Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00058/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision sent to parties on:**
On 25 September 2017	On 3 October 2017

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

AHMED HASSAN KHALIF

[NO ANONYMITY ORDER]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr Nigel Bramble, a Senior Home Office Presenting Officer

For the respondent: Mr David Sellwood, Counsel instructed by Duncan Lewis Solicitors

DECISION AND REASONS

© CROWN COPYRIGHT 2017

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal to allow the claimant's appeal against her decision to cease refugee status pursuant to section 72 of the Nationality, Immigration and Asylum Act 2002 (as amended) and Article 1C(5) of the Refugee Convention, alternatively that the claimant is excluded from refugee status pursuant to Articles 32 and 33 of the Refugee Convention, and to make a deportation order against him as a foreign criminal pursuant to sections 32 and 33 of the Borders, Citizenship and Immigration Act 2009.

2. The claimant is a citizen of Somalia. The index offence was his conviction for robbery on 24 February 2014, for which he was sentenced to 5 years' imprisonment. He remains on licence in relation to that sentence. He was served with notification of intention to cease his refugee status on 18 January 2016. On 10 May 2016, the Secretary of State signed a deportation order to return the claimant to his country of origin, Somalia.

The legal framework

3. The claimant is subject to automatic deportation by reason of the provisions of sections 32 and 33 of the UK Borders Act 2007. Section 32 defines 'foreign criminal' as a person who is not a British citizen, who is convicted in the United Kingdom of an offence, and in addition, that his offending meets either Condition 1 (sentenced to a period of imprisonment of at least 12 months) or Condition 2, that the offence is one of those specified as a serious criminal offence by order of the Secretary of State under section 72(4)(a) of the 2002 Act and the person is sentenced to a period of imprisonment.

4. If either Condition is met, the person is a foreign criminal and the statute creates an statutory presumption (section 32(4)) that such deportation order is conducive to the public good. The Secretary of State is required to make a deportation order in respect of a foreign criminal, unless one of the Exceptions in section 33 is applicable, or the foreign criminal is outside the United Kingdom, or section 34(4) applies (making a fresh deportation decision under section 32(5)).

5. The statutory presumption that deportation is conducive to the public good ceases to apply (positively or negatively) if an Exception is applicable. The relevant exception in section 33 in this appeal is Exception 1:

> "33. …(2) Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach –
>
> (a) A person's Convention rights; or
>
> (b) The United Kingdom's obligations under the Refugee Convention. …
>
> (7) The application of an exception –
>
> (a) Does not prevent the making of a deportation order;
>
> (b) Results in it being assumed neither that deportation of the person concerned is conducive to the public good, nor that it is not conducive to the public good."

6. Where the Secretary of State has certified her decision under section 72 of the 2002 Act, section 72(1) tells the Court or Tribunal how Article 33(2) of the Refugee Convention is to be applied. Section 72(10) of the 2002 Act requires the Tribunal to begin its consideration of the appeal with consideration of the section 72 certificate. The claimant will have appealed under section 82, 83, 83A or 101 of the Nationality, Immigration and Asylum Act 2002 (as amended), wholly or partly on the ground that to remove him from, or to require him to leave the United Kingdom, would breach the United Kingdom's Refugee Convention obligations (see section 72(9)(a)).

7. A section 72 certificate has the effect of raising a dual statutory presumption: first, that the claimant has been convicted on a final judgment of a 'particularly serious crime' and second, that he 'constitutes a danger to the community'. In the case of a person convicted in the United Kingdom, section 72(2) provides that both presumptions come into effect where the individual is sentenced to a period of imprisonment of at least 2 years.

8. Both presumptions may be rebutted by appropriate evidence, as set out in section 72(6) and *EN (Serbia) v Secretary of State for the Home Department & Anor* [2009] EWCA Civ 630.

9. If both presumptions are not rebutted, then section 72(10)(b) of the Act requires the Tribunal to dismiss the appeal in so far as it relies on the Refugee Convention ground. No presumptions are raised in relation to human rights.

