returnees from the West. (See MOJ, headnote paras (ii)-(vi)).

55 The Appellant asserts that he has no nuclear family in Mogadishu and, being from a minority clan, will have no clan support. We find that there is no reasonable degree of likelihood that those are reliable propositions. His argument that he is from a minority clan has been rejected and, as found by the FtT, the evidence relied upon by the Appellant as to the family's circumstances in Somalia, including the alleged lack of family there, is to be treated with 'the greatest circumspection'. The references from the Appellant's evidence which we drew to Mr Adewoye's attention as to the Appellant being born in, and had last lived in Mogadishu also suggest that the Appellant has greater connections with that city than he is prepared to admit to. Even if the information contained in the ICD.0350 form dated March 2013 at O3-19 was completed by the Appellant's Social Worker, we note that the Social Worker Wendy Hargreaves asserts in her letter dated 18 March 2013 at O2 that she also spoke with the Appellant's parents when completing the form. Further, information indicating that the Appellant was born in Mogadishu also appears in a VAF2 form dated 3 May 2008 at H1.

56 We find that we are entitled to proceed on the basis that the Appellant comes from a majority clan and will therefore be in a position to seek assistance from clan members who are not close relatives, who may potentially be able to assist the Appellant in providing a social support mechanism and assistance with access to a livelihood (MOJ headnote (vii) and (viii)).

57 With reference to MOJ headnote (ix) we do not accept, as being established to a reasonable of likelihood, that on return to Mogadishu after a period of absence, the Appellant has no nuclear family or close relatives in the city. Although therefore not required by MOJ, we nonetheless continue to perform the careful assessment of all the Appellant's circumstances as suggested at MOJ headnote (ix):

(i) The Appellant's circumstances before departing Somalia were that he lived in either Merka or Mogadishu (and we have indicated our doubts above as to the Appellant's evidence about his place of origin) and left Somalia in 2006 (Appellant's witness statement para 5), aged 10 or 11.

(ii) The Appellant arrived in the United Kingdom on 19 July 2006 and has now been outside of Somalia for 9 years. His Social Worker noted having spoken to the Appellant's parents in March 2013 that the when the Appellant started to attend school in Harrow he was bullied due to not being able to speak English. The FtT held that the Appellant will be able to speak the Somali language and is familiar with Somali culture from his parents [75].

(iii) The Appellant has not established that he has no family or clan associates to call upon in Mogadishu.

(iv) We accept that the Appellant will not have any of his own financial resources to all upon. It is unlikely that the Appellant would receive assistance through VARRP (considered at [423] of MOJ) on the grounds that, if this appeal fails and the Appellant is deported, there will be a deportation order against him.

(v) The Appellant's prospects of securing a livelihood will be, in the light of our finding that the Appellant has not established that he is from a minority clan and has no nuclear family in Mogadishu, much the same as many others returning to Mogadishu. Although the Appellant does not have any particular qualifications or skills, he is young and healthy, and the Appellant has not shown, as per MOJ headnote (x) 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 not been away.

(vi) As to the potential availability of remittances from the Appellant's family in the United Kingdom, we note that, contrary to the evidence of the Appellant's father, the Appellant asserted that he obtained some financial assistance from his mother and sister as well as his father. By whatever means, the Appellant has been supported financially in the United Kingdom by his family for some time, and there is no clear reason offered by the Appellant as to why this would not be able to continue if the Appellant departed. We do not over-state the amount of money that the Appellant may be able to receive from his family in the UK - this is likely to be modest, but we find that a degree of financial support would continue to be available to the Appellant in Somalia.

(vii) The Appellant has been financially supported by his family in the United Kingdom. However, the Appellant has engaged in criminal activity in the United Kingdom including being concerned with possession of proscribed drugs with intent to supply. This past criminal conduct indicates that the Appellant is not a naive young man with no street experience - see the description of appellant SSM at [475] of MOJ by way of comparison.

(viii) We have no indication of how the Appellant actually left Somalia and travelled to the United Kingdom. In those circumstances, we leave out of account the fact that the Appellant's departure from Somalia must have been funded by someone, at some point, in our assessment of the Appellant's likely circumstances on return.

