Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: RP/00052/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1st December 2021	**On 09th December 2021**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

YAHYA HASHI

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms L Tinubu of Immigration Advice Service
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Somalia, born on 10 May 1989, who appealed against the respondent's decision of 26 March 2018, refusing his human rights claim and revoking his protection status following the making of a deportation order under section 32(5) of the UK Borders Act 2007.

2. The appellant's appeal was allowed by First-tier Tribunal Judge Neville in a decision promulgated on 6 March 2020. However, in a decision of 21 September 2021, which is attached below as Annex A, I allowed the Secretary of State's appeal and set aside Judge Neville's decision on the basis that it contained material errors of law. At [20] of my decision I concluded that the re-

making could take place in the Upper Tribunal and made directions for the resumed hearing.

3. The matter then came before me today. It was agreed by all parties that, in view of the fact that a new country guidance case for Somalia was expected within the next few weeks, it was sensible for the hearing to be postponed to a later date. Further, in light of the fact that there was to be a substantial amount of evidence from three witnesses and that new findings of fact were to be made on all relevant matters, in particular the appellant's current family and living circumstances, it was also considered to be more appropriate for the matter to be remitted to the First-tier Tribunal for a *de novo* hearing.

4. Accordingly I remit the case for a *de novo* hearing with none of the findings of the First-tier Tribunal preserved.

DECISION

5. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law and the decision is set aside. The appeal is remitted to the First-tier Tribunal pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(b), to be heard before any judge aside from Judge Neville.

Signed S Kebede
Upper Tribunal Judge Kebede Dated: 1 December 2021

ANNEX A

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00052/2018

THE IMMIGRATION ACTS

Heard at : Field House **Determination Promulgated**
On : 14 September 2021

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Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

YAHYA HASHI

Respondent

Representation:
For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer
For the Respondent: Ms L Tinubu of Immigration Advice Service

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Mr Hashi's appeal against the respondent's decision to refuse his protection and human rights claim further to a decision to deport him under section 32(5) of the UK Borders Act 2007.

2. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the respondent and Mr Hashi as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant is a citizen of Somalia, born on 10 May 1989. He entered the UK on 30 June 2000 with his siblings, with entry clearance for family reunion to join his mother who had arrived in the UK on 11 January 1999 and had been granted refugee status and indefinite leave to remain on 28 April 2000.

4. On 6 November 2006, the appellant was convicted of robbery and sentenced to eighteen months' imprisonment. Deportation action was not pursued at that point because he was under 18 years at the time of conviction. However, he was subsequently convicted, on 4 September 2014, of conspiracy to supply a controlled Class A drug, heroin, and conspiracy to supply a controlled Class A drug cocaine and on 12 June 2015 was sentenced to two terms of 8 years imprisonment, to run concurrently. Deportation action was then pursued by the respondent.

5. On 9 September 2016 a decision was made to deport the appellant in accordance with section 32(5) of the 2007 Act and on 13 April 2017 he was invited to seek to rebut the presumption under section 72 of the Nationality, Immigration Act 2002 that he had been convicted of a particularly serious crime and constituted a danger to the community. He responded on 20 April 2017, claiming that he would be at risk on return to Somalia as a member of a minority clan with no means of support and no one to turn to for protection against the majority clan's armed militia and the Al Shabaab militia. He claimed also that his deportation would breach his Article 8 rights as he had lived in the UK for 17 years and had a family and private life in this country, with his mother, grandmother and his wife and children.

6. On 7 September 2017 the appellant was notified of the respondent's intention to cease his refugee status under Article 1C(5) of the Refugee Convention and paragraph 339A(v) of the immigration rules on the basis that the circumstances in connection with which he had been recognised as a refugee had ceased to exist. The respondent noted that the appellant had been granted refugee status in line with his mother, as a member of the Ashraf minority clan, but considered that that was no longer a basis upon which he would be at risk and that the overall security situation in Mogadishu had improved. On 8 June 2017 the respondent notified the UNHCR of the intention to revoke the appellant's refugee status. Written representations were received from the UNHCR in response, on 25 August 2017, recommending that cessation was not appropriate.

