Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/05949/2018

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre	**Decision & Reasons Promulgated**
On 2 May 2019	**On 23 May 2019**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AIM
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr C Howells, Senior Home Office Presenting Officer
For the Respondent: Mr A Joseph, instructed by Irving & Co, Solicitors

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order prohibiting the disclosure or publication of any matter likely to lead to members of the public identifying the respondent (AIM). A failure to comply with this direction could lead to Contempt of Court proceedings.

2. Although this is an appeal by the Secretary of State, for convenience I will refer to the parties as they appeared before the First-tier Tribunal.

Introduction

3. The appellant is a citizen of Somalia. His date of birth has been variously stated as 20 February 1983 (in the respondent's decision), 12 June 1986 (in the appellant's witness statement dated 1 October 2012) and 23 February 1986 (in the determination of the First-tier Tribunal). I will adopt the latter date which has most recently been accepted and was not disputed before me.

4. The appellant comes from Somaliland in Somalia. He lived there until he was 3 or 4 when he left with his grandmother and sister traveling to Ethiopia.

5. In February 1994, he entered the United Kingdom with his grandmother on a family visa. Before me, it was said that he had entered on the basis of family reunion and had been granted indefinite leave to enter. Mr Howells, who represented the Secretary of State, did not dispute that and so I shall determine this appeal on that basis.

6. The appellant was, therefore, 7 years and 11 months old when he entered the UK. From about the age of 12, after he left primary school, the appellant engaged in progressively more serious offending beginning with antisocial behaviour and escalating to violent offending. He was convicted of his first violent offence in 2002 when aged 14. His offending is set out in the printout of the PNC record contained within the appeal file. Together with his most recent offending, the appellant has been convicted of 28 offences on 11 separate occasions.

7. His most recent offending occurred in 2005. He was convicted at the Cardiff Crown Court on that date, after a trial, of three offences: attempted murder, robbery and violent disorder. He was sentenced to a term of imprisonment of twelve years in a Young Offenders' Institution. He was released from prison in 2012.

8. On 24 September 2007, the appellant was issued with a notice that he was liable to deportation. On 6 July 2012, a deportation order was signed against him. On 13 July 2012, he appealed against the deportation decision. On 10 October 2012, the First-tier Tribunal dismissed his appeal. He was subsequently refused permission to appeal to the Upper Tribunal and he became appeal rights exhausted on 31 January 2012. He was refused permission to challenge the refusal of permission to appeal by judicial review (on a Cart basis) on 12 March 2013.

9. On 6 December 2013, the appellant made further submission claiming asylum. A screening interview was conducted on 22 May 2014 and an asylum interview took place on 12 December 2014.

10. On 27 April 2018, the Secretary of State refused the appellant's claim for asylum, humanitarian protection and on a human rights basis.

The Appeal

11. The appellant appealed to the First-tier Tribunal. In a determination sent on 18 September 2018, Judge Frazer allowed the appellant's appeal under Art 3 of the ECHR and Art 8 of the ECHR. However, she dismissed his appeal on asylum and humanitarian protection grounds.

12. In summary, Judge Frazer did not uphold the Secretary of State's certification of the asylum claim under s.72 of the Nationality, Immigration and Asylum Act 2002 (the "NIA Act 2002"). She found that the presumption that he was a danger to the community had been rebutted. However, in assessing the appellant's asylum claim, Judge Frazer rejected his account that he would be at risk on return to Somalia as a result of a 'blood feud' arising from (it was said) his cousin having killed someone in the course of acting as a police officer and that his uncle had been told in 2013 by the police that all members of the appellant's family were at risk of a revenge killing.

13. However, Judge Frazer allowed the appellant's appeal under Art 3 on the basis that if he were returned to Mogadishu there was a real risk that he would be destitute and have to live in an IDP camp which would breach Art 3.

14. Finally, Judge Frazer found that the effect upon the appellant's wife (whom he had married in 2013) and their child ("D") amounted to "very compelling circumstances" such that, by virtue of s.117C(6) of the NIA Act 2002, the public interest did not require his deportation.

15. The Secretary of State sought, and was granted, permission to appeal by the First-tier Tribunal (Judge Hodgkinson) on 17 October 2018. The appellant filed a rule 24 response.

