Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/10514/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 March 2018	**On 14 March 2018**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SM
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr D. Clarke
For the Respondent: FH (respondent's niece)

DECISION AND REASONS

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

2. For reasons which will become apparent, I permitted the appellant's niece to represent him pursuant to rule 11(5) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

The background to the appeal

3. The background to the appeal is as follows. The appellant claims to be a citizen of Somalia, although the respondent contends that he is a citizen of Kenya. He arrived

in the UK on 16 October 2002 and was granted indefinite leave to remain on 17 March 2010.

4. He was convicted of robbery on 12 May 2010 after a plea of guilty, and on 4 August 2010 received a sentence of 3 years and 6 months imprisonment. On 12 September 2016 the respondent made a decision to deport him, the decision being expressed as a decision to refuse an asylum and human rights claim. The decision also included a certificate pursuant to section 72 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") (presumption of particularly serious crime and danger to the community).

5. His appeal against that decision came before First-tier Tribunal A.M. Black ("the FtJ") on 3 July 2017. She allowed the appeal on Refugee Convention grounds and also with reference to Article 3 of the ECHR. She also declined to uphold the s.72 certificate.

6. The respondent appealed against that decision. Permission having been granted, the appeal initially came before me on 20 October 2017. At that hearing the appellant was not legally (or otherwise) represented, and had not been represented before the FtJ.

7. There was evidence before the FtJ to the effect that the appellant suffers from paranoid schizophrenia and depression, for which he takes medication. In 2016 he was detained under section 3 of the Mental Health Act 1983 at G hospital. He has a history of mental health problems going back to 2004.

8. At the hearing before me in October 2017, the appellant was accompanied by his niece, FH. I heard submissions from the respondent in relation to the decision of the FtJ and announced that I would reserve my decision in terms of whether there was an error of law on the part of the FtJ, and if so, what should then follow.

9. However, as set out in a written adjournment decision, I decided that it would be inappropriate to decide any issues for the time being, without affording the appellant a further opportunity to obtain legal representation. It seems he had previously at some stage been legally represented.

10. As also explained in that adjournment decision, and repeated in this decision, at that hearing the appellant's presentation was, putting it neutrally so far as I can, unusual. He openly and ostentatiously sprayed himself with cologne at the start of the hearing. He was very excitable and talkative, addressing the presenting officer directly, and also attempting to explain his situation to court staff. Much of what he said was incoherent or tangential. He repeatedly interrupted the presenting officer. At one point he started to take off his shirt, and only desisted when I informed him that I would leave the room if he persisted. He was not threatening and obviously tried to be polite, but it was only with very careful management, and the assistance of his niece, that his behaviour could be controlled.

11. At the end of the hearing the appellant and his niece were provided by court staff with information about how to obtain legal representation through the system of legal aid. I was informed by FH that they had previously paid a significant sum for legal representation but that they no longer had the funds to do so.

12. I made careful directions tailored to the fact that the appellant was not represented and did not appear to have the capacity to represent himself. The directions were, to summarise, designed to encourage his family to try to obtain legally aided representation for him in advance of the next hearing.

13. However, from what I was told at the resumed hearing (7 March), no legal representative could be found. Hence FH asked that she be allowed to represent the appellant.

14. The resumed hearing, for understandable reasons, proceeded in a slightly unconventional manner in terms of the submissions on behalf of the appellant which at times merged into the giving of evidence both by the appellant and FH. Although at the hearing in October 2017 submissions were made on behalf of the respondent on the error of law issue, Ms Isherwood agreed that the respondent's submissions should be advanced afresh. I have therefore proceeded on the basis of those oral submissions (which in fact were not significantly different from those advanced at the October 2017 hearing).

The grounds and submissions

15. The respondent's grounds upon which permission was granted contend that the FtJ "failed to give clear reasons" as to why she concluded that the appellant was not a Kenyan national (the respondent's primary case), but that he was a Somalian national. The appellant and his family had been issued with Kenyan passports by the Kenyan authorities. The fact that the Kenyan authorities stated that they could not confirm the genuineness of the passports did not mean that they were not in fact genuine.