7. On 26 March 2018 the respondent signed a Deportation Order against the appellant and made a decision to refuse his protection and human rights claim. In that decision the respondent certified that the presumption in section 72(2) of the NIAA 2002 applied to the appellant and that Article 33(2) of the Refugee Convention applied such that the Convention did not prevent his removal from the UK. The respondent also considered that paragraph 399A(v)

of the immigration rules and Article 1C(5) of the Refugee Convention applied to the appellant and that his refugee status had therefore ceased, in light of the changed circumstances in Somalia in general, and for minority clan members, as set out in the case of MOJ & Ors (Return to Mogadishu) (Rev 1) (CG) [2014] UKUT 442. The respondent considered that the appellant would not face an Article 3 or Article 15(a) and (b) risk of harm on return to Somalia. Furthermore, it was considered that he did not qualify for humanitarian protection but that he was excluded from a grant of humanitarian protection in any event, under paragraph 339D of the immigration rules, as a result of his conviction and sentence.

8. As for Article 8, the respondent noted that the appellant had two sons living in the UK, both of whom were British, but it was not accepted that he was in a subsisting relationship with them owing to a lack of evidence. Neither was it accepted that the appellant had a subsisting relationship with the mother of his children, as there was no evidence of cohabitation prior to his imprisonment and his prison records indicated that he lived with his mother prior to his imprisonment. It was noted that the appellant's name did not appear on one of the birth certificates and it was not accepted that the appellant formed part of the family unit. The respondent considered that it would not be unduly harsh for the children and their mother to be separated from the appellant in any event. It was considered further that the appellant could not meet the requirements of paragraph 399A of the immigration rules on the basis of his private life and that he would be able to re-integrate in Somalia. The respondent concluded that there were no very compelling circumstances outweighing the public interest in the appellant's deportation.

9. The appellant's appeal against that decision was heard on 25 June 2019 in the First-tier Tribunal by Judge Neville. The judge recorded the evidence that the appellant and his partner had married in an Islamic marriage on 14 July 2012 and had lived together from that time. Their first son was born on 18 December 2012 and their second son was born on 18 June 2014 whilst the appellant was in custody on remand in relation to the drugs offences for which he was subsequently convicted. The appellant had moved back in with his wife and children when he was released on immigration bail on 18 June 2018, but they had had relationship difficulties and they separated after his partner miscarried in a further pregnancy. The appellant moved in with his mother and, although the couple later reconciled, he could not formally move back in with his wife since his mother's address had been approved for his licence. The judge heard oral evidence from the appellant, his mother, his partner, his brother and his sister. The judge accepted the appellant's evidence about the reasons for becoming involved in offending and for having no intention to re-offend. The judge was impressed by the appellant's partner's evidence and accepted that the appellant was committed to his relationship and to his children.

10. Having considered the OASys report and the evidence from the witnesses, the judge accepted that the presumption in section 72 had been rebutted by the appellant and that he was not, therefore, excluded from the protection of the Refugee Convention. As for the revocation of the appellant's

refugee status, the judge concluded that the situation in southern and central Somalia had deteriorated since the case MOJ to such an extent that there were strong grounds to depart from the country guidance. Accordingly, he found that the situation in Mogadishu was sufficiently significant and non-temporary so as to be able to conclude that the respondent had not met the burden of proof to justify cessation of the appellant's refugee status. The judge found that the appellant's individual circumstances were such that he would be at real risk of ending up in an IDP camp and that, given the deterioration in the country situation, the high threshold was met for an Article 3 claim. The judge accordingly allowed the appeal on protection and human rights grounds.

