Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00155/2018

THE IMMIGRATION ACTS

At: Manchester Civil Justice Centre **Decision & Reasons Promulgated**
On: 3rd March 2020 **On: 17th June 2020**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Mohamed Hassan Mohamed
(no anonymity direction made)

Appellant

And

The Secretary of State for the Home Department

Respondent

For the Appellant: **Mr Brown, Counsel instructed by IAS (Liverpool)**
For the Respondent: **Mr McVeety, Senior Home Office Presenting Officer**

DECISION AND REASONS

1. The Appellant is a national of Somalia born in 1986. He appeals, on protection and human rights grounds, against the Secretary of State's decision to deport him.

Background and Decision to Deport

2. The Appellant was brought to the United Kingdom in 1998 when he was approximately 12 years old. He had initially sought protection as the dependent

of the cousin[1] who had brought him here, but when that cousin abandoned him he sought asylum in his own right in 2002. He was granted refugee status and, on the 7th March 2003, indefinite leave to remain.

3. The Appellant is a serious criminal. He received his first conviction aged 18 and has received many more since: his PNC record shows 26 offences plus 2 non-recordable offences. His criminal career started with a series of driving-relating crimes (driving whilst uninsured/disqualified, using a mobile phone at the wheel), has included drug offences (Class B and A) and latterly escalated to Actual Bodily Harm[2], for which the Appellant was sentenced to 27 months' imprisonment[3] on the 13th February 2017. The Court further imposed a restraining order for 5 years, preventing the Appellant from contacting either of the victims of the assault or from returning to the area where it took place.

4. As a result of this offending, the Secretary of State has decided to deport the Appellant. The legal framework for the Secretary of State's decision is section 32(5) of the UK Borders Act 2007, which requires her to 'automatically' deport foreign criminals:

> '*32 Automatic deportation*
>
> (1) **In this section "foreign criminal" means a person—**
>
> **(a) who is not a British citizen,**
>
> **(b) who is convicted in the United Kingdom of an offence, and**
>
> **(c) to whom Condition 1 or 2 applies.**
>
> **(2) Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months.**
>
> (3) Condition 2 is that—
>
> (a) the offence is specified by order of the Secretary of State under section 72(4)(a) of the Nationality, Immigration and Asylum Act 2002 (c. 41) (serious criminal), and
>
> (b) the person is sentenced to a period of imprisonment.
>
> (4) **For the purpose of section 3(5)(a) of the Immigration Act 1971 (c. 77), the deportation of a foreign criminal is conducive to the public good.**
>
> (5) **The Secretary of State must make a deportation order in respect of a foreign criminal (subject to section 33).**'

[1] Also referred to elsewhere as the Appellant's 'uncle': the Appellant clarified before me that the man in question was his cousin but because he was older it was culturally appropriate to refer to him as 'uncle'.

[2] In my 'error of law' decision dated 20th May 2019 I mistakenly referred to this offence as Grievous Bodily Harm. Although that was the original charge, the jury returned a verdict of guilty of Actual Bodily Harm

[3] References in the papers to the Appellant having been sentenced to 30 months for the index offence are inaccurate: he received a sentence of 27 months, and an outstanding suspended sentence of three months was reactivated.

5. The Appellant can however successfully resist deportation if he can demonstrate that one of the 'exceptions' set out in section 33 of the same Act applies to him:

> '*33 Exceptions*
>
> (1) **Section 32(4) and (5)—**
>
> **(a) do not apply where an exception in this section applies** (subject to subsection (7) below), and
>
> (b) are subject to sections 7 and 8 of the Immigration Act 1971 (Commonwealth citizens, Irish citizens, crew and other exemptions).
>
> (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.**
>
> …'

6. In respect of s33(2)(a) the Secretary of State acknowledges that the Appellant has lived in the United Kingdom, with leave, for a long time. She is not however satisfied that he is culturally and socially integrated here, or that there would be very significant obstacles to his integration in Somalia. As such any interference with his Article 8 rights would be proportionate.

7. In respect of s33(2)(b) the Secretary of State imposed a certificate under s72 of the Nationality, Immigration and Asylum Act 2002. The effect of such a certificate is that the Appellant is no longer entitled to a grant of refugee status or humanitarian protection, because of his serious criminality.

8. For good measure the Secretary of State has found that the circumstances connected with the Appellant's grant of refugee status no longer exist, and that it would now be safe to return him to Somalia. The Secretary of State's 'refusal letter' is dated 20th September 2018. It relies upon the guidance in MOJ & Ors (Return to Mogadishu) Somalia CG [2014] UKUT 00442 (IAC) to the effect that the conflict in the city is now over, that al-Shabaab militants have been defeated, that there is an economic boom that works to the advantage of returnees, and that clan warfare is a thing of the past. That, contends the Secretary of State, deals with any residual Article 3 claim that the Appellant might have.

The Appeal

9. The Appellant appealed to the First-tier Tribunal on two grounds: he submitted that he remained a person in need of international protection, and further that it would be a disproportionate interference with his Article 8 private life to deport him today.

10. On the 29th November 2018 the appeal came before Judge Mark Davies of the First-tier Tribunal. By his decision of the 10th December 2018 Judge Davies dismissed the appeal on all grounds.

11. The Appellant sought permission to appeal to the Upper Tribunal, which was granted on the 4th March 2019 by Upper Tribunal Judge Eshun.

12. On the 20th May 2019 the matter came before me. In my written decision of the same date I set the decision of the First-tier Tribunal aside. My reasons for doing so are as follows.