16. Further, it is argued that the FtJ was wrong to take into account that the appellant's mother's grant of refugee status in the UK as a Somalian refugee has not been revoked. That was a matter for the Secretary of State to consider and not one for the FtJ to speculate upon.

17. Thus, the FtJ was wrong, it is said, not to consider the feasibility of the appellant's return to Kenya.

18. In relation to return to Somalia, it is contended that the FtJ erred when she concluded that the appellant could not return to Mogadishu on the basis of his minority clan status, having regard to *MOJ & Ors (Return to Mogadishu) Somalia* CG [2014] UKUT 00442 (IAC) whereby it is clear that minority clan status does not give rise to a risk of persecution in Mogadishu.

19. Further, as to the risk of destitution, the FtJ had "failed to give clear reasons" as to why the appellant would be unable to collect any remittances from his family in the UK, and failed to consider whether or not the appellant could benefit from any of the packages available under the Facilitated Returns Scheme.

20. Relying on the decision in *Said v Secretary of State for the Home Department* [2016] EWCA Civ 442, it is argued that the appellant in that case also had mental health

problems and it was decided that there was no reason as to why he could not re-establish himself on return to Mogadishu. In addition, there was an erroneous reliance by the FtJ on a GP's report in terms of the appellant's treatment and day-to-day difficulties. The GP was not an expert "in the field of schizophrenia" and the evidence did not suggest that the appellant needed a level of care that was not available in Mogadishu.

21. Lastly, it is said that the FtJ had failed to give clear reasons as to why the appellant would satisfy the high threshold for a claim to succeed on Article 3 grounds. She had referred to the fact that there were two hospitals in Mogadishu and the respondent's decision noted the presence of at least five mental health centres.

22. In her submissions, Ms Isherwood relied on the written grounds and where necessary I explained her submissions to FH and to the appellant. It was accepted on behalf of the respondent that there had been no challenge to the FtJ's rejection of the certificate under s.72 of the 2002 Act and although it was suggested that there were defects in the FtJ's conclusions in that respect, no challenge had been advanced in the grounds and it was accepted that that matter could not now be pursued.

23. In relation to the appellant's nationality, it was submitted that the FtJ had accepted the appellant's evidence that the Kenyan passport was not genuine and that it (and those issued to the family) were fraudulent documents. However, all that the Kenyan authorities had said was that they could not verify the documents. Further, the appellant's mother's refugee status was a matter for the Secretary of State.

24. In relation to return to Somalia, the FtJ had concluded that the appellant would be at risk because of his ethnicity, but that was contrary to *MOJ & Ors*. In response to my enquiry as to whether it was accepted on behalf of the respondent that the appellant would be at risk of persecution in his home area, Ms Isherwood said that in this respect the decision letter was relied on, and it was said that the appellant would be returned to Mogadishu. Beyond that she said she was not prepared to go.

25. It was for the appellant to establish that he would not be able to get support on return to Mogadishu. Support can be provided by the (UK) government. It was not enough for the appellant to say that all his family are in the UK, that he has not been to Mogadishu before or that he is not familiar with the city.

26. The medical evidence before the FtJ was "historic", and did not demonstrate that the Article 3 threshold was met. I was referred to *Said* at [12], [13] and [18] as to the need for an appellant to meet that high threshold.

27. FH said that in order to flee from Somalia he had to get a forged Kenyan passport, and those are still available today, provided by an agent. Most members of the Somalian community here had Kenyan passports.

28. She said that if the appellant went back to Mogadishu there would be no-one to support him. It would not be safe for him to go back. He does not know anyone and has no connexions there. His mother in the UK had had a stroke.

29. In answer to my questions the appellant said that he still takes medication which he named as Olanzapine (an anti-psychotic) and Citalopram (an anti-depressant). FHsaid that she and her brother give him his medicine because he does not take it by himself.

30. In response to an enquiry from me, Ms Isherwood said that the appellant had been arrested "this week" (5 March) by Herts police , and supporting documents in that respect were provided. They reveal that the appellant was arrested for "the possession of a white powder", but that he had not been interviewed in relation to that matter and had not been charged. It appears from the PNC printout that he is to appear at West and Central Hertfordshire Magistrates' Court on 2 May 2018 (although for what is not stated).