11. Permission to appeal against that decision was sought by the respondent on the grounds that the judge had failed to give adequate reasons for concluding that the appellant was not a threat to the community in the UK; that the judge had made a misdirection in law in not properly following MOJ and in particular had failed to give adequate reasons for finding that the appellant would have no access to opportunities to find employment; that the judge had erred by relying on the UNHCR report; that the judge's findings were inconsistent with the conclusions in Said v SSHD [2016] EWCA Civ 442 and SSHD v MS (Somalia) [2019] EWCA Civ 1345; and that the judge had failed to give the required weight to the public interest in deportation.

12. Permission was granted in the First-tier Tribunal on 26 March 2020 with particular reference to the challenge to the judge's findings on section 72, although without any restrictions on the grounds.

13. In response to directions from the Tribunal, the Secretary of State made further submissions, from Mr Clarke dated 8 June 2020 and subsequently from Mr Jarvis dated 6 January 2021. There was no Rule 24 response or any other submissions in reply from or on behalf of the appellant.

14. The matter then came before me and I heard submissions from both parties.

15. Mr Clarke relied on the initial grounds and his submissions, together with the submissions from Mr Jarvis, other than when they went beyond the scope of the original grounds. Ms Tinubu submitted, in response, with regard to the first ground relating to the section 72 certification, that the judge was entitled to conclude as he did and that the grounds were simply a disagreement with his fact-finding and decision. The judge was entitled to find that the appellant presented as a low risk since that was consistent with the OASys report and probation officer's report. The risk to the community had not changed since the report. As for the grounds relating to the country guidance, the judge's decision was consistent with the more recent case of Ainte (material deprivation – Art 3 – AM (Zimbabwe)) [2021] UKUT 00203 (IAC) in particular insofar as it was found that clan support, family support and remittances from abroad did not constitute protection. The judge was entitled to rely on the UNHCR report and the human rights reports and was entitled to reach the conclusions that he did about IDP camps and returns to Mogadishu.

16. Mr Clarke, in response, submitted with regard to the judge's findings on the section 72 certification, that the judge was wrong to find that the appellant's compliance with the Serious Crime Prevention Order assisted in demonstrating that he did not pose a risk, since the very purpose of the order was prevention of crime and management of risk. He relied upon Mr Jarvis's submission, at [8(b)], that the judge erred by giving weight to the appellant's completion of courses in prison as evidence of rehabilitation, which was contrary to the guidance in HA (Iraq) v Secretary of State for the Home Department [2020] EWCA Civ 1176. The judge's approach to the risk of serious harm was inadequately reasoned and failed to take account of all relevant factors. As for the judge's findings at [84] on employment opportunities, the judge had failed to consider the country guidance in MOJ in relation to opportunities created by the economic boom. The judge had conflated various issues and looked at evidence of the situation outside Mogadishu to justify a departure from MOJ, thereby giving unsustainable reasons for departing from MOJ. The judge had erred in the weight he gave to the UNHCR report.

Discussion

17. The first ground challenges the judge's finding that the appellant had rebutted the presumption in section 72 of the NIAA 2002, that he constituted a danger to the community. The respondent, in her grounds, submits that the judge was wrong to find that the appellant was not a danger to the community and that there was a lack of adequate reasoning by the judge for that finding. Ms Tinubu submits that the respondent is simply disagreeing with the judge's properly reasoned findings and conclusions in that regard, as the judge had full regard to the OASys report and other relevant evidence. If Ms Tinubu is right, and the grounds are no more than a disagreement, then clearly no error of law has been made. I have given careful consideration to that distinction. I have to conclude, however, that the challenge goes beyond mere disagreement and provides proper reasons for concluding that the judge's approach was not satisfactory and that he failed to demonstrate, in his findings at [26] to [36], that he had taken all relevant matters fully into account.