13. The first thing to be said about the decision of the First-tier Tribunal is that it betrays a lack of anxious scrutiny. Whilst defects in its structure might be salvageable, a fundamental error appears to have arisen in that the First-tier Tribunal repeatedly ascribes to Appellant's Counsel Mr Brown submissions that he did not make. Paragraph 49 reads "Mr Brown suggested the offences… were victimless". That is a most surprising submission for any Counsel to have made, but particularly where the victim of the assault was a vulnerable woman brutally attacked in her own home. I am quite satisfied that Mr Brown said no such thing. I can be so satisfied not just because he denies it, but because it is squarely contrary to the Appellant's written case, and because Home Office Presenting Officer Ms Young, who appeared for the Respondent at first instance and at the 'error of law' hearing in May 2019, agrees that it simply was not said. Further and more significantly, the Tribunal appears to have proceeded on the basis [at its paragraph 52] that Mr Brown conceded that Article 3 could not be relied upon. Again, both representatives agreed before me that the Tribunal here fundamentally misunderstood the Appellant's case. Article 3 was not conceded, and for the Tribunal to have proceeded on the basis that it was is an error of fact amounting to an error of law.

14. The Appellant further took issue with the First-tier Tribunal's analysis of section 72. It is submitted that in its assessment the Tribunal omitted to take material evidence into account. Before the First-tier Tribunal the Appellant had sought to rebut the presumption that he presents an ongoing danger to the community very largely by relying on the evidence of one Paul McCann, the Appellant's probation officer. Since Mr McCann was a person well placed to comment on the question of ongoing risk, this was potentially important evidence. Aside from an acknowledgment at its paragraph 25 that the First-tier Tribunal read it, Mr McCann's evidence features not at all in the final reasoning from paragraph 57 on.

15. In addition I could find no clear reasoning in the determination addressing the question of cessation, other than the comments at paragraph 64 about the ability of the Benadiri clan to support the Appellant if he returns to Mogadishu. This reasoning fails to address the evidence relied upon by the Appellant but more fundamentally fails to even engage with the submissions made by the Respondent, who had relied on MOJ. As the headnote of MOJ makes clear, members of minority clans cannot look to their fellow clan members for support:

> "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".

16. This failure to engage with the evidence in its assessment of risk further led the Tribunal to err in its assessment of whether there were "very significant obstacles" to integration under paragraph 399A of the Rules. In its assessment of whether the Appellant met the "integration" test in the same rule I am satisfied that further error arises in that the Tribunal appeared to discount twenty years of life in the United Kingdom simply on the basis of the conviction: see Tirabi (deportation; lawfully resident; s5(1)) [2018] UKUT 199 (IAC).

17. My written decision of the 20th May 2019 concluded:

> "For these reasons I am satisfied that the decision of the First-tier Tribunal must be set aside in its entirety. If the Tribunal fundamentally misunderstood the case for the Appellant there must be real doubts about whether he had a fair hearing. I am further satisfied that the Tribunal erred in failing to make relevant findings, failing to take material evidence into account, and in failing to apply country guidance".

18. I directed that the matter be brought back before me so that the decision in the appeal could be remade. There followed some significant and unfortunate delay. A hearing on the 2nd July 2019 was adjourned because the Appellant was unwell. A hearing on the 7th October 2019 was adjourned because Counsel was not available. A hearing proceeded on the 8th November 2019; I heard oral evidence from the Appellant, recorded verbatim in a typed note, and submissions from the parties. I reserved my decision. The on the 18th November 2019 the decision of the Upper Tribunal (President Mr Justice Lane and Upper Tribunal Judge Rimington) in SB (Refugee Revocation: IDP Camps) Somalia [2019] UKUT 00358 (IAC) became available. Given its potential relevance to the Appellant's case, I gave directions that the parties were at liberty to make further submissions should they wish to do so. The parties responded by requesting that a further hearing be listed: this took place on the 3rd March 2020 when Mr Brown and Mr McVeety addressed me on the impact of SB on the Appellant's case. A further cause for delay was that my typed note, taken on the 8th November 2019, was for a time unavailable to me because the file became corrupted and could not be opened. I am grateful to the parties for their assistance in helping me resolve that issue. I can confirm that the full record of proceedings of the November 2019 hearing has been available to me for the purpose of preparing this decision: I have the typed note of Mr Brown (agreed by Mr McVeety), I have twice listened to the recording of the hearing

made at the Civil Justice Centre, and in addition the corrupted file has now been recovered.

19. What follows is my 'remade' decision on the outcome of the appeal.

Issue 1: section 72

20. The Secretary of State has decided to impose upon the Appellant a certificate under section 72 of the Nationality, Immigration and Asylum Act 2002:

> '*72 Serious criminal*
>
> **(1) This section applies for the purpose of the construction and application of Article 33(2) of the Refugee Convention (exclusion from protection).**
>
> **(2) A person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if he is—**
>
> **(a) convicted in the United Kingdom of an offence, and**
>
> **(b) sentenced to a period of imprisonment of at least two years.**
>
> …
>
> **(6) A presumption under subsection (2), (3) or (4) that a person constitutes a danger to the community is rebuttable by that person.**
>
> …'

21. It is not in dispute that the Appellant has been sentenced to a period of 27 months imprisonment and so the conditions at s72(2) are met. It is however open to the Appellant to seek to rebut the presumption that he continues to constitute a danger to the community: s72(6). In seeking to do so Mr Brown relied upon the following matters:

i) That the Appellant's offending had to be set in the context of his life. The Appellant came to the United Kingdom as a 12-year old boy, accompanied by his cousin. He credibly describes being distressed at the separation from his family and how his relationship with his cousin became strained. His cousin was himself traumatized, resorting to drug and alcohol abuse to deal with that. The Appellant was thereafter abandoned by this cousin and was taken into care. The Appellant describes being traumatized by these events and in his own words: "I had never had any proper guidance and I fell into bad company". His first offence was when he was still a teenager. It should further be noted that in June 2015, a year before the index offence, the Appellant was himself subject to a serious assault. He was stabbed in a shop in London multiple times and states that as a result his mental health deteriorated.