58 The Appellant therefore fails to establish, as per MOJ, that he is a person with no clan or family support and would not be in receipt of remittances from abroad and has no prospects of securing a livelihood on return. He does not face a real risk of living in circumstances falling below that which is acceptable in humanitarian protection terms. The corollary of that position, described in headnote (xii), does not therefore arise.

59 The Appellant's removal to Somalia does not give rise to a breach of the United Kingdom's obligations under the Refugee Convention or Article 15(c) of the Qualification Directive, or the Appellant's rights under Article 3 ECHR.

The Immigration Rules and Article 8 ECHR

60 We approach this assessment following the guidance in Chege, ie to consider the following issues:

i Is the appellant a foreign criminal as defined by s117D (2) (a), (b) or (c).

ii If so, does he fall within paragraph 399 or 399A of the Immigration Rules

iii If not are there very compelling circumstances over and beyond those falling within 399 and 399A relied upon, such identification to be informed by the seriousness of the criminality and taking into account the factors set out in s117B.

61 We find that the Appellant is a foreign criminal as defined under S.117D NIAA 2002, on the grounds that the Appellant has been convicted of an offences that have caused serious harm: robbery, theft, using or threatening to use abusive or insulting words or behaviour with intent to cause fear or provocation of violence (2 such convictions), handling stolen goods, battery (2 such convictions), affray, and possession with intent to supply a Class B controlled substance. We find that there is no requirement to identify positive evidence that a particular individual has been caused serious harm by the Appellant's actions; rather, we find that we may take judicial notice of the fact that dealing in and facilitating the consumption of proscribed drugs is seriously harmful to society at large, both in terms of the health and welfare of drug users, and due to the criminality, such as theft and violence, which is associated with the drugs trade. We also find that the Appellant is a persistent offender. As a result, we agree with the Respondent that para 398(c) of the Rules applies to the Appellant.

62 However, neither para 399(a) or (b) apply to the Appellant, as he has no children or partner.

63 Further, we find that para 399A does not apply to the Appellant, on the grounds that (addressing the issues raised in 399A(a)-(c)):

(a) He has not been lawfully present in the UK for most of his life - he has been present for 9 years of his 20 years (at time of determining this appeal). Even though he was granted ILR, less than half of one's life cannot be held to be most of one's life.

(b) The Appellant has not socially and culturally integrated in the UK. Although criminal offences can be and are committed by persons who have been born in, and spent the whole of their lives in the UK, and whose only experience of culture and society is that within the UK, we find that social and cultural integration within the rules refers to social and cultural integration into law-abiding society. The Appellant has failed to integrate socially and culturally in the UK. In any event, the Appellant fails to satisfy 399A(a) and (c).

(c) There would not be very significant obstacles to the Appellant's integration into Somalia; we refer to our retained finding that the Appellant will speak the Somali language and will be familiar with Somali culture from his parents. As discussed above, any difficulties the Appellant has in obtaining employment will not be such as to be likely to cause him to become destitute.

64 As para 399 and 399A do not apply, para 398 provides that "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."

65 Chege suggests that 'compelling' as an adjective has the meaning of having a powerful and irresistible effect; convincing. We also note at [43]-[44] of MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192:

> "43. The word "exceptional" is often used to denote a departure from a general rule. The general rule in the present context is that, in the case of a foreign prisoner to whom paras 399 and 399A do not apply, very compelling reasons will be required to outweigh the public interest in deportation. These compelling reasons are the "exceptional circumstances".
>
> 44. We would, therefore, hold that the new rules are a complete code and that the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence."

66 The reference to exceptional circumstances has since 28 July 2014 been replaced with the expression "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".

67 The Court of Appeal in MF (Nigeria) appeared to equate the two terms at [43]-[44], as did the Upper Tribunal in Oladeji (s.3(1) BNA 1981) [2015] UKUT 326 (IAC) (21 May 2015):

> "24. We consider that the new rule has not imposed a higher threshold but simply confirmed the approach of the Court of Appeal in MF (Nigeria) [2013] EWCA Civ 1192 which regarded the two expressions as synonymous."

68 We find that the identification of 'very compelling circumstances over and above those described in paragraphs 399 and 399A" therefore requires a proportionality balancing exercise to be carried out, through 'the lens of the rules' (AJ (Angola)), and Part 5A NIAA 2002.

69 We find that the deportation of foreign criminals is in the public interest and is part of the maintenance of effective immigration control (s.117B(1) and 117C(1)).