16. The appeal to the Upper Tribunal was initially heard by UTJ Allen on 1 February 2019. He set aside Judge Frazer's decision so far as it related to Arts 3 and 8 of the ECHR.

17. As regards Art 3, UTJ Allen concluded that the judge had failed to consider whether the appellant could return to Somaliland. Further, in relation to her assessment of his circumstances if he were to return and relocate to Mogadishu, the judge had failed properly to apply the relevant country guidance case of MOJ and Others [2014] UKUT 442 (IAC), in particular she had failed properly to consider whether the appellant would be able to take advantage of the 'economic boom' in Mogadishu.

18. As regards Art 8, UTJ Allen concluded that the judge had failed to consider whether the impact upon the appellant's partner and daughter would be "unduly harsh" and whether, since he had been sentenced to a term of imprisonment of at least four years, the public interest was outweighed because there were "very compelling circumstances over and above" those set out in para 399 and 399A of the Immigration Rules (HC 395 as amended) which reflect s.117C(4) and (5) of the NIA Act 2002.

19. In para 21 of his decision, UTJ Allen observed that the impact upon the appellant's daughter and wife, identified by Judge Frazer, were not matters which "on any rational view in my conclusion amount to such as to make it unduly harsh for the appellant's wife and/or daughter consequent on his deportation". Further, at para 22 of his decision, taking those and all other circumstances into account, he concluded that the test in s.117C(6) was an "extremely high one, and it cannot properly be argued that the test was met in this case".

20. It might be thought that given those conclusions that the circumstances of the appellant's partner and child could not rationally fall within what is "Exception 2" in s.117C(5) and all the circumstances taken together could not amount to "very compelling circumstances over and above" those in Exception 2, UTJ Allen would have not only set aside the judge's decision to allow the appeal under Art 8 but would also have remade the decision dismissing the appeal; the only rational conclusion that the appellant could not establish a breach of Art 8. However, he did not do that as, it can be seen from para 23 of his decision, he was persuaded by the representatives that it might be helpful for further submissions to be made even though it was not proposed that any further evidence be submitted. And, of course, there was also the outstanding issue under Art 3 which had to be re-determined afresh.

21. In the result, the appeal was relisted before me on 2 May 2019 when the representatives who had appeared before UTJ Allen (Mr Howells for the Secretary of State and Mr Joseph for the appellant) again appeared.

The Issues and Submissions

22. The only new evidence relied upon before me, and which I admitted without objection from Mr Howells, was a birth certificate showing the birth of a second child ("M") of the appellant and his partner on 31 March 2019. Appended to it is a brief postnatal care record relating to the appellant's partner. Consequently, the only new "fact" arising since the decision of Judge Frazer is that the appellant and his partner now have a second child who is just over 1 month old.

23. It was accepted before me that there were two issues. First, whether the appellant could establish that his return to Somalia would breach Art 3 because on return he would be destitute. That was argued both on the basis that he was returned to his home area in Somaliland (whether via Mogadishu or directly by air to that area) and if he were to internally relocate to Mogadishu. Applying the approach in MOJ and Others, it was contended that he would be destitute and at real risk of being forced to live in an IDP camp in circumstances in breach of Art 3.

24. The second issue concerns Art 8. It was common ground between the parties that this issue had to be resolved by applying Part 5A of the NIA Act 2002. In particular, the appellant could only succeed if he could establish that he fell within s.117C(6), namely that there were "very compelling circumstances, over and above those described in Exceptions 1 and 2".

25. Those exceptions are set out in s.117C(4) and (5) respectively. It was common ground that, in accordance with NA (Pakistan) and Others v SSHD [2016] EWCA Civ 662, I should first consider whether the appellant could succeed under Exception 1 and/or Exception 2 and then, if he could, whether his circumstances as a whole amounted to "very compelling circumstances" over and above the applicable Exception.

26. S.117C(4) sets out Exception 1, dealing with an individual's private life in the following terms:

> "Exception 1 applies where –
>
> (a) C has been lawfully resident in the United Kingdom for most of C's life,
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> (b) C is socially and culturally integrated in the United Kingdom, and
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> (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported."