ii) The Appellant has expressed remorse for his offending behaviour. In his statement dated 21st November 2018 the Appellant says this: "I acknowledge that I went down the wrong path and I committed offences and caused a lot of harm to people. I feel sad and sorry for my behaviour. I

am disappointed in myself. I regret my actions, I let myself down and I regret that I hurt people".

iii) The Appellant has not been convicted since the index offence[4] of actual bodily harm. He has further testified that he has turned his life around and that he wishes to make a fresh start and make a positive contribution to society. Whilst in prison he undertook an alcohol awareness course (the Appellant avers that he was under the influence of alcohol during some of his offences), an anger management course and an Islamic spiritual course. He has spent time privately trying to "heal" himself.

iv) It is the view of the probation service that since his release from prison the Appellant has exhibited "positive engagement and compliance". In his letter dated the 17th November 2018 Probation Officer Mr Paul McCann reports that the Appellant has expressed deep regret for his actions, and has said that he understands the hurt that he caused. He has also explored the triggers for his offending behaviour and has sought to avoid alcohol and "negative peers". In navigating various challenges since his release the Appellant has, in Mr McCann's estimation, exhibited a "pro-social" attitude: as an example Mr McCann cites the Appellant's decision to co-operate with the police after he himself was attacked, rather than seek out his own retribution. Mr McCann's letter concludes:

> "*Mr Hassan was initially assessed as a medium risk of serious harm to the public. This assessment is based on the nature of the offence and his current circumstances. However, since Mr Hassan has been under the supervision of probation he appears to be managing himself and his triggers appropriately. I have no evidence to indicate that Mr Hassan is not complying with his licence in the community.*
>
> *Mr Hassan is an intelligent, polite and helpful individual who, with the correct support and direction, can become a positive, productive member of society*".

I note that Mr McCann has supplemented his 2018 evidence with a further short but undated letter, lodged with the Tribunal under cover of an email dated the 26th June 2019. Therein Mr McCann states that the Appellant completed all of his probation requirements in February 2019. He attended all appointments as required and was polite and compliant. Mr McCann states that in his opinion the Appellant has the ability to be a productive member of society.

22. Mr Brown asked me to take all of the foregoing into account in my assessment of whether the Appellant continues to pose a danger to the community. At the forefront of his submissions was the unchallenged fact that the Appellant has not been convicted of any offence since February 2017, when he was sent to

[4] Confusingly a number of different dates have been given in the papers in respect of the index offence of ABH. Counsel's instructions were that the assault took place in June 2016, and the Appellant himself states that it took place in 2015. I have based my decision on the information gleaned from the PNC, record of indictment and the sentencing remarks: the assault took place on the 19th August 2016 and the Appellant was convicted and sentenced in the Crown Court on the 13th February 2017.

prison for the assault that took place in August 2016. He was released in March 2018 and has been on immigration bail ever since. He has therefore been back in the community for well over two years and has not been in any trouble. In Mr Brown's submission, this should be contrasted with the period between 2004 and 2016, when the Appellant was committing criminal offences with some regularity. This cessation in offending must be assessed in the light of Mr McCann's evidence that the Appellant showed good engagement with probation services, and that he complied with all of the requirements imposed upon him. Mr McCann's professional view is that the Appellant is now managing himself and his "triggers" appropriately, and that the Appellant is capable of being a productive member of society. All of that, submits Mr Brown, must then be placed in the overall context of this Appellant's life. As a young refugee he was separated from his family, brought to this country by an older relative who apparently made little or no effort to care for him before abandoning him; he was taken into care and fell into bad company. His offending behaviour started in that chaotic youth, and his record, and its apparent halt since 2016, must be assessed against that background.

23. Mr McVeety asked that I begin my assessment of the Appellant's behaviour by reminding myself of the nature of his criminality. In the years between 2004 and 2016 he was convicted of 26 offences. The last was the index offence for which he now faces deportation. I have been provided with the sentencing remarks of Mr Recorder Potter, handed down at Cambridge Crown Court on the 13th February 2017. Recorder Potter sets out the background to the offence. The Appellant and his co-defendant paid a visit to the home of man whom it is said owed the Appellant money. At first the Appellant appeared to deal with the question of the debt in a reasonable manner, but moments after he left the property he, for whatever reason, changed his approach. He returned to the house in an aggressive state of mind and swung a weapon at the man who owed him the money. The man tried to get away from the Appellant who, instead of pursuing him, grabbed a woman who was present. Recorder Potter comments that the woman believed that she was assaulted to "get back" at the Appellant's debtor: in his assessment that is exactly right. The sentencing remarks continue:

> "You hit her with sufficient force on two occasions with a glass, a weapon, that caused her to fall to the floor. That should have been the moment when you thought twice about continuing the escapade that you were embarked upon but you didn't, and you continued to assault a woman who was in no state to defend herself whilst she was lying on the floor, pressed up against the bannisters in full sight of her partner who could see what was going on, and you kicked her not just to the leg and the shoulder but also to the face and at some stage in the stomach. You've seen the photographs and what you did to her face causing to her cuts and bruises and humiliating her still further because the severity of the attack was such that she actually wet herself. You only stopped because your co-defendant … told you to stop and at that point [the victim], clearly terrified and suffering, as she was to tell the police, excruciating pain ran from the location, jumped through a window and broke her ankle, fractured her ankle, and you caused that, no-one else".

24. Mr McVeety asked me to note the "utter contempt" that the Appellant demonstrated towards the woman he assaulted, who in the facts rehearsed by the sentencing judge, owed him nothing and was entirely innocent. In respect of the Restraining Order the Judge added that he considered it necessary for the protection of the two individuals who were the subjects of the attack and to "protect Cambridgeshire", the scene of the crime. The Order was imposed for five years. Mr McVeety pointed out that at the date of the hearing that Order was still in place. He submitted that this was a strong indication that the Appellant remained a danger to the community in the form of those two individuals.