10. I am guided in my approach to the section 72 certificate by the decision of the Upper Tribunal in *Mugwagwa* (s.72 - applying statutory presumptions) Zimbabwe [2011] UKUT 338 (IAC). Paragraph 1 of the judicial headnote to that decision is as follows:

> *"1. The First-tier Tribunal (Immigration and Asylum Chamber) is required to apply of its own motion the statutory presumptions in s.72 of the Nationality, Immigration and Asylum Act 2002 to the effect that Art 33(2) of the Refugee Convention will not prevent refoulement of a refugee where the factual underpinning for the application of s.72 is present even if the Secretary of State has not relied upon Art 33(2) and s.72."*

11. The Upper Tribunal in *Mugwagwa* explained the effect of the section 72 certificate as follows:

> "23. Section 72(2) creates statutory presumptions that the requirements of Art 33(2) are met and, as a consequence, the prohibition against refoulement will not apply. Section 72 is in mandatory terms: "[a] person shall be presumed…". In our judgment, where s.72(2) or any of the other statutory provisions creating presumptions in s.72 applies, the Tribunal is under a duty to apply s.72 to the individual in the appeal. Given the evidential base provided by these presumptions, subject to rebuttal, Art 33(2) will apply in such circumstances so that that a refugee's removal will not be a breach of the Refugee Convention. Of course, the individual will, whilst he fulfils the definition in Art 1 of the Refugee Convention, still have the status of a refugee in international law; and he cannot be removed from the UK to his country of nationality as that would inevitably infringe Art 3 of the ECHR. However, given the terms of the

> 2002 and 2007 Acts, his appeal relying on 'asylum' or 'refugee' grounds cannot succeed."

12. That is the legal framework against which this appeal fell to be analysed.

Background

13. The claimant was born in Somalia in 1990 and is a member of the minority Midgan clan. He lived in Mogadishu, Somalia's capital city, with his parents, brother and sisters. The whole family left Somalia in early 1992, the claimant then aged just 2. The family went first to the Yemen, where they were recognised as refugees by the Yemeni Government and UNHCR. In July 2003, the family entered the United Kingdom under UNHCR's 10-year resettlement program and were granted indefinite leave to remain in the United Kingdom on 1 August 2003. All of the claimant's family members apart from him are now naturalised British citizens.

14. The claimant has a lengthy criminal history: between August 2009, when he was 19 and February 2014, when he was 24, he received 8 convictions on 4 occasions. The first was an offence against the person (for which he received a caution). There followed convictions for domestic burglary with intent to steal, handling stolen goods, theft from the person, attempted robbery, two counts of robbery, one offence of common assault and one of failing to surrender to custody, all of which were dealt with by community orders or detention in a Young Offenders Institution.

15. On 24 February 2014, the claimant was convicted, with a younger co-defendant, for a robbery which took place on 11 October 2013. Both defendants were sentenced to 5 years' imprisonment, the claimant in prison and his younger co-defendant in a Youth Offenders Institution. The Judge's sentencing remarks for the two defendants were as follows:

> "Your previous convictions both provide significant aggravation of your offending. You are both guilty of many robberies committed. …You [the claimant] last robbery [age] 20, you are now aged 24, 23 at the time of the offence.
>
> You have received a number of disposals over the years for these. It is clear that neither of you has learnt anything at all. I see no significant mitigation in either of your cases. … I see nothing that offends the principle of totality in this case in a correct calculation of the appropriate sentence.
>
> This offence in the case of both of you is so serious that neither a community penalty nor a fine can be justified and the least sentence I can impose upon you is one of 5 years. …"

16. The Secretary of State noted that the claimant had ties within the Somali community in the United Kingdom and that he had received a British education and obtained qualifications here (GCSEs, NVQ and BTEC Nationals). In addition, the claimant had studied business management at college, all of which would assist him on return to Somalia. The claimant had asserted that he suffered depression: the Secretary of State noted that there were mental health services available in Somalia to assist him.

Cessation of refugee status

17. The Secretary of State informed the claimant of her intention to cease his refugee status, having regard to the change of circumstances in Somalia. The Secretary of State invited UNHCR to comment on the proposed cessation. In a letter dated 1 March 2016, UNHCR expressed concern as to whether it was appropriate for refugee cessation to be triggered by a criminal conviction and considered that the Secretary of State's assessment of circumstances in Mogadishu and in Somalia was overly optimistic. UNHCR's letter referred to the Human Rights Watch report for 2013, the UN Commissioner for Refugees Report of January 2014; the LandInfo Country Information Centre report of March 2014; the Norwegian Organisation for Asylum Seekers report of April 2014, and the *MOJ* decision by the Upper Tribunal.