27. In that regard, Mr Howells accepted that the requirements of s.117C(4)(a) and (b) were satisfied. On the basis that he accepted that the appellant had entered the United Kingdom with indefinite leave to enter in January 1994 when he was 7 years and 11 months old, he had lived most of his life (meaning at least half of his life: see SSHD v SC(Jamaica) [2017] EWCA Civ 2112) lawfully in the UK at the date of the hearing when he was 33 and 2 months old or, indeed, at the date of the deportation order on 6 July 2012 when he was 18 years and 6 months old. On either basis he met the requirement in s.117C(4)(b) – although the correct date for that assessment is at the date of the hearing and, despite the wording of s.5(1) of the Immigration Act 1971, the invalidating effect of a deportation order upon the appellant's ILE is to be ignored (see Tirabi (Deportation: "lawfully resident": s.5(1)) [2018] UKUT 199 (IAC).

28. The submissions, therefore, in relation to Exception 1 focused on whether there were "very significant obstacles" to his integration into Somalia on return.

29. As regards Exception 2, that is set out in s.117C(5) as follows:

> "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."

30. It was accepted before me that C's partner was a British citizen and both C's children are British citizens such that they are respectively his "qualifying partner" and "qualifying child" as defined in s.117D(1). It was also accepted that he had a "genuine and subsisting relationship" with his wife and with his two children. The submissions, therefore, in respect of Exception 2 focused upon whether the impact of his deportation would be "unduly harsh" upon either his partner or his children.

31. In relation to the proper approach to "unduly harsh" I was referred to the Supreme Court's decision in KO (Nigeria) and Others v SSHD [2018] UKSC 53 which had

approved the formulation of the UT in MK (Sierra Leone) [2015] UKUT 223 (IAC) at [27] that:

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

32. In RA (s.117C: "unduly harsh"; offence: seriousness) Iraq [2019] UKUT 00123 (IAC) the UT noted that the expression set a "high threshold".

33. In applying s.117C(6), it was also common ground that the individual's claim must be a 'very strong' one. I was referred to the recent decision of the UT in MS (s.117C(6): "very compelling circumstances") Philippines [2019] UKUT 00122 (IAC) in which the UT set out the proper approach to s.117C(6) requiring a consideration of all the circumstances including the seriousness of a particular offence for which the foreign offender had been convicted.

34. It is of course, axiomatic that the notion of "very compelling circumstances", by the very wording of s.117C(6), requires more than a bare satisfaction of either Exception 1 or Exception 2 in s.117C(4) and (5). With those matters in mind I now turn to consider the appellant's claim under Art 3 and Art 8 respectively.

Discussion

Article 3

35. Mr Joseph put the appellant's case under Art 3 on two bases. First, he submitted that the appellant would be at risk of treatment contrary to Art 3, namely serious harm amounting to torture, degrading treatment or punishment if he returned to his home area in Somaliland where he has no relatives. Secondly, he would equally be at risk if he were returned to Mogadishu. In either case, he has no family there and there was no evidence that his family in the UK could support him or that he would, in the case of Mogadishu, be able to take the benefit of the 'economic boom' so as to support himself and not be forced to live in an IDP camp.

36. Mr Howells submitted that the appellant came from the second city of Somaliland, Burao. He had lived there for three to four years before moving to Ethiopia for two years and then coming to the UK in 1994. He referred me to the decision of the Upper Tribunal in AMM and Others (Conflict; humanitarian crisis; returnees; FGM) Somalia CG [2011] UKUT 445 (IAC) at paras 14 and 15 of the headnote which recognised that "former residents" of Somaliland could return there without risk. He could safely return to Somaliland without a breach of Art 3.

37. Secondly, Mr Howells submitted that the appellant could, in any event, safely and reasonably be expected to return Somalia and live in Mogadishu. In that regard, he relied upon the country guidance decision in MOJ and Others (Return to Mogadishu) Somalia CG [2014] UKUT 442 (IAC) in particular paras (ix)–(xi) of the headnote. Mr