25. It is not in dispute that the Appellant has committed a particularly serious crime. That is not the question before me (cf IH (s.72; 'Particularly Serious Crime') Eritrea [2009] UKAIT 00012). The presumption that the Appellant seeks to rebut, in accordance with s72(6), is that he continues to be a "danger to the community".

26. In my assessment of that matter I have had regard to the Appellant's difficult life. Although I have not been shown any independent evidence (for instance in probation or social services reports) that the Appellant was indeed 'led astray' in his youth, on the bare facts before me I see no reason to reject his evidence that this was the case. He grew up in Somalia in a time of conflict, lost his father to violence and then the rest of his family to forced migration. The 'uncle' who was supposed to care for him did no such thing and he ended up in the care system. The rest is history, set out in black and white in the PNC. I accept Mr Brown's characterisation of the Appellant's youth as chaotic, and one that perhaps unsurprisingly led him into trouble. The question for me, in my consideration of the certificate, is whether he has left that chaos behind.

27. I have placed what weight I can on the Appellant's history, and on the fact that he has not been convicted of any offence since 2017. Having done so, I am unable to find that these matters are of sufficient weight to rebut the presumption in the statute.

28. As to the challenges faced by the Appellant in his youth, this is something of a double edged sword. If he is the product of his upbringing, then with the criminal record that he has, it might be said that there would need to be very powerful evidence indeed to demonstrate that he has overcome what has become his innate criminality. On the other hand it is of course not the case that every refugee child who faces hardship ends up becoming a violent criminal: indeed that is very rarely the case, serving only to underline that the Appellant chose his own path.

29. I have looked with care at the evidence of Mr McCann, the Appellant's probation officer. He has made a very positive assessment of the Appellant's engagement with probation services, and his personal interaction with Mr McCann. I accept and give some weight to the fact that the Appellant has complied with the terms of his licence. I must however agree with Mr McVeety that Mr McCann has chosen his words carefully. He records that the Appellant

has "expressed" deep regret and that he has the "ability" to become a positive member of society. That someone has the "ability" to not be a criminal is hardly a matter that can attract any significant weight in my evaluation: all but the most extreme of offenders have that. That the Appellant has expressed regret for viciously assaulting a defenceless woman in her own home is of course to be welcomed but having looked with care at his evidence I am not persuaded that he appreciates the magnitude of that event for the victim, or why others might regard it with revulsion. In his witness statement he simply says of the attack: "I am sorry for my actions that night". I note that he devotes considerably more of the statement to describing trauma that *he* has experienced.

30. Whilst I have borne in mind that there appears to be a cessation in criminality, the weight that can be attached to the recent lack of offending is minimal, given that the Appellant remained on licence for some of that period and was throughout on notice that he was subject to deportation proceedings: in those circumstances there were powerful incentives for him to stay out of trouble which would disappear should this appeal be allowed. I also recognise that for quite a significant proportion of the time since the Appellant's release he has been too injured to be out committing crimes: he was stabbed in an attack in Liverpool in October 2018 and then in April 2019 fell down the stairs at his home, injuring his ankle to the extent that he has been on crutches ever since.

31. Finally, there is the matter of the Restraining Order, which remains in place. Restraining Orders may be imposed by a sentencing judge under s5 of the Protection from Harassment Act 1997 (as amended by s12 of the Domestic Violence, Crime and Victims Act 2004):

> '(1) A court sentencing or otherwise dealing with a person ("the defendant") convicted of an offence may (as well as sentencing him or dealing with him in any other way) make an order under this section.
>
> (2) The order may, for the purpose of protecting the victim or victims of the offence, or any other person mentioned in the order, from conduct which—
>
> (a) amounts to harassment, or
>
> (b) will cause a fear of violence,
>
> prohibit the defendant from doing anything described in the order.
>
> (3) The order may have effect for a specified period or until further order.
>
> (3A) In proceedings under this section both the prosecution and the defence may lead, as further evidence, any evidence that would be admissible in proceedings for an injunction under section 3.
>
> (4) The prosecutor, the defendant or any other person mentioned in the order may apply to the court which made the order for it to be varied or discharged by a further order.
>
> (4A) Any person mentioned in the order is entitled to be heard on the hearing of an application under subsection (4).

> (5) If without reasonable excuse the defendant does anything which he is prohibited from doing by an order under this section, he is guilty of an offence.
>
> (5A) ...
>
> (6) A person guilty of an offence under this section is liable—
>
> (a) on conviction on indictment, to imprisonment for a term not exceeding five years, or a fine, or both, or
>
> (b) on summary conviction, to imprisonment for a term not exceeding six months, or a fine not exceeding the statutory maximum, or both.
>
> (7) A court dealing with a person for an offence under this section may vary or discharge the order in question by a further order.'

32. It is established that an order may *only* be imposed where a Judge is satisfied that it is *necessary* to protect the victim/victims from harassment or a fear of violence: R v Stuart Brough [2011] EWCA Crim 2802. This was the test applied by Recorder Potter in February 2017 when he told the Appellant, who had not opposed its imposition: "I would have imposed it anyway, I tell you bluntly". I accept Mr Brown's submission that the existence of the restraining order is not determinative of the question of ongoing risk, but it is a matter that I must give some weight to. The Judge considered its imposition necessary to protect the individuals concerned for a period of five years. That was his assessment in February 2017 and the Appellant has neither sought for the Order to be discharged (as would be open to him under s5(4) of the Act) or produced any weighty evidence before me that it should be.

33. Taking all of the above into account I cannot be satisfied that the Appellant has rebutted the presumption that he constitutes a danger to the community. It follows that the Appellant can succeed on neither refugee nor humanitarian protection grounds.