31. In relation to his arrest (on 5 March 2018) the appellant said that he did not have any drugs on him and his solicitor had said that the case was nothing. He said that he was not a bad person and has not been violent. When I reminded him that he had been convicted of robbery he said that his barrister had told him to plead guilty which he did as he wanted to go home.

32. He said that his appearance at the Magistrates' Court on 2 May 2018 is in relation to stealing clothes from a charity shop. He seemed to be attempting to explain that he had not stolen any clothes and that it was some Romanians that he was with that had done that, although what the appellant said was not clear.

33. In relation to those matters, Ms Isherwood submitted that that does show that the appellant is capable of going out on his own and is not always with his family or being assisted by them.

34. FH's response was that most of the time the appellant was with them but they cannot be with him 24 hours a day. He has made friends with his/their grandmother's neighbours who are Romanians and take him out for a drive. She has tried to tell them not to go around with them but he does not think right.

The FtJ's decision

35. I propose to give a fairly full summary of the FtJ's decision because that will help to put my conclusions on the respondent's grounds into context.

36. The FtJ summarised the appellant's claim as to the circumstances in which he left Somalia. Thus, he is said to be from Kismayo where he lived with his parents and siblings. At the age of 13 the appellant saw his father being ill-treated in the family home by militia and witnessed his sister being raped several times. He also saw his father shot in the head and killed by militia. The family home was confiscated and the family sought refuge with the help of neighbours.

37. Three weeks after the attack they went to Kenya where they were taken to a refugee camp in which the conditions were appalling. They were harassed by Kenyan police and local Kenyans. The appellant was beaten by the police and detained for three

days. The family stayed in the camp for six years until it was closed by the government.

38. The family then stayed with friends and neighbours who received financial support from relatives in the USA. The appellant was again detained by the police and beaten, but released on payment of a bribe. Arrangements were made for the appellant to leave the country with the assistance of an agent and the use of a false Kenyan passport.

39. It is not necessary to set out the FtJ's reasons for concluding that the appellant had rebutted the presumptions provided for in s.72 of the 2002 Act (presumption of particularly serious crime and danger to the community) given that there is no challenge to that aspect of the decision.

40. At [39] the FtJ stated that the appellant has very poor mental health and is taking medication for paranoid schizophrenia and depression. She referred to his evidence that he attends medical appointments every week and attends hospital once a month.

41. At [41] the FtJ stated that she was satisfied that the appellant is a wholly credible and reliable witness, as was his nephew, Mr H. She said that their evidence was consistent, transparent and coherent. She said that the appellant answered questions quickly and openly, and his evidence was freely given even when to his detriment.

42. The FtJ dealt with the issue of the appellant's nationality at [42]. She referred to the letter produced on behalf of the respondent being a letter dated 23 March 2016 from the Kenyan Ministry of Interior and Coordination of National Government which stated that the appellant and various identified members of the family had travelled on particular passports. The letter also stated that "We cannot however confirm the authenticity of all the above passports and their holders as this is only possible when the original passports are availed."

43. She went on to note the appellant's case that he and his family lived in refugee "camps" in Kenya and that agents had provided the Kenyan passports. She noted that the appellant's mother was one of those that did so (her name being one of those on the letter). She then referred to the fact that the appellant's mother has been granted asylum by the respondent "presumably on the ground that it was accepted that she was a member of a minority clan in Somalia and would be at risk on return."

44. She then said as follows:

> "Given that stance, it is not clear on what basis the respondent now seeks to aver that the appellant and his mother are entitled to Kenyan nationality. There is no indication that the respondent has sought to revoke the refugee status granted to the appellant's mother. The appellant told me the agent had obtained his Kenyan passport and that it was a false document; he was not entitled to Kenyan citizenship. This is consistent with the appellant and his family living in a refugee camp in Kenya. I accept the appellant's account and find that he is not entitled to Kenyan citizenship. He is a Somali citizen."

45. She went on to find that the appellant is a member of a minority clan, that he was born in Kismayo, and that that was consistent with his speaking Bravanese but not Somali. She also stated that she found the appellant a credible witness and adopted as her findings of fact her summary of his claim.