Howells submitted that the appellant speaks Somali even though he says he is not proficient in it. His own evidence, before the First-tier Tribunal, was that he had a grandmother in the UK with whom he communicates but who has never learnt English. Further, Mr Howells submitted that the appellant had not shown that he could not, at least on a temporary basis, obtain financial assistance from his relatives in the UK. He submitted that the appellant has a partner (who is working), a grandmother and uncle. Mr Howells also referred me to the independent social worker's report prepared by Andrew Beckwith at para 2.10 which refers to a cousin of the appellant. Mr Howells submitted there was no evidence to suggest that they could not provide the appellant with some financial assistance. Mr Howells submitted that the appellant was in good physical and mental health and was able to work. He referred me to a number of documents in the bundles including the report of Julia Long, a forensic psychologist at paras 7.8 and 7.9 and 11.9–11.11 dealing with the appellant's ability and aspirations to work and his educational background. Mr Howells also referred me to a number of certificates at page 111 onwards of the appellant's bundle showing his educational and vocational achievements. Mr Howells submitted that the appellant would be able to benefit from his work and educational experience on return to Mogadishu. Further, there was no evidence that his clan, the Ardin Mudowey tribe, was a minority clan. Mr Howells submitted that it was unlikely that the appellant would, as a result, be destitute on his return to Mogadishu.

38. In respect of Somaliland, Mr Howells relied upon the same factors as relevant to his position there.

39. As regards the appellant's return to Somaliland, I was not referred to any specific background material concerning the circumstances in Somaliland. The only material to which I was referred, and which is helpfully set out in Mr Joseph's rule 24 response on behalf of the appellant, was the brief treatment "Somaliland and Puntland" in the CG decision of AMM and Others. There at paras 14 and 15 of the headnote the following is said:

> "14) The present appeals were not designed to be vehicles for giving country guidance on the position within Somaliland or Puntland. There is no evidential basis for departing from the conclusion in NM and others, that Somaliland and Puntland in general only accept back persons who were former residents of those regions and were members of locally based clans or sub clans. In the context of Somali immigration to the United Kingdom, there is a close connection with Somaliland.
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> 15) A person from Somaliland will not, in general, be able without real risk of serious harm to travel overland from Mogadishu International Airport to a place where he or she might be able to obtain an unofficial travel document for the purposes of gaining entry to Somaliland, and then by land to Somaliland. This is particularly the case if the person is female. A proposed return by air to Hargeisa, Somaliland (whether or not via Mogadishu International Airport) will in general involve no such risks."

40. To an extent, Mr Joseph is correct in his submission that all that AMM and Others demonstrates is that return to Somaliland by a person who is a "former resident" of

that area and who is a member of a locally based clan, can do so either directly by air to Hargeisa or via Mogadishu International Airport. The fact is, however, that no background material was put before me as to the precise circumstances which the appellant would face on return. He would, of course, have not have lived in Somaliland since he left when he was 3 or 4 years of age. He would, in my judgment, nevertheless be a returning resident and could do so safe in accordance with what is said in AMM and Others. Judge Frazer made no findings relevant to the appellant's return to Somaliland and, indeed, that was one of the reasons why UTJ Allen set aside her decision (see para 17 of his decision). I accept that the appellant speaks Somali on the basis that he is able to communicate with his grandmother who does not speak English. He has lived with his grandmother previously.

41. I remind myself that the burden of proof is upon the appellant, albeit to the lower standard applicable in international protection cases, to establish that on his return to Somaliland there would be a breach of Art 3 in the sense (relevant in this appeal) that he would be destitute. I accept Mr Howells' submissions that on return to Somalia, the appellant would have the advantage of his work and educational experience in the UK and, I also accept that his family in the UK would be in a position to provide him financial assistance to at least allow him to 'find his feet' in his home country. That, in my judgment, applies whether he were returned to Somaliland or Mogadishu. There is simply no evidence concerning the economic or other circumstances to which the appellant would return in Somaliland. For the reasons I have given, together with those which I shall give shortly in relation to Mogadishu, the appellant has failed to satisfy me that there is a real risk that if he returned to Somaliland that he would be destitute and would face treatment contrary to Art 3 of the ECHR because of his circumstances.

42. Turning now specifically to Mogadishu, the relevant situation in Mogadishu was, as a matter of common agreement between the parties before me, set out in the CG decision of MJ and Others where at paras (vii)–(xi) of the headnote the Upper Tribunal set out the circumstances 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.
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> (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.
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> (ix) If it is accepted that a person facing return to Mogadishu after a period of absence has no nuclear family or close relatives in the city to assist him in re-establishing himself on return, there will need to be a careful assessment of all 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."

43. At para [344] the Upper Tribunal remarked:

> "The economic revival of Mogadishu can be described only as remarkable, considering what is known about conditions in the city since the civil war began in 1991."