70 The Appellant speaks English, but he gains no positive entitlement to leave to remain because of that (AM (s.117B) [2015] UKUT 260 IAC). Although, as Mr Adewoye asserted, the Appellant may not be in receipt of public finds, he is clearly not financially independent (s.117B(3)).

71 The Appellant has not been in the United Kingdom unlawfully. There is therefore no requirement under s.117B(4) to treat any private life that he has developed in the United Kingdom as having little weight. However, AM provides that:

> "In some circumstances it may also be that even a person with indefinite leave to remain, or a person who has obtained citizenship, enjoys a status that is "precarious" either because that status is revocable by the Secretary of State as a result of their deception, or because of their criminal conduct. In such circumstances the person will be well aware that he has imperilled his status and cannot viably claim thereafter that his status is other than precarious."

72 Notwithstanding the Appellant's enjoyment of ILR, he might, as a result of his criminality, be described as holding an immigration status which was 'precarious', with the result, under s.117B(5) that any private life developed at a time when his status was precarious should be given little weight. However we do not find it necessary to rule on whether the Appellant's immigration status has been precarious, as the Appellant has advanced very little if any evidence of his private life in the UK, aside from his connections with his family members. There is therefore little evidence to attach weight to.

73 No issues arise under s.117B(6).

74 When examining the consideration at s.117C(2), that the more serious the offence committed by a foreign criminal, the greater is the public interest in deportation, we find that although the Appellant's offences are not of the *most* serious in nature, and his longest single period of imprisonment was 8 months, we find that his offences running up to the end of 2012 were becoming increasingly serious, and that his many offences of failing to comply with community orders indicated that he was largely immune to the sanctions of the criminal courts. We treat his offences as being of a serious nature and the public interest in deportation as having significant weight.

75 Neither Exception 1 or 2, set out in s.117C(4) and (5) apply, given our findings on para 399A at [63] above, as he has no child or partner. S.117C(3) therefore provides that it is a consideration, for us to take into account, that the public interest requires the Appellant's deportation.

76 S.117C(6) does not arise directly, as the Appellant has not been sentenced to a period of imprisonment of at least 4 years.

77 We do not find that the apparent indication within s.117C(3) that the Appellant's non-satisfaction of Exception 1 or 2 within s.117C(4) or (5) means that it is, without more, proportionate to deport the Appellant. We find that that is so for the following reasons:

(i) If it were otherwise, then persons sentenced to periods of at least 4 years imprisonment, whose removal still, under s.117C(6), requires a consideration of whether there are very compelling circumstances over and above those in Exceptions 1 and 2, would be provided greater statutory protection than those with shorter sentences.

(ii) Paragraph 398 of the Rules still requires, for the Appellant, consideration of whether there are any very compelling circumstances over and above paras 399 and 399A.

(iii) Part 13 is a complete code which must involve a proportionality balancing exercise which takes all material considerations into account.

78 We come to the following conclusions.

79 The Appellant's family life in the United Kingdom is limited. Although his parents were described in 2014 by the FtT as being "committed to the Appellant and that they have a genuine parental relationship with him..." [66] , it was also observed that "This family life is nevertheless likely to end soon irrespective of whether he is allowed to remain there because he is likely to become independent of his parents in the foreseeable future" [67]. The evidence that we heard from the Appellant's father as to his current relationship with the Appellant paints a picture of a young man merely sharing the same roof with his father. The Appellant has not told his father what he was arrested for in May 2015 or the conditions of his bail. He comes home at night, sleeps, and then goes out for most of the day, with friends whom the Appellant's father does not know, and comes home late; the father does not know what the Appellant has been doing. The father candidly admitted that he did not know whether the Appellant was still smoking cannabis.

80 We did not hear from the Appellant's mother or sister. They live in Wembley. The hearing took place in central London. The reasons given by the Appellant's father for their non-attendance (sickness, and pregnancy resulting in feeling unwell, respectively) are not compelling. We find that their non-attendance is indicative of the importance that they attach to the present proceedings and to the level of importance that they attach to their family ties to the Appellant, that is to say, not very much.