46. Next, the FtJ set out verbatim the guidance in *MOJ & Ors*. She referred to background evidence set out in *RH (Sweden) App No. 4601/14* (in 2015) and *K.A.B. v Sweden*, Application No. 17299/12, 5 September 2013 in terms of the human rights and security situation in Somalia which was "serious and fragile" but there had been improvements.

47. At [47] she noted that the appellant had never lived in Mogadishu and found that he is not familiar with the city. He is a member of a minority clan, and lived with his family in southern Somalia until he fled when a child. She found that he has no family in Somalia and that his family is in Kenya where they are refugees.

48. In the same paragraph she said that the appellant has been diagnosed with paranoid schizophrenia since 2004 for which he takes medication. She referred to a medical report dated 15 March 2017 which was to the effect that he has had intermittent in-patient treatment. The report said that the appellant was "currently" experiencing low mood, anxiety attacks and paranoia, and that he takes medication in the form of Olanzapine and Citalopram. She then said as follows:

> "The appellant's GP states that the appellant requires 'assistance when going out as he has become very anxious and stressed when out in public'. While this report does not comply with the practice direction relating to expert evidence, I bear in mind the appellant has no representation in these proceedings and has poor mental health. The content of this letter has not been challenged by the respondent who acknowledges the appellant's mental health history. In the circumstances, I give significant evidential weight to the GP report and accept its contents as an accurate representation of the appellant's treatment and day to day difficulties. Its contents are consistent with the appellant's and his nephew's account of having to be assisted when leaving the house, weekly medical appointments and monthly in-patient treatment."

49. The FtJ then referred to the appellant having various family members in the UK and living with his family. She found that one or other member of his family accompanies him when he goes out, that he attends for medical treatment once a week "and for in-patient hospital care once a month". She referred to the evidence of the appellant's nephew to the effect that he is the appellant's primary carer albeit that they do not currently live together because the appellant's mother suffered a stroke earlier in the year and needs live-in care, and the nephew lives with her.

50. She concluded at [49] that if the appellant were deported he would continue to require medication but would not have the benefit of family support that he would become stressed and anxious on return and would be unable to go out on his own. She found that the evidence does not suggest that he is capable of living independently and is not capable of employment in Somalia. She further found that

he would not have the benefit of support from clan members on return to Mogadishu.

51. In the following paragraph the FtJ said that while family members would provide the appellant with financial support from the UK on his return, his mental health was such that even if he was able to access medication similar to that prescribed in the UK, he would be unable to go out on his own to collect the funds remitted from the UK. She referred to an aspect of the guidance in *MOJ & Ors* to the effect that help "is only likely to be forthcoming for majority clan members, as minority clans may have little to offer".

52. Thus, the FtJ concluded that the appellant would have to live in Mogadishu on his own without family or clan support. She found that he would be at real risk of destitution irrespective of funds being sent from the UK. She also found that his inability to go out without support also impacts on his ability to travel from Mogadishu to his home area in the south and that no family or clan support would be available to him for such a journey.

53. At [51] she expressly stated that she did not accept the respondent's position as set out in the decision that his illness would not prevent him from finding employment or accessing humanitarian assistance. She said that that was "wholly unrealistic" in the light of the medical evidence and the appellant's own account of his day-to-day life in the UK. She concluded that he would be unable to find accommodation and to maintain himself in practical terms even if he were able to access funds remitted from the UK.

54. As to whether the appellant would be able to obtain treatment for his mental health, she referred to the background evidence relied on by the respondent (albeit stating that a WHO website could not be accessed). She concluded that there was no evidence before her that the drugs currently prescribed for the appellant which keep his schizophrenia and depression under control, or similar medication, would be available in Somalia. She found that there was no evidence to counter the appellant's evidence on the point.

55. She referred to evidence from the appellant's mother that the appellant was exhibiting unusual behaviour after his father's murder and that there was no suggestion that he was treated for that at the time. The FtJ then said that the standard of care available in all other hospitals other than the two noted in the WHO report suggests that appropriate treatment would not be available to the appellant on return.

56. She thus concluded that:

> "there was a real risk of the appellant living in conditions that will fall below acceptable humanitarian standards. This is due to the appellant's minority clan membership and the resultant lack of support available to him."