Issue 2: Cessation and Article 3

34. The parties are in agreement that whatever the Tribunal's decision on s72, the Appellant can still succeed in his appeal on protection grounds if he can demonstrate that he would face a real risk of inhuman and degrading treatment upon return to Somalia, contrary to the United Kingdom's obligations under Article 3 ECHR. The Respondent accepts that at the date that the Appellant was granted refugee status the question of serious harm under Article 3 could be deemed to 'stand and fall' with the refugee claim. As such the grant of refugee status in 2003 amounted to an acceptance that the Appellant then faced a real risk of serious harm in Somalia.

35. The Respondent submitted before me that such a risk no longer pertains. There has been significant and durable change on the ground such that the Appellant no longer faces any such risk. The Respondent relies in particular on the findings in MOJ (Somalia) and SB (Refugee revocation).

36. MOJ was decided in 2014. Its central conclusions, insofar as they are relevant to the Appellant, are expressed in the headnote:

> *(ii)* ***Generally, a person who is "an ordinary civilian" (i.e. not associated with the security forces; any aspect of government or official administration or any NGO or international organisation) on returning to Mogadishu after a period of absence will face no real risk of persecution or risk of harm such as to require protection under Article 3 of the ECHR or Article 15(c) of the Qualification Directive. In particular, he will not be at real risk simply on account of having lived in a European location for a period of time of being viewed with suspicion either by the authorities as a possible supporter of Al Shabaab or by Al Shabaab as an apostate or someone whose Islamic integrity has been compromised by living in a Western country****.*
>
> *(iii)* ***There has been durable change in the sense that the Al Shabaab withdrawal from Mogadishu is complete and there is no real prospect of a re-established presence within the city.*** *That was not the case at the time of the country guidance given by the Tribunal in AMM.*
>
> *(iv) The level of civilian casualties, excluding non-military casualties that clearly fall within Al Shabaab target groups such as politicians, police officers, government officials and those associated with NGOs and international organisations, cannot be precisely established by the statistical evidence which is incomplete and unreliable. However, it is established by the evidence considered as a whole that there has been a reduction in the level of civilian casualties since 2011, largely due to the cessation of confrontational warfare within the city and Al Shabaab's resort to asymmetrical warfare on carefully selected targets.* ***The present level of casualties does not amount to a sufficient risk to ordinary civilians such as to represent an Article 15(c) risk****.*
>
> *(v) It is open to an ordinary citizen of Mogadishu to reduce further still his personal exposure to the risk of "collateral damage" in being caught up in an Al Shabaab attack that was not targeted at him by avoiding areas and establishments that are clearly identifiable as likely Al Shabaab targets, and it is not unreasonable for him to do so.*
>
> *(vi) There is no real risk of forced recruitment to Al Shabaab for civilian citizens of Mogadishu, including for recent returnees from the West.*
>
> *(vii)* ***A person returning to Mogadishu after a period of absence will look to his nuclear family, if he has one living in the city, for assistance in re-establishing himself and securing a livelihood. Although a returnee may also seek assistance from his clan members who are not close relatives, such help is only likely to be forthcoming for majority clan members, as minority clans may have little to offer****.*

(viii) ***The significance of clan membership in Mogadishu has changed. Clans now provide, potentially, social support mechanisms and assist with access to livelihoods, performing less of a protection function than previously. There are no clan militias in Mogadishu, no clan violence, and no clan based discriminatory treatment, even for minority clan members.***

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

- ***circumstances in Mogadishu before departure;***
- ***length of absence from Mogadishu;***
- ***family or clan associations to call upon in Mogadishu;***
- ***access to financial resources;***
- ***prospects of securing a livelihood, whether that be employment or self employment;***
- ***availability of remittances from abroad;***
- ***means of support during the time spent in the United Kingdom;***
- ***why his ability to fund the journey to the West no longer enables an appellant to secure financial support on return.***

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

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

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

> ***IDP camp where there is a real possibility of having to live in conditions that will fall below acceptable humanitarian standards.***

37. Applying MOJ the following factors clearly weigh against the Appellant:

    a) as an ordinary civilian he is not in general at risk of indiscriminate violence engaging Article 15(c) of the Qualification Directive;

    b) he does not face a real risk of harm (for instance from Islamic militants) because he is a returnee from the West;

    c) al-Shabaab have withdrawn from Mogadishu and there is no real risk of forced recruitment;

    d) insofar as there pertains a risk of terrorist violence in Mogadishu it is not unreasonable to expect the Appellant to avoid such attacks by staying away from obvious targets such as government buildings;

    e) there is no real risk that the Appellant would be subject to clan violence in Mogadishu.

38. Mr Brown took issue with at least some of these conclusions, pointing to evidence post-dating MOJ which indicates that the Tribunal may have been unduly optimistic about the ability of Somalia, and Mogadishu in particular, to escape the decades-old cycle of violence.

39. Before I address the most recent evidence I note that I also have before me an expert report on conditions in Somalia. Its author is Karen O'Reilly, a protection officer for the UNHCR with long experience of working in East Africa processing the claims of Somali refugees. Ms O'Reilly states that she has particular experience in interviewing and assessing the claims of Benadiris. Her report is dated 22nd October 2018. It is based on her knowledge of the situation in Somalia gleaned from interviews with refugees, and upon objective country background material, for instance reports by Human Rights Watch and the Red Cross. Ms O'Reilly identifies four factors which she contends are of particular significance in assessing the risk to the Appellant.

40. The first is that in her opinion the Benadiri minority continue to face a real risk of serious harm in Somalia today. She cites interviews that she has conducted with refugees who state that their family members have *inter alia* been shot, beaten, robbed, bombed or raped by members of the Abgaal or Habir Gedir clans. Ms O'Reilly then notes that such accounts are consistent with external country information sources which confirm that the "Benadiris/Reer Hamars have historically been persecuted in Somalia". Her report then sets out extracts from a 2012 Canadian Immigration Board report, a 2010 Minority Rights Group report, 2008 UN materials and an extract from a paper written by an Anita Adam in 2015.