81 Bearing in mind that the Appellant was still only 19 at the time of the hearing, we give him the benefit of the doubt as regards the existence of family life between himself and his other family members in the United Kingdom, but we find that family life, as defined by Article 8 ECHR, continues to exist between them by only a slender margin.

82 We take into account the Appellant's likely future offending behaviour. We do not have any pre-sentence or OASys reports before us and therefore there is no professional assessment of his propensity to re-offend. However, we have regard to the Appellant's persistent offending over a period when aged 14-17. We understand from the Appellant's evidence that a bag of cannabis was found by the police near to a place where the Appellant and two friends were standing. None of them admitted to owning the bag of drugs. We do not find, even on a balance of probabilities, that the Appellant was in possession of cannabis when arrested in May this year. There is no evidence in the bundle produced for this hearing of the completion of victim awareness courses, or other rehabilitative training. We have no confidence that the Appellant will avoid further convictions.

83 Mr Adewoye has made reference to the case of Maslov in his submissions. We recall that in Akpinar, R (On the Application Of) v Upper Tribunal (IAC) [2014] EWCA Civ 937, relied on by the Respondent in submissions before the FtT, Sir Stanley Burnton, (with whom MacFarlane LJ and Maurice Kay LJ agreed) held as follows:

> "43. My conclusion is that there is not a "clear and constant jurisprudence of the Strasbourg court" (see *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, paragraph 26, and *R v. Special Adjudicator ex parte Ullah* [2004] UKHL 26 [2004] 2 AC 323 at paragraph 20) requiring this Court to treat "very serious reasons", if the phrase means "very serious offences", as a precondition of deportation of someone who is a "settled migrant who has lawfully spent all or the major part of his or her childhood and youth" in this country."

84 Rather, [75] of the judgment in Maslov could be explained thus, in the view of the Court of Appeal at [32]:

> "I do not think that the Court can have intended or did intend otherwise. What was said in paragraph 75 must be read as relating to the facts of the case before it, among other factors that the offending in question was, as subsequently stated in Onur, no more than acts of juvenile delinquency."

85 We therefore take into account, as an important factor, the fact that the Appellant's offences were committed when he was a minor, necessarily at a time before a person has become fully mature. However, save for his remaining free from further conviction since 29 May 2013, we see no real evidence that the Appellant has effected any material change in his life or that he is engaging in any positive way in society.

86 We are of the view that giving appropriate weight to the public interest in deporting foreign criminals, and weighing all that can properly be weighed in the balance in favour of the Appellant, and having regard to his private and family life in the United Kingdom, the Appellant has not demonstrated that there are very compelling circumstances outweighing the public interest in deportation. There is nothing very powerful, irresistible or convincing which would demonstrate that the Appellant's removal is disproportionate under Part 13 of the Rules, which includes a proportionality balancing exercise.

87 In light of the fact that we have found that the Appellant's deportation would not be contrary to the UK's obligations under the Refugee Convention or the Human Rights Convention, we finally consider whether there are any exceptional circumstances, as contemplated under para 397 of the rules, as to why the public interest in deportation may be outweighed. We can find no additional factors that there are relevant to that assessment; there are no exceptional circumstances under which we would allow this appeal.

88 The Tribunal having previously found that the First tier Tribunal decision of 15 August 2014 involved the making of an error of law, and having set that decision aside, we make the following decision.

Decision

89 We re-make the decision, dismissing the Appellant's appeal against the Respondent's decision of 4 July 2013 to make a deportation order against the Appellant. The appeal is dismissed on asylum, human rights and humanitarian grounds.

Signed:

Deputy Upper Tribunal Judge O'Ryan

9 November 2015

Appendix 1: Error of law decision

IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01672/2013

THE IMMIGRATION ACTS

Heard at Field House **Promulgated**
On 30 January 2015

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Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MOHAMMED HASSAN BARRE

Respondent

Representation:
For the Appellant: Mr I Jarvis, Home Office Presenting Officer
For the Respondent: Mr A Adewoye, Solicitor

DECISION AND DIRECTIONS

1. The appellant in these proceedings is the Secretary of State. However, for convenience I refer to the parties as they were before the First-tier Tribunal.

2. Thus, the appellant is a citizen Somalia born on 6 August 1995. On 8 July 2013 the respondent made a decision to make a deportation order against the appellant under

Section 3(5)(a) of the Immigration Act 1971, it being considered that the appellant's deportation is conducive to the public good.