44. The economic conditions are further described in the Upper Tribunal's Decision at paras [345], [346] and [351] as follows:

> "345. It is beyond doubt that there has been huge inward investment, large-scale construction projects and vibrant business activity. Land values are said to be 'rocketing' and entrepreneurial members of the diaspora with access to funding are returning in significant numbers in the confident expectation of launching successful business projects. The question to be addressed is what, if any, benefit does this deliver for so called 'ordinary returnees' who are not themselves wealthy businessmen or highly skilled professionals employed by such people.
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> 346. According to the respondent, a striking feature of developments in Mogadishu since AMM is the evidence that 'huge numbers' of people have returned to Mogadishu, that is said to be indicative of a considerable reduction in levels of violence and improvements in security. Some local NGO sources have said that there were 300,000 returning residents to Mogadishu in the six months between November 2011 and April 2012 alone. By August 2012 it had been estimated that more than 500,000 people had moved back to the capital including the vast majority who had fled since 2007.

….

> 351. Further, there is evidence before the Tribunal, identified by Dr Mullen, to the effect that returnees from the West may have an advantage in seeking employment in Mogadishu over citizens who have remained in the city throughout. This is said to be because such returnees are likely to be better educated and considered more resourceful and therefore more attractive as potential employees, especially where the employer himself or herself has returned from the diaspora to invest in new business."

45. I accept that the appellant has never lived in Mogadishu. I also, as I have already found, accept that he does speak Somali at least sufficient to communicate with his grandmother over the years and, no doubt, therefore any deficiency in that language could in time easily be overcome in Somalia. I also accept that he would be able to obtain financial assistance from his family, including his partner and other members of his family in the UK. He is an abled bodied person and has experience of work and educational qualifications which will assist him on return. As regards his clan, the Ardin Mudowey, neither representative was in a position to assist me as to whether this was a majority or minority clan. No background material was put before me to assist. In any event, as MOJ and Others emphasises, the relevance of clans in Mogadishu is now in relation to support mechanism rather than creating risks to others. I am satisfied that the appellant is likely, on return to Mogadishu, despite the absence of any family or other connections with Mogadishu to be able to take advantage of the "economic boom" and to be able to financially provide for himself. Any short-term necessary financial support would, in my judgment, be available from his family in the UK.

46. In these circumstances, the appellant has failed to establish that there is a real risk that on return to Mogadishu he will be destitute and at risk of having to live in an IDP camp.

47. For these reasons, the appellant has failed to establish that his removal to Somalia would breach Art 3 and I dismiss his appeal on this ground.

Article 8

48. In relation to Art 8, the parties' submissions addressed first whether the appellant could establish Exception 1 in s.117C(4) and/or Exception 2 in s.117C(5); and, then, if he could whether there were "very compelling circumstances, over and above those described in Exceptions 1 and 2" as required by s.117C(6) in order for him to establish that the decision breached Art 8 because the public interest was outweighed by his particular circumstances.

49. As regards Exception 1, Mr Howells accepted that the appellant met the requirements in s.117C(4)(a) and (b), namely that he had been lawfully resident in the United Kingdom for most of his life and that he was socially and culturally integrated in the United Kingdom. He submitted, however, that there were not "very significant obstacles" to his integration in Somalia. He relied upon the same

factors which, he had submitted, led to a finding that the appellant's return would not breach Art 3.

50. Mr Joseph submitted that the assessment under s.117C(4)(c) was not the same assessment as under Art 3 even if similar factors were relevant. He submitted that the appellant was, in his word, "effectively" a British citizen. He had no connections to Somalia and he had not lived in Mogadishu and had left Somalia when he was 3 or 4 years old. He invited me to consider that the appellant would have no accommodation or support in Mogadishu.

51. Whilst I accept Mr Joseph's submission that the issue of whether there are "very significant obstacles" for the appellant's integration in Somalia is not the same question as whether or not there is a breach of Art 3 of the ECHR, I do accept Mr Howells' submissions that the factors that are relevant to the Art 3 assessment remain relevant to determining whether there are "very significant obstacles" to his integration. Integration is, as the Court of Appeal held in Kamara v SSHD [2016] EWCA Civ 813, to be approached holistically looking at all the circumstances. Equally, the requirement that there be "very significant obstacles" is a high threshold. It is not satisfied simply by establishing difficulties, inconvenience or hardships alone on return.