41. The second issue identified by Ms O'Reilly is the "deterioration in the security situation in Somalia". In this section she takes issue with the Home Office's assessment that conditions on the ground have further improved since MOJ. Third, Ms O'Reilly stresses the poor humanitarian situation, and fourth, the obstacles to employment and integration faced by those who have been away from the city for a long time.

42. In addition to the expert report the Appellant has produced a bundle of more recent material. The 2019 Human Rights Watch report found that in 2018 fighting and insecurity led to an estimated 2.7 million Somalis being internally displaced, exposing them to a risk of serious abuse by security forces of various descriptions, and to harsh humanitarian conditions which the UN believe to include indiscriminate killing, forced eviction, sexual violence and limited access to basic services. Notably Human Rights Watch also report on incidents of clan violence, in direct contradiction to the conclusions in MOJ that clan militias were no more. The bundle also contains considerable evidence of continuing violence in the city including numerous car bombs and targeted assassinations.

43. In evaluating this evidence I have borne in mind the test to be applied when considering whether to depart from extant country guidance. In SG (Iraq) v Secretary of State for the Home Department [2012] EWCA Civ 940 indicated that there must be "strong grounds supported by cogent evidence".

44. I regret to say that I did not derive very much assistance from the report of Ms O'Reilly. I do not doubt that Ms O'Reilly has accrued many years' experience in interviewing Somali refugees and in reading reports on the region but neither has given her any particular insight beyond that available to this Tribunal, which has of course similar experience in hearing the first-hand accounts of refugees, and is able to read the human rights reports for itself. The report therefore added little to what is already known and accepted, for instance that minorities such as the Benadiri have historically suffered disproportionately during the long conflict in Somalia.

45. Having regard to the more recent bundle I am prepared to accept, for the purpose of this appeal, that there continues to be significant terrorist activity in Mogadishu and that the security situation is generally changeable. It can be said that the view expressed in 2014 in respect of inter-clan violence has proved to be unduly optimistic: the UN, Human Rights Watch and Amnesty International all refer to clan militias being involved in fighting. I do not accept however that conditions have deteriorated to the extent that Article 15(c) is generally engaged in Mogadishu. Al-Shabaab have not retaken any territory in the city, and in that respect the overall situation is much the same as it was when the Tribunal heard the evidence that it did in MOJ. Although the threat of terrorist attack on government/international targets has not diminished to the extent hoped by that Tribunal, the reality is that most inhabitants of the city are able to live and work without facing a real risk of indiscriminate violence.

46. As for the humanitarian situation, it remains the case that a huge number of civilians continue to depend upon international organisations and/or the Somali government for sustenance and shelter. This brings me to those parts of MOJ dealing with socio-economic conditions. The Appellant stresses the following matters:

    a) Where an individual has no family or clan connections to turn to there will need to be a careful assessment of his circumstances;

    b) If he has no means of supporting himself there is a prospect that he will find himself living in circumstances falling below that which is acceptable in humanitarian protection terms;

    c) As a minority clan member there is a real risk that he will end up in an IDP camp "where there is a real possibility of having to live in conditions that will fall below acceptable humanitarian standards".

47. As Mr Brown acknowledged at the final hearing in this appeal, the findings to this effect in MOJ must now be read in light of subsequent Court of Appeal commentary, in two cases in particular: Secretary of State for the Home Department v Said [2016] EWCA Civ 442 and Secretary of State for the Home Department v MS (Somalia) [2019] EWCA Civ 1345, such commentary being found to be authoritative by the Presidential panel of the Upper Tribunal in SB [at §49].

48. The issue arising in SB was whether the guidance at (ix) –(xii) of the headnote in MOJ could be read as a general finding that returnees who were at a real risk of ending up in an IDP camp – i.e. those with no connections or means of supporting themselves – thereby faced a real risk of living in conditions contrary to the United Kingdom's obligations under Article 3. In Said Burnett LJ (as he then was) stressed that such a generalised finding could not be considered consistent with the jurisprudence on Article 3. That jurisprudence emphasises that absent a *Sufi and Elmi* exception - where the conditions on the ground result from human action - the threshold to be met is particularly high; more importantly the assessment must be individualised, and based on the characteristics of the returnee concerned. The guidance in MOJ could not therefore be read as a blanket finding. All that the Tribunal could have intended was that decision makers conduct an individualised assessment. Burnett LJ's conclusions were subsequently endorsed by Hamblen LJ in MS.

49. With that guidance in mind the Tribunal in SB went on, with reference back to the earlier country guidance in AMM and others (conflict; humanitarian crisis; returnees; FGM) Somalia CG [2011] UKUT 00445, to say this:

> "55. … The largely naturally-caused events that led the Upper Tribunal in AMM to find that the high threshold for Article 3 harm, as regards conditions in IDP camps, had been met, no longer applied at the time of MOJ. Given that there is nothing in MOJ or anywhere else that we have seen which suggests human agency is responsible for the generalised conditions faced in IDP camps (as opposed to instances of specific harm), that high threshold needs to be met. Insofar as MOJ might have been read