And that:

> "The appellant has therefore demonstrated he is entitled to the grant of refugee status on the grounds of his ethnicity. The respondent's decision to deport him is incompatible with the UK's obligations under the Refugee Convention. For similar reasons, the decision places the UK in breach of Article 3."

57. She said finally that given those conclusions she had not addressed Article 8.

Assessment

58. In considering the question of whether there is an error of law in the decision of the FtJ, I have not taken into account anything that was said by the appellant and FH which amounted to evidence rather than submissions as to error of law.

59. In relation to the issue of whether there is any error of law in the FtJ's assessment of the appellant's nationality, I am not satisfied that the respondent's grounds have any merit. An essential ingredient of the FtJ's consideration of this issue was the appellant's account of events that are said to have taken place in Somalia, and the claim that the family sought refuge in Kenya thereafter.

60. The FtJ was very clear in her finding that both the appellant and his nephew were credible witnesses, although it is not clear what evidence the appellant's nephew gave in relation to events in Somalia and Kenya. The FtJ gave clear reasons for concluding that the appellant was a credible witness, as indicated by my summary of her findings. The FtJ's wholesale acceptance of the appellant's credibility could be open to question on the basis that part of the appellant's evidence was that he did not commit the robbery for which he was convicted, and her having accepted his evidence that "he is a law-abiding person", but it is tolerably clear that the FtJ's assessment of his credibility which she relied on for her findings, was his evidence in relation to his time in Somalia and Kenya, as well as his personal/family circumstances and background.

61. Once the FtJ had found that the appellant's account was a credible one, and that account included having used a false Kenyan passport to travel to the UK, that could have been the end of the enquiry into the issue of his citizenship. I do not detect in the respondent's arguments any basis from which to conclude that the FtJ was not entitled to find as she did in relation to the appellant's credibility in general terms. The general includes the specific in terms of his time in Somalia and Kenya and the use of a false Kenyan passport. The appellant's evidence was that the passport was obtained through an agent whilst they were in the refugee camp in Kenya.

62. In any event, the FtJ went further. I have given a detailed summary of what the FtJ said at [42] in relation to the passports and the letter from the Ministry in Kenya. The FtJ did not conclude that that letter established that the passports were not authentic, but equally, the letter did not say that they were genuine either.

63. The evidence that the appellant's mother has been recognised by the respondent as a refugee from Somalia is a matter that the FtJ could not simply ignore. She was bound

to take it into account. Whilst of course it is true that the granting or revocation of refugee status is a matter for the Secretary of State, the FtJ was similarly entitled to take into account that the respondent has not sought to revoke her refugee status on the basis that she is in fact Kenyan (or for any other reason).

64. The decision of the FtJ to allow the appeal on refugee and Article 3 grounds is rather more complex, not so much from a factual point of view, notwithstanding the respondent's criticisms of some aspects of the FtJ's factual findings, but from a legal perspective.

65. There is nothing of substance in the respondent's challenge to the FtJ's factual findings. Contrary to what is said in the grounds, the FtJ did give clear reasons as to why the appellant would be unable to, in effect, function independently in Mogadishu. She found that he would not be able to go out on his own to collect any funds remitted from the UK, and would have no-one there who would help him. With the guidance in *MOJ & Ors* in mind, she found that he would have no clan support. She further concluded that he would not be capable of finding employment or accommodation. Again, I have given a summary of the FtJ's findings on all of these issues.

66. As regards the FtJ's consideration of the medical evidence specific to the appellant, she assessed the information given in the GP's report, again as I have summarised above at [48]. It is plain that the FtJ was aware of the limitations of the evidence from the GP. She took into account that the evidence in that report was not challenged on behalf of the respondent, and that its contents were consistent with the evidence of the appellant and his nephew.

67. The respondent's criticism of this aspect of the FtJ's decision is, it must be said, rather difficult to follow. The criticism that the GP is not an expert in schizophrenia does not reveal any flaw in the FtJ's reasoning. Nothing in the FtJ's findings touches on any dispute about whether or not the appellant suffers from schizophrenia, if that is what that aspect of the complaint in the grounds is directed to. There does not appear to have been any dispute about the fact and nature of his mental disorder. The FtJ was perfectly entitled to attach the weight that she saw fit to the report in terms of it stating that he suffers from paranoid schizophrenia (not disputed) and of his description of his treatment and day-to-day difficulties, which was consistent with the oral evidence that she heard.