52. In this case, whilst I accept that the appellant has never lived in Mogadishu, or indeed in Somalia at all since he was 3 or 4, he nevertheless speaks Somali, at least to a communications level, and in respect of which any deficit would, in my judgment, be likely overcome relatively quickly. Whilst he has no family or friends in Mogadishu, he has, in my judgment, the ability to obtain employment and therefore provide financially for himself both in terms of accommodation and subsistence. In the short-term, at least, financial support could be forthcoming from the UK. I do not accept Mr Joseph's characterisation of the appellant being "effectively" a British citizen. True, it is, that he has lived here for over 25 years since January 1994. He came as a young child aged 7. He has, as Mr Howells' submission in relation s.117C(4)(b) acknowledged, integrated into society in the UK. That does not, however, mean that he would face "very significant obstacles" to integrating in Somalia which is his country of birth, origin and ethnic background. I accept that he would face difficulties in doing so, not least because of the period of time since he was last in Somalia and his age when he left. However, I am not satisfied that the level of difficulty he would face, despite those factors, reaches the level of "very significant obstacles" such that he satisfies the requirements of Exception 1 in s.117C(4).

53. Turning now to the Exception 2, the issue is whether the impact of his deportation would be "unduly harsh" upon his partner and/or his two children. That decision has to be reached on the basis only of the impact upon them without regard to the public interest or seriousness of the appellant's offending (see KO (Nigeria) and Others). The test in MK, as approved by the Supreme Court in KO (Nigeria) and Others at [27], imposes a high threshold (see RA at [17]). It is a higher hurdle than that of "reasonableness" in s.117B(6) (see KO (Nigeria) and Others at [23]). It denotes

something "severe, or bleak" and is the "antithesis of pleasant or comfortable" (see MK at [46]). In KO (Nigeria) and Others, Lord Carnwath at [23] stated that:

> "One is looking for a degree of harshness going beyond that which would necessarily be involved for any child faced with a deportation of a parent."

54. With the necessary change in the wording, it is equally true that the test seeks a degree of harshness going beyond that which would necessarily be involved for any partner left in the UK faced with the deportation of their partner.

55. In this case, I heard no oral evidence. Judge Frazer did hear some oral evidence and that is reproduced in her decision in the First-tier Tribunal together with the supporting evidence from the independent social worker, Andrew Beckwith and medical evidence concerning the health of the appellant's partner who suffers from anxiety, depression and back problems and in relation to the appellant's first child, who suffers from febrile convulsion but in respect of whom it is said that she is likely to grow out of by the age of 6.

56. The evidence is helpfully summarised by the judge at paras 30–33 of her determination as follows:

> "30. In August 2013 the Appellant's daughter had a seizure. She had a further one some three months later and was hospitalised. Thereafter she continued to have seizures at intervals. The letter from Dr Thorne dated 13th June 2018 states that [M] has been diagnosed with febrile convulsions. She was seen by a Consultant Paediatrician on 15th May 2018. Dr. Thorne was of the opinion that if she was suffering from febrile convulsions she would continue to grow out of them in time. I considered the letter of Dr Stevens, Consultant Paediatrician dated 29th January 2018 which also provides the opinion that she was suffering from febrile convulsions which she should grow out of. The medical evidence suggested that the convulsions were connected to temperature raises which explained the diagnosis.
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> 31. I have considered the report of Andrew Beckwith in this context. He reports about the Appellant's family situation. I noted in particular his observations at paragraph 2.8:
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> > 'Although [M] attends nursery two days a week, due to [F's] work patterns, which does include Saturday and Sunday working, the primary carer for [M] is her father. Throughout my visit I observed a very close relationship between father and daughter. For the first hour of my visit, [F] was working and I spent this time just mainly watching father and daughter play together. It is my opinion that there is a very strong attachment between them. Even when [F] did return it was noticeable that [M] would gravitate towards her father, sitting on his knee to read books and sing nursery rhymes with him. [F] confirmed that this was not unusual. She stated that [M] had a very strong bond with her father. She said laughingly that she sometimes feels slightly jealous as [M] and her father are inseparable.'
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> 32. In his analysis at paragraph 3.2 Mr Beckwith states, 'the deportation of [the appellant] would deny [M] a relationship with her father. No modern means of communication via Skype or any other social media outlet could replicate the personal relationship they have.'