18. Firstly, whilst the judge was clearly aware of the appellant's lengthy sentence and, at [6], referred to the leading role he played in the conspiracy to supply class A drugs, there was no indication in his findings at [26] to [36] that he considered that to be a matter of any relevance in assessing future risk. Indeed, his observations at [26] suggest that he effectively dismissed the offending as being irrelevant to the assessment of future risk, and in doing so it appears to me that he was proceeding on a misunderstanding of the guidance in EN (Serbia) v Secretary of State for the Home Department & Anor [2009] EWCA Civ 630. I simply cannot accept that the nature of the appellant's offending and his role in the offending is to be completely disregarded in an assessment of future risk and it is at the very least a matter that ought to have been given some consideration in the overall assessment of risk. The judge went on to assess risk in the light of the appellant's own evidence about his reasons for his previous offending and his lack of intention to re-offend and it seems that that, taken together with the assessment in the OASys report as to the risk of re-offending being low, led the judge to his conclusion that the

appellant did not pose a danger to the community. However, in doing so, I have to agree with Mr Jarvis in his submissions at [8] that there was an over-reliance upon factors for which caution was expressed in HA (Iraq) as quoted. In addition, as Mr Clarke submitted, the judge went on, at [30] to [31], to consider the "wider evidence of the appellant's current living situation" without properly explaining its relevance at that point and without considering those circumstances and the change in circumstances in the context of the assessment in the OASys report of 'medium risk of serious harm'. Furthermore, like Mr Clarke, I find it difficult to understand, with reference to [32] of the judge's decision, how the appellant's compliance with a Serious Crime Prevention Order was an indication of a lower risk of reoffending. In all of these circumstances I find that there is merit in the Secretary of State's challenge to the judge's findings in relation to section 72 of the 2002 Act and that those findings suffer from a lack of clear and adequate reasoning, and a failure to consider all relevant factors, such that the conclusions simply cannot be sustained.

19. As for the second ground, I have no hesitation in concluding that the judge made material errors of law when assessing risk on return against the guidance in MOJ. Firstly, the judge found that the background information before him entitled him to depart from the country guidance in MOJ, yet there was a failure to provide a clear explanation as to why that was the case and, as Mr Clarke properly pointed out, much of the evidence relied upon by the judge in relation to increased incidents of violence and the deteriorating security situation, related to parts of the country outside Mogadishu. Further, the judge failed to relate that evidence to the appellant's own circumstances, addressing the situation of IDPs and the humanitarian problems arising for those returning to Mogadishu in general, without explaining how those matters applied to the appellant. When the judge turned to the appellant's own situation, at [84], he assessed his circumstances on return to Mogadishu on the basis that he would have no opportunities to find employment, yet failed to explain why that was the case in light of the evidence in MOJ of the "economic boom" and the employment opportunities for those returning from westernised countries. At [85], the judge assessed the appellant's situation on the basis that he would end up in an IDP camp, but provided no proper reasoning for concluding that that would be the case. Indeed the judge's reasoning runs entirely contrary to the findings in the more recent case of Ainte which, although post-dating Judge Neville's decision, provides a more informed assessment of the appellant's likely circumstances on return to Mogadishu.

20. For all these reasons I find the Secretary of State's grounds to be made out and conclude that the judge's decision cannot stand and must be set aside. The underlying facts of this case are not in dispute for the most part, although it will be necessary for the appellant's family and living circumstances to be assessed at the date of the hearing given that they have not remained consistent. The re-making of the decision will involve the proper application of the relevant legal principles and country evidence and guidance to the facts as assessed at the date of the hearing. In such circumstances it seems to me that the appropriate course is for the case to be retained in the Upper Tribunal.

DECISION

21. The Secretary of State's appeal is allowed. Judge Neville's decision is set aside. The matter will be listed for a resumed hearing at a date to be notified to the parties, for the decision to be re-made.

22. For the reasons stated above, whilst the underlying facts are largely not in dispute, it will be necessary to have evidence of the appellant's current family, living and other circumstances, such that oral evidence may be required from the appellant and any witnesses. As such, a face-to-face hearing will be the appropriate forum.

23. Any further evidence relied upon by either party is to be filed with the Upper Tribunal and served upon the other party no later than 14 days before the resumed hearing. Skeleton arguments may be filed and served up to 3 days before the hearing.

Signed: S Kebede
Upper Tribunal Judge Kebede Dated: 17 September 2021