3. The appellant appealed against that decision and his appeal was heard by First-tier Tribunal Judge N J Bennett on 23 July 2014, whereby he allowed the appeal. Permission to appeal against his decision having been granted, the matter now comes before me.

4. The further background to the appeal, as set out in the decision of the First-tier Tribunal, is that the appellant arrived in the UK in July 2006 with his three siblings, having been granted indefinite leave to enter to join his father. Judge Bennett's determination goes on to record that since 1 December 2009 the appellant has been convicted of 25 criminal offences. From the respondent's decision letter it can be seen that his offending has including robbery, public order offences, possession of class B drugs and failure to comply with various court orders.

Submissions

5. Mr Jarvis referred to the fact that a number of adverse findings were made in relation to the appellant and his witnesses, for example in terms of his mother's claim that the appellant's father had been killed in Somalia, whereas his father was in fact a witness in the proceedings before the Tribunal. In addition, the First-tier Judge had noted that the appellant's mother's claim to come from the minority Ashraf clan had been rejected by an Adjudicator in the course of her appeal. Those matters, it was submitted, were relevant to the application of the country guidance decision of AMM and others (conflict; humanitarian crisis; returnees; FGM) Somalia CG [2011] UKUT 00445 (IAC).

6. At [66] of the determination Judge Bennett had stated that he viewed the evidence of the witnesses about their circumstances in Somalia, including their lack of family there, with the greatest circumspection, and he had considerable reservations about the evidence of their belief that the appellant had changed for the better.

7. He concluded at [75] that the appellant speaks the language of Somalia and would be familiar with Somali culture from his parents. It was submitted that the conclusion at [79] that there were exceptional circumstances, particularly having regard to the situation in Merka, was a wrong approach. The judge had in effect undertaken an Article 15(c) analysis by the back door.

8. In addition, it was submitted that Judge Bennett had failed to take into account the amendments to the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") brought about by Section 19 of the Immigration Act 2014. Although the judge heard the appeal on 23 July 2014, the appeal was not determined until 12 August 2014 and by then the amendments to the 2002 Act had come into force. Furthermore, the Immigration Rules were amended such that there would need to have been "very compelling circumstances" over and above those described in paragraphs 399 and 399A before the appeal could be allowed. The amendments to the Immigration Rules

applied from the date of implementation, no matter when the immigration decision was made in a deportation case.

9. In any event, the judge had to apply the country guidance decision of AMM and in respect of which the determination betrays a fundamental misunderstanding in terms of his having said that that decision does not say anything about other parts of the country. AMM dealt mostly with Mogadishu because that was the only point of return. It decided that a return to Mogadishu would not involve a breach of a person's Article 3 rights. It said that there was a potential for Article 15(c) harm for most people but not if a person had connections. In this case there were serious issues with the appellant's credibility. That in turn reflects on the issue of what connections the appellant may have in Somalia.

10. There was no analysis in the determination of what would happen if the appellant was returned to Mogadishu, rather than Merka. There was no assessment of the impact of the lies that the family had told in other respects. Furthermore, there was no consideration of whether the appellant could live in Mogadishu.

11. Mr Adewoye rejected the suggestion that Judge Bennett should have taken into account the amendments to the 2002 Act brought about by the Immigration Act 2014, and the amendments to the Immigration Rules, given that they were not in force at the time of the actual hearing. He relied on the decision in YM (Uganda) v Secretary of State for the Home Department [2014] EWCA Civ 1292. It was submitted that only if I were to find an error of law in the assessment of Article 8 would I then have to apply what is now the current law under Section 117C of the 2002 Act.

12. Furthermore, it was submitted that even if Section 117C had applied to the circumstances of the appellant's appeal, he would have the benefit of the exceptions under Sections 117C(4)(b) and (c), that is in terms of social and cultural integration in the UK and very significant obstacles to integration into Somalia. The judge had accepted that the appellant has social and family ties to the UK and that there were significant difficulties for life for him in Somalia if deported. He was aware of the need to establish exceptional circumstances in terms of undue hardship as indicated in the various authorities.

13. I was referred to various paragraphs of the Country Information and Guidance Report by the Home Office in relation to Somalia, the date of which appears to be 27 February 2014 (page 12). Reference was made to the skeleton argument that was before the First-tier Tribunal.