18. The Secretary of State considered the UNHCR representations, but nevertheless concluded that there was a significant change in circumstances which could justify the claimant's return to Somalia without a risk of persecution or serious harm. Her cessation decision, contained in the deportation decision letter, was made under paragraph 338A and 339A(v) of the Immigration Rules HC395 (as amended) with reference to Article 1C(5) of the Refugee Convention.

19. The claimant appealed to the First-tier Tribunal.

First-tier Tribunal decision

20. The First-tier Tribunal Judge did not deal first with the section 72 presumption. His conclusions and reasons begin with section 117C of the 2002 Act and Article 8 ECHR. The Judge was satisfied that the claimant was a 'foreign criminal' as defined in section 32 of the 2007 Act, but held that the claimant could bring himself within Exception 1 in section 33 and that there was no presumption that his removal was for the public good.

21. At [39], the Judge summarised the effect of the section 72 presumptions. He held that the claimant had rebutted both presumptions and that the section 72 certificate 'was not justified'. At [40], the Judge said that 'the question of whether or not it is a particularly serious crime is relevant to whether or not humanitarian protection should be withdrawn or refused'. There are no further findings about humanitarian protection in the First-tier Tribunal decision.

22. The Tribunal then considered cessation. It did so without express reference to the UNHCR letter, and discounted a country report from Professor Aguilar on the basis that it 'does not displace the previous findings of MOJ'. The First-tier Tribunal found as a fact that on return

> "52. …the [claimant] will be in a situation with no clan or family support and would not be in receipt of remittances from abroad, and would have no real prospects of securing access to a livelihood on return and that would mean that his conditions could well fall below that which is exceptional in humanitarian protection terms."

23. The Judge found that it had not been open to the Secretary of State to conclude that the cessation provisions were made out. He considered the Refugee Convention risk to amount to 'compelling circumstances as to why [the claimant] should not be returned to Somalia', and allowed the appeal on refugee status grounds. The First-tier Tribunal made no anonymity direction.

24. The Secretary of State appealed to the Upper Tribunal.

Grounds of appeal

25. The Secretary of State's grounds of appeal were that it had not been open to the First-tier Tribunal to find that the 'particularly serious crime' presumption was rebutted. She relied on the sentencing remarks, and the length of the sentence (5 years). The Secretary of State submitted that the decision that the index offence did not amount to a particularly serious crime was perverse and/or irrational, particularly in view of the sentencing remarks.

26. The Secretary of State also challenged the finding that the presumption that the claimant posed a danger to the community of the United Kingdom (section 72(2)) had been rebutted. She argued that the Judge had not given sufficient weight to evidence in the OASys reports that the claimant still posed a medium risk of harm, albeit a low risk of reoffending.

27. The Secretary of State argued that the First-tier Tribunal had not approached properly the country guidance in *MOJ.* She did not challenge any of the factual findings made by the First-tier Tribunal about the claimant's likely circumstances on return to Mogadishu. Nor did she challenge the treatment of humanitarian protection by the First-tier Tribunal at [40].

28. The Secretary of State contended that the Article 8 ECHR findings made by the First-tier Tribunal were incapable of amounting to very compelling circumstances outside the Rules, for which leave to remain should be given, as the compelling circumstances reasoning in the First-tier Tribunal's decision did not appear to relate to the claimant's private and family life.

Permission to appeal

29. Permission to appeal was granted on all grounds. The grant of permission to appeal identifies the following arguable errors of law:

    (i) That the Judge misdirected himself in law when considering exclusion under section 72 of the 2002 Act;

    (ii) That the Judge erred in fact and law, in finding that the index offence was not a 'particularly serious crime' in the section 72 sense;

    (iii) That the Judge erred in fact in assessing that the claimant no longer posed a danger to society, as required for a section 72 certificate;

(iv) That the First-tier Tribunal failed to identify the Refugee Convention reason 'and consequently erred in his approach to Article 8 [ECHR]'; and

(v) That the findings as to whether the index offence was a 'particularly serious crime' were perverse and/or irrational.