> 33. Mr Beckwith also commented on the potential effect of the Appellant's removal on his wife's mental health and ability to provide effective care for the children (paragraph 3.5). He provides his wife with emotional and practical support, assisting her with the care of the children. She suffers from back problems and anxiety and depression. Under cross-examination the Appellant's wife gave evidence that she had family in Cardiff and also had close connections with her husband's family. I find that if the Appellant were removed, it would be open to the Appellant's wife to seek support from her family and extended family members but I appreciate that this would not be of the same quality as support from her husband, the father of her child. I also take into account the comments in the report which warned that if her mental health symptoms continued and without her husband's support, this would affect her ability to parent her children long term."

57. Mr Joseph submitted that it was in the best interests of not only M but also the appellant's new daughter that the family should stay together. He accepted that the test of "undue harshness" sets a particularly high bar. Nevertheless, he submitted that the report of Andrew Beckwith established that M would not just miss her father but his removal would have an impact upon her (and now her new sibling) as they grew up. He pointed out that the appellant was a full-time father as his partner worked and he could not because of the deportation order. He was, Mr Joseph submitted, effectively her primary carer although he recognised that the care was shared. He was devoting all of his time to his family and his older child was fully aware of her relationship with her father. He submitted it would be devastating to lose her father. He pointed out that the appellant had "turned his life around".

58. In respect of the appellant's partner, Mr Joseph submitted that they have been together since 2013 and their relationship was strong. He relied upon her medical condition and what the independent social worker said, namely that she would struggle without the appellant to look after the children.

59. Mr Joseph submitted that taking all these factors into account the appellant's deportation would be "unduly harsh" on both his partner and his two children.

60. Mr Howells submitted that the appellant's partner had the support of other family members who could both assist her in relation to monitoring her own health and help with the children. He relied upon paras 3.1, 3.2, 3.4, 3.5 and 4.1–4.2 of the independent social worker's report. He submitted that the appellant's partner would not be alone living without the appellant.

61. In respect of the appellant's eldest child, he accepted that the medical evidence was that she suffered from seizures but that she was likely to grow out of them possibly by the age of 7 and he referred me to the report of a consultant paediatrician, Dr Stevens, in a letter dated 5 February 2018 at page 37 of the appellant's bundle.

62. Mr Howells reminded me that more than the normal effect of separation had to be shown in order to establish the "unduly harsh" requirements. Mr Howells submitted that the impact upon the appellant's partner and his children was not such as to amount to "undue harshness" such that Exception 2 had not been established.

63. I state at the outset that I accept that the evidence shows that the appellant's partner suffers from anxiety, depression and back problems. I note, however, that the appellant's partner works. I also accept the evidence that the appellant's older child suffers from febrile convulsions but that the evidence is that she is likely to grow out of these seizures possibly by the age of 6. I accept that, in relation to caring for both the appellant's older child and now a second child, that will be harder as a single parent than it would be if the appellant were to remain in the UK. I find, however, that the appellant's partner has extended family in the UK who could provide support for her. I take fully into account what is said by Andrew Beckwith, in particular at paras 3.1–3.5, in relation to his view of the impact of the appellant's deportation both upon M and his wife. I do not accept, however, that that impact reaches the significant threshold of "undue harshness" required to establish Exception 2. It falls short of it, in my judgment, by quite some way. I have reached that assessment on the basis of all the evidence. I note, however, that UTJ Allen in his earlier decision went even further in expressing the view that the impact upon M and the appellant's wife (the evidence in respect of which was not materially different from that before me) could not "on any rational view" reach the level of being "unduly harsh". As I have said, I reach my finding on the evidence independent of that view expressed in the earlier hearing.

64. For these reasons, therefore, I am not satisfied that the appellant can establish either Exception 1 or Exception 2 in s.117C(4) and (5) respectively.

65. With those findings in mind, I turn to consider s.117C(6) and whether it is established that there are "very compelling circumstances, over and above those described in Exceptions 1 and 2" (my emphasis). Only if that is established, can it be shown that the public interest in the appellant's offending is outweighed so as to make his deportation disproportionate.

66. In that regard, I accept that the appellant's deportation would interfere with his private and family life established over his long residence in the UK and in respect of his family life with his wife and (now) two children. There is no suggestion they should leave the UK with him.