My assessment

14. It is submitted on behalf of the respondent that the First-tier Judge should have taken into account the coming into force of Section 19 of the Immigration Act 2014 which introduces amendments to the 2002 Act concerning deportation of foreign criminals. It is also submitted that the First-tier Judge ought also to have taken into account in his decision the amendments to the Immigration Rules which took effect from 28 July 2014. Whilst it is accepted that neither the statutory changes nor the changes to the

Immigration Rules were in force at the time of the hearing before the First-tier Judge (23 July 2014), by the time of promulgation on 12 August 2014, all those provisions were in force. Thus, the judge's decision was required to apply the relevant provisions of the amended 2002 Act and associated amendments to the Immigration Rules.

15. On behalf of the appellant it is submitted that given that the changes were not in force at the time of the hearing, the judge was not required to, and indeed ought not to have, taken any of those changes into account. It was submitted that the decision in YM (Uganda) supported the appellant's position on this issue. Mr Jarvis on the other hand, contended that in fact YM (Uganda) established the opposite of what was contended for on behalf of the appellant.

16. Mr Adewoye relied on [12] of YM (Uganda). In that paragraph it is noted that the relevant parts of the Immigration Act 2014, amending the 2002 Act, came into force on 28 July 2014, that is after the oral argument had taken place in the appeal before the Court of Appeal and whilst the judgment was in preparation. However, that particular paragraph says nothing about whether the court was obliged to take the new provisions into account in its judgment. At [25] and [26] the arguments on behalf of the parties before the court are set out, in terms of whether the Upper Tribunal had been required in that case to make its decision in terms of the law as it was before it, or as subsequently enacted. The Secretary of State agreed with the proposition that the Court of Appeal had to consider the law as it was when the Upper Tribunal "made its decision" and the court was not therefore required to consider the new provisions in the 2002 Act when deciding whether there had been an error of law in the decision of the Upper Tribunal. At [36] the Court of Appeal concluded that its task was to consider the law as it applied at the time of the Upper Tribunal's decision and not to consider the law as it had subsequently changed. Thus, the Court decided that the amendments to the 2002 Act and to the Immigration Rules were irrelevant to the task of deciding whether the Upper Tribunal had made an error of law.

17. Although the Court of Appeal was not concerned with the question of whether the Upper Tribunal should have taken into account changes in the law post-hearing but prior to promulgation, the Court of Appeal does use the word "the decision", rather than hearing, as in the date of the decision by the Upper Tribunal rather than the date of hearing. In any event, it does seem to me to be an untenable proposition to suggest that if statutory changes take effect on a date after the hearing but prior to promulgation, a judge is not required to take those changes into account. Mr Adewoye in effect suggested that it would have been unfair for the judge to have taken into account those changes to the legal framework post-hearing. However, it would have been open to the judge to have recalled the parties for a further hearing or to have invited written submissions on the effect of the legislative changes. Mr Adewoye suggested that there had to be some mandate in the Procedure Rules for the judge to have taken such a course. Even if there is any force in that proposition, which I do not believe that there is, it is easily answered with reference to the Asylum and Immigration Tribunal (Procedure) Rules 2005 as then in force. The

judge could have reconvened the hearing or invited further submissions with reference, if necessary, to rule 43 (conduct of appeals and applications), and rule 45 (directions).

18. I am satisfied that it was an error of law for Judge Bennett to have determined the appeal without reference to the changes in the 2002 Act as brought about by the Immigration Act 2014, and the changes to the Immigration Rules. So far as the Immigration Rules are concerned, the position is not so straightforward but after analysis, I have come to the view that he was similarly required to take them into account.

19. The changes to the Immigration Rules took effect on 28 July 2014 so far as concerns, amongst other matters, Article 8 claims from foreign criminals. These relate to paragraphs A279, 398, 399 and 399A-C. Although not canvassed in argument before me, I have considered whether those changes, taking effect on 28 July 2014, apply to decisions taken by the Secretary of State before that date. In this case, the decision to make a deportation order was made on 8 July 2013. The changes are brought about by HC 532, and as concerns foreign criminals are in paragraphs 13-30 of the Statement of Changes. Under the "Implementation" section it states as follows:

> "The change set out in paragraph 13 of this statement takes effect on 28 July 2014.
>
> The changes set out in paragraphs 14 to 30 of this statement take effect on 28 July 2014 and apply to all ECHR Article 8 claims from foreign criminals which are decided on or after that date."