> to suggest otherwise, or insofar as it might otherwise be read as indicating a generalised risk of Article 3 harm, Burnett LJ's judgment cogently explains why that is wrong. Irrespective of whether his judgment is formally binding on us, it is fully-reasoned and compelling and should be followed. In our view, it will be an error of law for a judge to refuse to do so.
>
> 56. We are reinforced in this conclusion by MI (Palestine) v Secretary of State for the Home Department [2018] EWCA Civ 1782. In his judgment, Flaux LJ held that Burnett LJ in Said "evidently considered that the country guidance case [viz MOJ] showed that the conditions in Somalia, although harsh, could no longer be attributed to the direct and indirect actions of the parties to the former conflict so that the N Test applied to the applicant's case and he could not satisfy that test, hence the Secretary of State's appeal succeeded" (paragraph 18).
>
> 57. Mr Toal submitted that, in relation to paragraph 31 of Said, there was "no inconsistency between the requirement to conduct a properly individualised assessment of an applicant's particular circumstances and recognition that some predicaments shared by large groups of people violate the Article 3 rights of all the members of the group". In this regard, Mr Toal relied upon the judgment of the Strasbourg Court in Salah Sheekh v the Netherlands (2207) App 1948/04. In that case, the ECtHR held that a person who belonged to Asharaf clan would, as such, be at real risk of Article 3 ill-treatment and it was unnecessary for him or her to show any further reasons why, as an individual, he or she might be at risk.
>
> 58. Whilst this is, of course, correct, it does not carry the present claimant's case any further. As a person who may be in an IDP camp, the claimant would not, for the reasons we have given, be as such at real risk of Article 3 harm. In order to establish the risk of such harm he would, therefore, have to show that his personal circumstances meant he reached the requisite threshold".

50. It is against this legal framework that I evaluate the Appellant's likely circumstances upon return to Somalia.

51. When he claimed asylum in 2002 the Appellant, then aged only 16, made a witness statement in which he explained that his father had been killed in the war in Somalia and that his mother had asked a relative to take the Appellant away because she was unable to cope with looking after her 5 children alone. Their home in Jowar had been seized by a militia and at the date that the Appellant and his cousin left Somalia the family were sheltering in the home of an aunt. The Appellant's evidence today is that his family all left Somalia at the same time as he did – over 22 years ago – and that he no longer has any connection or clan affiliations there. Nor does he have any friends that he knows of living in the country. He can recall that he and his family were from the Benadiri minority, but is unaware of what sub-clan he might have belonged to: he professes little understanding of the clan system or how it works. At the hearing in November 2019 the Appellant told me that he has a sister in America whom he found through Facebook. She is married and works in a shop – she got resettled in America straight from a refugee camp. Other than that he has

not been able to find his mother or any other family member. He has had no contact with his mum for over 20 years. When he was in immigration detention there was a poster advertising an organisation that helped with family reunification. He gave them all his details but they did not get back to him with any news. The Appellant states that although he does still have Somali friends his main means of communication is in English and that he has forgotten much of his Somali.

52. Although Mr McVeety took some issue with the assertions that the Appellant knows no-one in Mogadishu - or anywhere else - to whom he could turn, the reality is that I have no evidential basis to conclude otherwise. The Appellant has consistently said that he has had no contact with his mother for over 20 years and as Mr Brown points out, there is no indication that the Appellant had any family support when he ended up in care, or in hospital having been stabbed on two separate occasions. I am further prepared to accept the Appellant's assertion that he has no understanding of, or access to, any clan-based affiliations. As a member of the Benadiri minority it is unlikely that any such affiliation would in any event be of much assistance. I therefore proceed on the basis that he will be returning to Mogadishu with no connections to call upon. I further accept that as someone who has not been there since childhood he may face immediate difficulties in navigating the city, for instance in knowing which area might be the most suitable place to live.

53. As to the Appellant's ability to obtain work in Mogadishu and sustain himself, I am not prepared to accept that the Appellant will struggle with his language skills. He spoke no language but Somali until he was 12 years old and for some time after his arrival in the United Kingdom continued to live with his cousin to whom, it can be assumed, he continued to speak Somali. He told me himself that he has Somali friends. I think it unlikely, in those circumstances, that his spoken Somali is of sufficiently poor standard to present any kind of obstacle to him making himself understood.

54. I was referred to his evidence that he has since his release from prison sustained an injury that has left him disabled. He fell downstairs at his home in April 2019 and broke his ankle. He had to have an operation in which two plates were fitted in his leg and at the hearing in November 2019 he told me that his mobility was still significantly affected (he attended that hearing on crutches). At that time he was having to sleep on a friend's sofa because he is unable to cope with the stairs in his own place. He still had staples in his leg. The Appellant further avers that he is taking medication to help with depression, and that he suffers from memory problems. He is very frightened of being returned to Somalia and does not know how he would cope there. I was provided with some medical evidence to support the Appellant's claims: an x-ray of his ankle showed his stapes and plates, his GP records show that he is being prescribed 10 mg of citalopram for depression, and various items of correspondence show that he was being treated for a fracture at the Royal Liverpool and Broadgreen University Hospital during 2019. I was not however shown any medical evidence that his ankle injury would lead to long-term

mobility problems as suggested by the Appellant in his evidence: his discharge summary from the hospital dated the 17th April 2019 states that he should not bear weight on his leg for 6 weeks.

55. Having had regard to that evidence I do accept that the Appellant is so debilitated by his ankle injury or depression that he would be unable to work to support himself. His fracture does appear to have been quite complex but it is now 14 months since the injury occurred and there is no medical evidence before me to indicate that it will lead to any significant long-term impairment of mobility. As to his depression I note that 10mg citalopram is the lowest possible dose that this common anti-depressant is prescribed at, and that there is no psychological evidence before me to support a conclusion that mild depression could have any significant impact on the Appellant's ability to integrate in Somalia.

56. I now apply those findings to the conclusions of the Tribunal in MOJ, read with the subsequent clarification of the Court of Appeal and the President's decision in SB.

57. The Appellant is undoubtedly going to face some obstacles in resettling in Mogadishu. He will have to take measures to protect his own security such as avoiding obvious targets for terrorist attack: as the Tribunal concluded in MOJ, it is not unreasonable to expect him to do so. Although he has no current friends or family in the city there is no obvious reason why such contacts - the essence of a private life – cannot in time be established: it is of course the case that the Appellant knew no-one when he arrived in the United Kingdom. It remains open to him to do some research, possibly with the assistance of his sister in America, and find relatives or old family friends who may still be in the area. If he wishes to avoid entering an IDP camp he is going to have to work to support himself. He has not demonstrated why he would be unable to do so. He has sufficient spoken Somali to be able to communicate, and in addition speaks fluent English; his probation officer Mr McCann assessed that he is an intelligent young man who has the ability to be a productive member of society. With those factors in mind I find that the Appellant has failed to show that 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". If for whatever reason the Appellant does find himself in an IDP camp he will, on the evidence before me, undoubtedly face socio-economic conditions far below those that he has enjoyed in the United Kingdom. He has not however demonstrated that he has any particular characteristics or vulnerabilities which would mean that those conditions would be of sufficient severity as to engage Article 3.