67. I apply the approach set out by the Upper Tribunal in MS. I must take into account the seriousness of the appellant's offending. I accept, of course, that the appellant's last offence occurred in 2012. He had a previous history, mostly as a juvenile, of persistent offending. That most recent conviction was, however, for a number of very serious offences including the extremely serious offence of attempted murder and for which he was sentenced to twelve years' imprisonment. Mr Howells told me that there was no available record of the sentencing judge's remarks because the Crown Court had lost the 'tape'. The seriousness of that offence, however, speaks for itself. It is one of the most serious criminal offences. And, the sentence also speaks to the seriousness of the appellant's offending. I also accept that the appellant has not offended since he was released from prison in September 2012. Mr Howells did not seek to look behind Judge Frazer's finding at para 24 of her determination where she found, on the basis of all the evidence including that of the independent social

worker, that the appellant was "no longer at any significant level of risk for general offending". She found that "his rehabilitation has had some success". She further expressed the view that he had turned his life around. In RA, the Upper Tribunal concluded that the fact that the individual has not committed any further offences since his release from prison is:

> "highly unlikely to have a material bearing, given that everyone is expected not to commit crimes. Rehabilitation will therefore normally do no more than show that the individual has returned to the place where society expects him (and everyone else) to be. There is, in other words, no material weight which ordinarily falls to be given to rehabilitation in the proportionality balance …"

68. In addition, the Upper Tribunal also recognised that it could not categorically say that rehabilitation was "never" capable of playing a significant role.

69. Even taking into account Judge Frazer's finding (which I have no reason to doubt) that the appellant has changed, perhaps as a result of marrying and having children since 2013, the public interest is reflected in the seriousness of his offence (see s.117C(1) and (2)). He has been convicted of a number of serious offences, including the extremely serious offence of attempted murder for which he was sentenced to twelve years in a YOI. There is, in my judgment, a very strong public interest, including deterring other foreign criminals, reflected in the facts of that offence.

70. My attention was not drawn to any factors under s.117B that were pertinent to my decision. It was accepted, by Mr Howells, that the appellant had ILE, albeit that that was now invalidated by the deportation order in July 2012. Whether, as a result of the effect of s.5 of the Immigration Act, or because of the known existence of a deportation order, the appellant's family life with his partner was established and formed at a time when his continued presence in the UK was precarious in the sense that it was always at risk of not continuing.

71. Given that the appellant cannot establish that he falls within Exception 1 or Exception 2, it is difficult to see how he could show "very compelling circumstances" which are "over and above" either of those exceptions since the substance of his case based upon his private life in the UK or his family life with his partner and children are the subject matter of those two exceptions respectively.

72. In reaching my conclusion in respect of s.117C(6), I bear in mind that the appellant has been in the UK since he was 7 years old. He has, however, a lengthy criminal record albeit one, apart from the most recent offences, committed when he was a juvenile. His most recent offences are very serious or, in the case of attempted murder, extremely serious indeed. Only a "very strong" case could amount to "very compelling circumstances" over and above there being "very significant obstacles to his integration" or that the impact on his partner and/or his children would be "unduly harsh". That is a very high hurdle to overcome indeed. The only new evidence since the decision of UTJ Allen is that the appellant and his partner now have a second child born in March of this year.

73. In my judgment, taking all the circumstances cumulatively, in particular the fact of the appellant's rehabilitation, the children's best interests and the impact upon them and his wife if he were deported and his circumstances on return to Somalia, cannot be described as "very compelling circumstances" which are "over and above" those in Exception 1 and Exception 2. Indeed, they come nowhere near establishing that there are "very compelling circumstances" over and above Exceptions 1 and/or 2.

74. For these reasons, I am satisfied that the appellant's deportation is proportionate and not a breach of Art 8 of the ECHR.

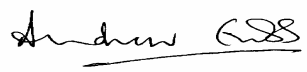
Decision

75. The decision of the First-tier Tribunal to allow the appellant's appeal was set aside by the Upper Tribunal in its decision sent on 6 March 2019.

76. I remake the decision dismissing the appeal under Arts 3 and 8 of the ECHR.

77. The First-tier tribunal's decision to dismiss the appeal on asylum and humanitarian protection grounds stands.

Signed



A Grubb
Judge of the Upper Tribunal

22, May 2019