20. Looking at other paragraphs in the Implementation section, it could be said that the changes only relate to decisions made by the Secretary of State, rather than courts or Tribunals because courts or Tribunals do not, in one sense, decide claims but appeals, and other provisions in the Implementation section consider applications made before 28 July 2014 but not decided by that date. Similarly, some of the implementation provisions relate to applications made before the amendments to the rules on other dates came into force.

21. However, I am satisfied that the changes to the Immigration Rules as they apply to foreign criminals did come into force on 28 July 2014 whenever the decision was made by the Secretary of State. I take this view for three reasons. Firstly, A362 as amended states that:

> "Where Article 8 is raised in the context of deportation... the claim under Article 8 will only succeed where the requirements of these rules as at 28 July 2014 are met, <u>regardless of when the notice of intention to deport or the deportation order, as appropriate was served</u>." (my emphasis).

22. Secondly, the explanatory memorandum to HC 532 at 3.4 and 3.5 refers, in essence, to the need to coincide and align the changes to the Immigration Rules with the corresponding changes to the 2002 Act so far as concerns foreign criminals.

23. Thirdly, the court in YM (Uganda), at [39] said that:

> "In the absence of any statement to the contrary, the most natural reading of the Rules is that they apply to decisions taken by the SSHD until such time as she promulgates new rules, after which she will decide according to the new rules. The same applies to decisions by Tribunals and the courts...".

24. Having concluded that the First-tier Judge erred in law in his failure to apply the amendments to the 2002 Act and the changes to the Immigration Rules, the next question to be decided is whether the error of law is such as to require the decision to be set aside. Mr Adewoye submitted that in any event, even with reference to the new rules and the new statutory regime, the appellant's appeal would have succeeded. However, under Section 117C(4)(a) the appellant would have had to have established that he had been lawfully resident in the UK for most of his life. He arrived when he was aged 10, going on 11, and at the date of the hearing before the First-tier Tribunal he was aged 18. At the date the decision was promulgated he was aged 19. On either view he had not been lawfully resident in the UK for most of his life. Even assuming under Section 117C(4)(b) it could be said that he was socially and culturally integrated in the United Kingdom by reason of the length of time that he had been here, he would nevertheless have to establish that there would be "very significant obstacles" to his integration into Somalia under sub-paragraph (4)(c). I do not read the judge's conclusions as meaning that on the facts that particular test would have been met.

25. A further issue arises in terms of [71] of the determination. There it is stated that the appellant does not face automatic deportation under the UK Borders Act 2007 "which means that Parliament has not decided by statute that the public interest requires his deportation". However, that is precisely what Section 117C(1) of the 2002 Act does say: "The deportation of foreign criminals is in the public interest."

26. Similarly, the same can be found in paragraph 398(c) of the Immigration Rules, namely that the deportation of a person from the UK is conducive to the public good "and in the public interest" because in the view of the Secretary of State their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law. The Secretary of State did conclude that the appellant was a persistent offender. The provisions of the Immigration Rules in 398 reflect those in the 2014 Act. I do not consider that it could be said that the outcome of the appeal would have been the same notwithstanding the errors of law.

27. These are sufficient reasons to conclude that the decision of the First-tier Tribunal should be set aside. However, I am also satisfied that there is merit in what is said on behalf of the respondent in terms of the judge's consideration of the then country guidance in AMM. Judge Bennett concluded that the appellant's return to Merka, having regard to the situation there, the appellant's age and lack of experience in living there as an adult, outweighs the public interest in deportation. As Mr Jarvis submitted however, that conclusion fails to take into account that the appellant would be returned in the first instance to Mogadishu. It is sufficient to refer to the headnote of AMM, which contains the guidance reflected in the body of the decision.

In essence, AMM concluded that with respect to Mogadishu there remained in general a real risk of Article 15(c) harm for the majority of those returning there after a significant period of time abroad. However, that risk did not arise in the case of a person connected with powerful actors or belonging to a category of middle class or professional persons who can live to a reasonable standard in circumstances where the Article 15(c) risk does not apply. The Tribunal did say however, that the significance of that category, was not to be overstated and is not automatically to be assumed to exist merely because a person has told lies.