68. The medical evidence before the FtJ was less than ideal, as she acknowledged, but such is often the case in such appeals, particularly where an appellant is not legally represented. In my judgement the FtJ was entitled to make the findings that she did in relation to the appellant's personal circumstances and in relation to his day-to-day living.

69. Further, she made sustainable factual findings in relation to what were reasonably likely to be the appellant's circumstances on return to Somalia, specifically Mogadishu, finding that he would be unable to find employment, accommodation or access humanitarian assistance, or be able to access any remittances that may be

forthcoming from the UK. She made those findings in line with the decision in *MOJ & Ors* to which she referred extensively and which she plainly had at the forefront of her mind when coming to her conclusions.

70. It is true that the FtJ did not refer to the issue of what financial assistance may be available to the appellant under what is described in the grounds as the Facilitated Returns Scheme. This was a matter considered in *MOJ & Ors* at [329] and [423], in which it was said that financial assistance from the Home Office may be available to voluntary returnees, in the form of a grant of up to £1,500, and which may be of significant assistance to a returnee. However, that omission is hardly significant in the context of the FtJ's findings about the appellant's ability to manage independently.

71. As to what medical treatment may be available to the appellant in Mogadishu, the respondent does not take issue with the FtJ's findings in terms of whether the medication that he is presently receiving would be available to him. The respondent could, it seems to me, have sought to argue that the medication that the appellant is receiving is not unusual in terms of treatment for mental disorders, although she has not sought to do so. However, there is of course more to the appellant's treatment than the medication he is receiving, as is clear from the evidence that was before the FtJ.

72. In principle, I agree with the respondent's argument that a differential in treatment is not a basis upon which a person could succeed in an Article 3 claim. The authorities on this point are very clear. However, I do not interpret the FtJ's decision as meaning that she found for the appellant in terms of Article 3 on the basis of a differential in treatment, although she considered it as a relevant factor in her overall assessment of the conditions in which he would be living if returned.

73. Nevertheless, there is within the respondent's grounds a complaint that is succinctly expressed but not given the prominence that it deserves in the challenge to the FtJ's decision. That is the contention that the FtJ was wrong to allow the appeal on asylum grounds on the basis of the appellant's minority clan status. She said at [54] that the appellant had "demonstrated he is entitled to the grant of refugee status on the grounds of his ethnicity. The respondent's decision to deport him is incompatible with the UK's obligations under the Refugee Convention".

74. The respondent is right in suggesting that the Tribunal in *MOJ & Ors* rejects the notion that minority clan status is sufficient to found a claim to refugee status so far as return to Mogadishu is concerned.

75. Before returning to this point, I consider the respondent's arguments relying on the decision of the Court of Appeal in *Said*. To summarise, the point advanced is that the appellant in that case also had mental health problems and it was concluded that that was not a sufficient basis from which his appeal should have been allowed in terms of a return to Mogadishu.

76. For the point that the respondent relies on *Said*, I am not satisfied that it has merit. Reliance on the facts of one case to support a conclusion that another appellant's case

is so similar as to demand the same outcome is an approach that I consider demands a degree of caution. In any event, a reading of *Said* reveals a significantly different factual matrix. If nothing else, I only need I think to refer to the fact that the appellant in that case was from a majority clan [5]. It was also an established fact that he was capable of working [5], [19]. There was every prospect that he would be provided with financial aid from a large and supportive family in the UK, quite apart from the prospect of some assistance from his clan [19]. There was no reason to believe that he could not receive the "relatively commonplace" medical treatment (for PTSD and depression) that he is receiving in the UK if returned to Mogadishu. The case was not, in short, an Article 3 case.

77. The respondent does not, although could have, relied on the analysis in *Said* of what was said in *MOJ & Ors* at [408], namely:

> "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."

78. Burnett LJ said as follows:

> "I am unable to accept that if a Somali national were able to bring himself within the rubric of para 408, he would have established that his removal to Somalia would breach article 3 of the Convention. Such an approach would be inconsistent with the domestic and Convention jurisprudence which at para 34 UTIAC expressly understood itself to be following."