Rule 24 Reply

30. Notice that permission had been granted was sent to both parties on 9 August 2017. The claimant and his representatives were entitled to submit a Rule 24 Reply within 1 month of that date, that is to say, by 9 September 2017. No Rule 24 Reply was received within that period and there is no application to extend time.

31. At the hearing, Mr Sellwood handed me a skeleton argument which, he said, should also be treated as his Rule 24 Reply. The document in question does not comply with rule 24(3) and I treat this document as a skeleton argument, not a Reply.

32. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

33. For the Secretary of State, Mr Bramble relied on his grounds of appeal. The sentencing remarks had been truncated in the First-tier Tribunal decision, such that they did not properly reflect the serious view taken by the sentencing judge. Although no weapon had been used in the robbery, the claimant and his co-defendant had used force at a level which the Judge described as 'not insignificant'. At [40], the First-tier Tribunal had considered humanitarian protection, but if exclusion applied, it would apply both to refugee protection and to humanitarian protection.

34. The First-tier Tribunal's findings on Article 3 and Article 8 ECHR were sweeping and unsound. The Judge had given insufficient weight to the country evidence of Professor Aguilar, and also to the risk factors at (x) and (xi) in *MOJ.* The claimant was a young man, not a vulnerable woman, and would be able to re-establish himself in Somalia on return.

35. The First-tier Tribunal's findings of fact on the likely circumstances of the claimant's return to Mogadishu were not specifically mentioned in the grounds of appeal, but Mr Bramble argued that as the sentence imposed was more than 4 years, the Judge's findings on very compelling circumstances failed properly to apply either paragraph 398 or section 117C(6) and could not stand.

36. For the claimant, Mr Sellwood relied on his skeleton argument. In relation to the 'particularly serious crime' and 'danger to society' elements of the section 72 test, he seeks there to rebut the allegation that the First-tier Tribunal's approach was based on a material misdirection in law. Mr Sellwood argued that the Secretary of State's challenge was a perversity/rationality challenge, not a misdirection in law. Mr Sellwood did not seek to argue that if the Refugee Convention claim failed, the

claimant was not also excluded from humanitarian protection. That was not in issue before me at the hearing.

37. Mr Sellwood relied on *IH* (section 72: 'particularly serious crime') Eritrea [2009] UKAIT 0012 at [14], [75] and [76] and on *EN (Serbia) v Secretary of State for the Home Department and Another* [2009] EWCA Civ 630 at [45]. He contended that the First-tier Tribunal's decision dealt properly with both assessments, taking into account the claimant's history, the nature and circumstances of the offence, the OASys reports, and the claimant's evidence and experiences while imprisoned, which showed at least some insight into the consequences of his actions.

38. He argued that the Secretary of State's reliance on *MA (Pakistan) v Secretary of State for the Home Department* [2014] EWCA Civ 163 was erroneous: the appellant in *MA* had not faced up to his criminal offences (see [19] in the judgment of Lord Justice Elias, giving the judgment of the Court) and the offences in question were grave indeed (money laundering and trafficking of Class A drugs). I note that the sentence imposed on MA was 3 years' imprisonment, not 5 years, as here.

39. As regards the question of cessation, Mr Sellwood contended that refugee status could not be reviewed or annulled, save where the most substantial and clear grounds exist, and that a change in country circumstances must be significant and non-temporary (see *Salahadin Abdulla (Area of Freedom, Security and Justice)* [2010] EUECJ C-175/08, [2011] QB 46). The Secretary of State and/or the Tribunal was required to consider whether there were any other grounds on which the individual had a fear of persecution on return, and the decision was therefore fact-specific at the date of decision or hearing. The Secretary of State had given insufficient weight to the UNHCR letter in deciding whether the threshold of significant and non-temporary change of circumstances in Somalia was reached. Mr Sellwood contended that it had been open to the First-tier Tribunal Judge to find as a fact that the cessation certificate was unlawful.