58. It follows that the Appellant can no longer refuse to avail himself of the protection of his country of nationality, because the circumstances in connection with which he was recognised as a refugee – the position of the Benadiri in 1998 – have ceased to exist.

Issue 3: Article 8

59. Section 33(2)(a) of the Border Act 2007 provides that the Appellant can avoid deportation if it can be shown that it would be contrary to his rights under the European Convention on Human Rights. The Appellant asserts that his removal would be a disproportionate, and so unlawful, interference with his private life, as protected by Article 8 ECHR. In a case where Article 8 is invoked I must be guided as to where the public interest lies by s117C Nationality, Immigration and Asylum Act 2002. Section s117C(4) sets out the following tests in respect of a claimant's private life:

> '(4) Exception 1 applies where—
>
> (a) C has been lawfully resident in the United Kingdom for most of C's life,
>
> (b) C is socially and culturally integrated in the United Kingdom, and
>
> (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.'

60. If the Appellant can demonstrate that each of requirements are met, his appeal must be allowed on human rights grounds, notwithstanding that it is in the public interest to deport foreign criminals.

61. On behalf of the Secretary of State Mr McVeety conceded that the Appellant has been lawfully resident in the United Kingdom for most of his life. I am satisfied that this was a concession properly made. The Appellant was granted refugee status on the 7th March 2003 and was subsequently granted indefinite leave to remain. The deportation order was not signed until the 19th September 2018, giving the Appellant a total of 15 years, 6 months and 12 days in the United Kingdom with leave to remain. Prior to his arrival in the United Kingdom the Appellant has spent 12 years, 4 months and 16 days outside of the country; since the deportation order was made a further 1 year 8 months and 21 days have accrued, making an aggregate total of approximately 14 years.

62. The Secretary of State did not accept that the Appellant is socially and culturally integrated in the United Kingdom.

63. The Appellant himself points out that he has lived in this country for 22 years. He has grown up here and speaks English without any accent. He states that he knows no culture other than the United Kingdom and that he has many friends in this country – they are from all over, not just Somalis. He also has friends who are Arabs, Africans, Yemenis and Liverpudlians. The Appellant told me that if he allowed to remain in the United Kingdom he would like to go to college and do something like IT. I accept that these are all matters which indicate some degree of social integration.

64. Against those matters, however, I must weigh the fact that the Appellant has, during his adult life in the United Kingdom, committed no fewer than 26 criminal offences. This is not a *Tirabi* situation in which one crime is balanced against a settled life. This is a question of whether, during the years 2004 and

2016 when the Appellant was committing crime with solid regularity, it can be said that he was socially and culturally integrated here. Although it was not part of the Respondent's case, there is some suggestion in the evidence that the Appellant's actions arose in the context of his involvement in a gang: he told his GP as much in 2018. If that is right then it would be entirely consistent with the Appellant's record, not just in respect of his violent or drug related offences, but in his many convictions that indicate a general rejection of authority, i.e. driving after disqualification, failing to surrender to custody or to comply with community orders.

65. In this regard Mr McVeety placed reliance on the Court of Appeal decision in Binbuga v Secretary of State for the Home Department [2019] EWCA Civ 551 where the Court draw a clear distinction between integration in an anti-social, pro-criminal milieu, and integration within the lawful social structure of the United Kingdom [§56-57 Binbuga]. Being a criminal does not automatically place an individual outwith society, but in order to show that the test is met there must be some evidence of participation within the "various incidents of society such as clubs, societies, workplaces or places of study" as opposed simply to association with pro-criminal peers. I have no such evidence in this case. Although I believe that he would for a period have attended school in London I have seen no evidence that the Appellant has ever worked, or been involved in any lawful community organisation in this country. His only real engagement has been with the criminal justice system. I heard no evidence from friends or family. In those circumstances I find that the Appellant has failed to discharge the burden of proof and show that he is culturally and socially integrated in the United Kingdom.

66. It follows that I need say very little about whether the Appellant can meet the final limb of the test, that he face very significant obstacles to his integration in Somalia. I need do no more than refer back to my findings in respect of risk on return. I there concluded that as a Somali man with an ability to speak the language there were no real obstacles to the Appellant in time managing to establish a private life for himself in Mogadishu. He may not know anyone there today, but I was shown no evidence to suggest that there would be any impediment to him making new friends and building his own connections there. He has further failed to demonstrate that he would be unable to find work and support himself.

67. I am not satisfied that the Appellant has demonstrated that the 'private life' exception to automatic deportation applies to him. Nor am I satisfied that there are in this case any particular reasons why the public interest in deportation would, exceptionally, be outweighed. The Appellant has no particular 'pull' factors compelling his remaining in the United Kingdom – he has no family here, nor is there any evidence of strong social ties such as a career or friendships. Conversely there are no 'push' factors relating to his likely circumstances in Somalia that are of sufficient gravity to warrant the appeal being allowed. The Appellant will undoubtedly face challenges in rebuilding his life in Mogadishu but for all of the reasons rehearsed above these fall short

of establishing the sort of very compelling circumstances that would render this deportation disproportionate.

Decisions

68. The decision of the First-tier Tribunal contains errors of law such that it must be set aside in its entirety.

69. The decision in the appeal is remade as follows: the appeal is dismissed on all grounds.

70. There is no order for anonymity.

Upper Tribunal Judge Bruce
Date 11th June 2020