79. If the FtJ meant at [53] to rely on what was said at [408] of *MOJ & Ors* to support a conclusion that the appellant's case met the Article 3 threshold, and I consider that she probably did, in my view she erred in doing so, understandable though that error is.

80. I now return to the point about the appellant's ethnicity and the FtJ having said at [54] that the appellant is entitled to a grant of refugee status on the grounds of his ethnicity. As a basis for entitlement to refugee status in Mogadishu, absent other considerations, that is an erroneous conclusion. In this respect also, I am satisfied that the FtJ erred in law.

81. However, I do not consider that either of the errors of law I have identified are such as to require the decision to be set aside. That is because had there not been those errors the outcome would inevitably have been the same.

82. The underlying error on the part of the FtJ, with respect to this experienced judge, was to have failed to recognise the essence of the task that she was performing in assessing the viability of the appellant's return to Mogadishu. That was essentially a question of internal relocation.

83. I sought to obtain from Ms Isherwood an acceptance on behalf of the respondent that the appellant would be at real risk of persecution or serious harm on return to his

home area of Kismayo. There was some reluctance on her part to give any commitment in that respect (see my [24] above). However, it is plain from the background evidence to which the FtJ referred, and that in the respondent's bundle, and the fact that the respondent has made it clear that as regards return to Somalia return would be to Mogadishu and Mogadishu only, that the appellant would be at risk on return to Kismayo on account of his minority clan status. It seems to me obvious that the respondent implicitly at least accepts that to be the case.

84. The next question then, easily stated but not necessarily easily resolved, is whether there is an internal relocation option available to the appellant. That, it seems to me, was in fact the question that the FtJ was considering when analysing the appellant's circumstances on return to Mogadishu, and a task which she performed with evident care.

85. Her conclusions in terms of the appellant's minority clan status, lack of support or practical ability to access funds, inability to find employment or accommodation, inability to live independently, and the (reasonably) likely prospect of his having to live in an IDP camp and his having to live in conditions falling below acceptable humanitarian standards, are plainly conclusions that are directly relevant to the issue of internal relocation to Mogadishu.

86. In *AH (Sudan) v Secretary of State* [2007] UKHL 49, Lord Bingham referred to what he had said in Januzi v Secretary of State for the Home Department [2006] UKHL 5, namely that:

> "The decision-maker, taking account of all relevant circumstances pertaining to the claimant and his country of origin, must decide whether it is reasonable to expect the claimant to relocate or whether it would be unduly harsh to expect him to do so . . . There is, as Simon Brown LJ aptly observed in *Svazas v Secretary of State for the Home Department*, [2002] 1WLR 1891, para 55, a spectrum of cases. The decision-maker must do his best to decide, on such material as is available, where on the spectrum the particular case falls . . . All must depend on a fair assessment of the relevant facts."

87. I cannot see that the FtJ's factual findings, reached without any error of law, are such as would lead to any other conclusion but that it would not be reasonable and would be unduly harsh to expect the appellant to relocate to Mogadishu. On that basis she would have been bound to allow the appeal on Refugee Convention grounds, and consequently on Article 3 grounds.

88. The issue to which I have referred at [77]-[79] in relation to what was said in *Said* about [408] of *MOJ & Ors* could not in fact have made any difference to the outcome of the appeal.

89. To conclude therefore, although there are errors of law in the FtJ's decision in the respects to which I have referred, those errors of law are not such as to require her decision to be set aside. After a very careful and thoughtful analysis of the facts, she came to conclusions that were open to her as to the circumstances that the appellant would find himself in on return to Mogadishu.

90. Not forgetting that the appeal was in fact an appeal in relation to the respondent's decision to deport the appellant, the FtJ was right to find that he came within one of the exceptions to the deportation provisions of s.32 of the UK Borders Act 2007, namely Exception 1 under s.33(2) (Refugee or Human rights Convention).

Decision

91. The decision of the First-tier Tribunal involved the making of an error on a point of law but its decision is not set aside and its decision to allow the appeal on asylum grounds and under Article 3 of the ECHR is to stand.

Upper Tribunal Judge Kopieczek 11/03/18

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

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