28. Pausing there, there is no assessment by the First-tier Judge of the significance of the lies that had been told by or on behalf of the appellant in connection with this appeal, in terms of events in Somalia and the family's clan status. In addition, it is to be remembered that at [66] Judge Bennett said that he viewed the remainder of the witnesses' evidence about their circumstances in Somalia, including their lack of family there, with the greatest circumspection because they had shown themselves to be untruthful in the core aspect of their claim and willing to say whatever they think will further their cause. Those are mattes that needed to be considered in the context of the country guidance in AMM so far as it relates to Mogadishu.

29. AMM also concluded that the armed conflict in Mogadishu at that time did not pose a real risk of Article 3 harm in respect of any person in that city, regardless of circumstances. It did conclude that such a person may face a real risk of Article 3 harm by reason of his or her vulnerability. In this connection the appellant's age and lack of experience of Somalia would have been significant. However, those factors were not considered with reference to Mogadishu itself, as opposed to Merka.

30. Thus, in terms of the judge's assessment of the then country guidance, I am also satisfied that he erred in law. That error of law is also in its own right such as to require the decision to be set aside.

31. It is not appropriate for this appeal to be remitted to the First-tier Tribunal and the decision will be re-made in the Upper Tribunal. It is not anticipated that there will be the need for any further evidence to be given, but I do consider that a further hearing is necessary to allow the parties to make submissions in terms of the re-making.

32. The findings of fact made by the First-tier Tribunal, except in so far as any of those findings are infected by the error of law, are to stand.

DIRECTIONS

1. At the next hearing the parties must be in a position to make submissions as to what findings of fact are to be preserved, and in relation to the application of the decision in MOJ & Ors (Return to Mogadishu) Somalia CG [2014] UKUT 00442 (IAC).

Upper Tribunal Judge Kopieczek 4/03/15

Appendix 2:

MOJ & Ors (Return to Mogadishu) (Rev 1) (CG) [2014] UKUT 442 (IAC) (3 October 2014)

Headnote:

"LEGAL GUIDANCE

(i) The operation of the Upper Tribunal Immigration and Asylum Chamber Guidance Note no. 2 of 2011, "Reporting Decisions of the Upper Tribunal Immigration and Asylum Chamber" and, particularly, [11] thereof, does not render the process of composition of country guidance decisions procedurally unfair.

(ii) As a general principle, where attendance of an appellant is a prerequisite to the vindication of the person's right to a fair hearing, the appellant must be present.

COUNTRY GUIDANCE

(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.

(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.

(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.

(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.

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

(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 for majority clan members, as minority clans may have little to offer.

(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.

(ix) If it is accepted that a person facing a return to Mogadishu after a period of absence has no nuclear family or close relatives in the city to assist him in re-establishing himself on return, there will need to be a careful assessment of all of the circumstances. These considerations will include, but are not limited to:

circumstances in Mogadishu before departure;

length of absence from Mogadishu;

family or clan associations to call upon in Mogadishu;

access to financial resources;

prospects of securing a livelihood, whether that be employment or self employment;

availability of remittances from abroad;

means of support during the time spent in the United Kingdom;

why his ability to fund the journey to the West no longer enables an appellant to secure financial support on return.

(x) Put another way, it will be for the person facing return to explain why he would not be able to access the economic opportunities that have been produced by the economic boom, especially as there is evidence to the effect that returnees are taking jobs at the expense of those who have never been away.

(xi) It will, therefore, only be those with no clan or family support who will not be in receipt of remittances from abroad and who have no real prospect of securing access to a livelihood on return who will face the prospect of living in circumstances falling below that which is acceptable in humanitarian protection terms.

(xii) The evidence indicates clearly that it is not simply those who originate from Mogadishu that may now generally return to live in the city without being subjected to an Article 15(c) risk or facing a real risk of destitution. On the other hand, relocation in Mogadishu for a person of a minority clan with no former links to the city, no access to funds and no other form of clan, family or social support is unlikely to be realistic as, in the absence of means to establish a home and some form of ongoing financial support there will be a real risk of having no alternative but to live in makeshift accommodation within an IDP camp where there is a real possibility of having to live in conditions that will fall below acceptable humanitarian standards."