40. As regards Article 8 ECHR, the First-tier Tribunal Judge had been entitled to conclude, as he had, that the claimant could show very compelling circumstances, over and above those outlined in Exceptions 1 and 2 in section 117C(4) and 117C(5) of the Nationality, Immigration and Asylum Act 2002 (as amended) and paragraph 398 of the Rules, to outweigh the public interest in deportation. The skeleton argument does not identify what those were, and the compelling circumstances reasoning relied upon is that at [54] in the decision.

41. Finally, Mr Sellwood argued that the standard for perversity and/or irrationality in relation to the finding that the index offence was not a 'particularly serious crime' was not met, having regard to the reasoning in the First-tier Tribunal decision.

42. In his oral submissions, Mr Sellwood reminded the Tribunal that section 72 of the Nationality, Immigration and Asylum Act 2002 (as amended) reflected Article 33 of the Refugee Convention, which defines the circumstances in which a refugee can be refouled to the country of origin. The threshold is high, because of the grave ramifications of any error.

43. Mr Sellwood observed that the Secretary of State's grounds were a disagreement with the outcome of the appeal, rather than identifying any arguably material error of law in the First-tier Tribunal decision. The Secretary of State in her grounds had not challenged the findings of fact or credibility in the grounds of appeal, and it was not open to her to do so now.

44. It had been open to the Judge to find, for the reasons he gave, that the claimant was no longer a danger to the community, having regard to the later of the two OASys reports before him. The risk of destitution on return by reason of the lack of clan or family support was capable, by itself, of meeting the Article 3 ECHR or Article 15(c) standard and even if it was right that the difficulties experienced in Mogadishu by the Midgan were now at the level of discrimination, not persecution, the claimant had been entitled to succeed on the basis of potential destitution. That amounted to very compelling grounds under section 117C(6) and paragraph 398; in fact, no other conclusion was open to the First-tier Tribunal on the evidence before it.

Discussion

The section 72 certificate

45. I consider first, as section 72(10)(a) requires, whether the Secretary of State's challenge to the First-tier Tribunal's section 72 decision is sound. This claimant was sentenced to 5 years and so both presumptions are raised in relation the Refugee Convention ground, subject to rebuttal.

46. The Secretary of State challenged the First-tier Tribunal's section 72 decision both on the basis that it was not open to the First-tier Tribunal Judge to find that the crime in question was not 'particularly serious', and on the basis that the Judge was not entitled to find that the claimant did not pose a danger to society. Her challenge is a challenge to the First-tier Tribunal Judge's findings on rebuttal.

'Particularly serious crime' presumption

47. The Judge's finding that the index offence of robbery, which attracted a sentence of 5 years imprisonment, did not constitute a particularly serious crime is unsustainable, having regard to the sentencing Judge's remarks, which are not properly represented in the summary at [44]. It was not a question of aggravating features making the offence serious. The sentencing judge said this:

> "This offence in the case of both of you is so serious that neither a community penalty nor a fine can be justified and the least sentence I can impose upon you is one of 5 years."

The finding made in the First-tier Tribunal decision was contrary to the evidence before the Judge and cannot stand (see *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982 at [90]).

'Danger to the community' presumption

48. The First-tier Tribunal Judge considered also that the presumption was rebutted in relation to whether the claimant constituted a danger to the community. He took into account the claimant's relative youth (24 years old), that he had 'gone off the rails in his late teens' and that 'there was clearly a period when he was operating without any proper restraint'. The claimant had found it difficult to assimilate into the English way of life, having arrived here as a teenager of 13 years old, and although he achieved the necessary qualifications to obtain a place to study Business Studies at Thames Valley University, he left there after a year and began committing street-related offences. He was gambling, and had a significant alcohol and drug addiction problem.

49. While in prison, the claimant had undertaken courses in drug and alcohol management, as well as skills courses on mathematics, English, and various City and Guilds certificate. Since leaving prison on licence (he will remain on licence until 3 December 2018 when his sentence expires), he has been successfully discharged from the post-release drug and alcohol treatment programme. He remains on antidepressants and has been referred for neurological testing.

50. The Judge took account of the second OASys report on the claimant, completed on 13 November 2015 before his release. The report indicates some progress on insight into his offending, but on the page marked 'Risk of Serious Harm Screening (Layer 3)' the report indicates that he still has control issues or disruptive behaviour, that there are concerns in respect of breach of trust, and that he is considered to be a risk to other prisoners. On 27 June 2015, he was moved to the segregation unit for disruptive behaviour, because he had barricaded his cell. He had been placed in special accommodation on 6 July 2015 for trying to set fire to his cell. The report concluded that the claimant presented a Medium risk of serious harm to the public or to known adults, which is defined thus:

> "**Medium risk of serious harm -** there are identifiable indicators of serious harm. The offender has the potential to cause serious harm but is unlikely to do so unless there is a change in circumstances, for example, failure to take medication, loss of accommodation, relationship breakdown, drug or alcohol misuse'.

51. The claimant told the interviewing officer that he still needed support with anger management, that he struggled with controlling his temper and emotional management, linked to his depression medication, which he considered to have the side-effect of aggression and temper control problems. The claimant asked for support in this area. In his decision, the Judge said that both OASys reports considered the claimant to present a low risk of reoffending, 'although, of course, of medium risk [of harm] in terms of the people who might be offended against' and concluded that the claimant did not continue to be a danger to the community. I note that there was no more recent evidence before the First-tier Tribunal than the November 2015 OASys report.

52. Again, the Judge's finding of fact that the presumption is rebutted is not supported by the evidence and is perverse. I consider, having regard to the matters set out above,

that it was not open to the Judge on the evidence to find that the section 72 presumption of danger to the community had been displaced.

53. It follows from these findings that neither presumption in section 72 is rebutted. The Secretary of State's section 72 certificate stands, and the Refugee Convention element of this appeal must be dismissed.

Humanitarian protection

54. The First-tier Tribunal made no separate decision on humanitarian protection, to which the section 72 certification regime does not apply. Neither party has suggested, having regard to the exclusion provisions relating to subsidiary protection contained in Article 17(1)(b) and (d) of the Qualification Directive 2004/83/EC, that the outcome of this appeal would have been different under the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (as amended). On the basis of the arguments before me, the humanitarian protection claim falls with the Refugee Convention claim.

Article 3 and cessation in international law

55. The remaining question is whether the claimant can be removed from the United Kingdom, or whether he is protected from removal by Article 3 ECHR, as set out in *Mugagwa.*

56. The risk for this claimant on return to Mogadishu is analysed by the First-tier Tribunal on the basis of the Upper Tribunal's country guidance in *MOJ v Secretary of State for the Home Department.* The relevant parts of the judicial headnote are as follows:

> "*(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."

57. The First-tier Tribunal made findings of fact, applying the above guidance. I note the failure to deal with the UNHCR evidence, but that evidence strengthens rather than weakens the claimant's case as to risk and instability in Mogadishu. I am satisfied that the error in failing to deal with the UNHCR letter is immaterial in this appeal. The weight to be given to country expert evidence is a matter for the fact-finding Tribunal. The Judge's approach to the evidence of Professor Aguilar is robust, but again, a more nuanced approach would have favoured the claimant. I do not find that the Judge's approach to Professor Aguilar's evidence was such as to amount to a material error of law.

58. There is no challenge by the Secretary of State to the First-tier Tribunal's findings of fact. The Judge found that the claimant left Mogadishu as 2-year old child; that his entire family are in the United Kingdom and are British citizens, that his family in the United Kingdom are largely dependent on state benefits and 'no doubt struggling to meet their own needs', and that the claimant was a member of the minority Midgan clan with no clan links in Mogadishu. He concluded that the claimant would have very poor financial prospects and would be one of those who would have no alternative but to live in makeshift accommodation in an IDP camp. That finding was open to him on the facts and evidence before him.

59. On that basis, Article 3 ECHR is applicable to the facts as found. This decision contains errors of law (principally, the approach to section 72 and the confused approach to Article 8 ECHR and part VA of the 2002 Act). But the claimant is entitled to succeed under Article 3 ECHR, on the basis of current conditions in Somalia and the factual matrix in his case.

DECISION

60. For the foregoing reasons, my decision is as follows:
The making of the previous decision involved the making of an error on a point of law.
I set aside the previous decision. I remake the decision by dismissing the Refugee Convention appeal but allowing it under Article 3 ECHR.

Date: 2 October 2017 Signed *Judith AJC Gleeson*

Upper Tribunal Judge Gleeson