Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/10218/2018 (V)**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8th March 2022	**On the 30 March 2022**

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

MMM
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms C Besso, of Counsel, instructed by Wilsons Solicitors LLP
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Somalia born in 1984. He arrived in the UK in March 1993 with his mother and two brothers, and the family applied for asylum. They were refused asylum but granted

exceptional leave to remain, and subsequently, in April 2003, indefinite leave to remain.

2. The appellant has been convicted of 17 offences: the offending behaviour started in September 1999 when he was 14 years old. The offences range from motoring, possession of control drugs, assaults, theft, possession of an offensive weapon and threatening and abusive behaviour. In October 2015 the appellant was convicted of the index offence: three charges of burglary for which he was sentenced to 27 months imprisonment. In October 2015 he was notified of a decision to deport, and in response he raised a human rights' claim and claimed asylum. His appeal against the decision refusing his protection and human rights claim dated 9th August 2018 was dismissed by First-tier Tribunal Judge Reid in a determination promulgated on the 9th April 2020.

3. Permission to appeal was granted by the Vice President of the Upper Tribunal, Mr CMG Ockelton, on 21st April 2021 in light of the decision of the High Court granting permission for judicial review of the refusal of permission to appeal against the decision of Judge Reid.

4. I found that the First-tier Tribunal had erred in law for the reasons set out in my decision appended as Annex A to this decision. I set aside only the decision dismissing the appeal under Article 8 ECHR and the findings at paragraph 95 of the decision which had been shown to err in law. I noted however that as the appeal would have to be remade at the date of hearing updating evidence might mean a preserved findings changed due to new evidence.

5. The matter came before me to be remade on 23rd November 2021 but had to be adjourned due to a solicitor error meaning that the bundle of new evidence had not been prepared. I directed that any new evidence should be filed and served by 31st January 2022. The matter now comes back before me to remake the appeal. Although the new evidence was served late Mr Melvin confirmed for the respondent that he was ready to proceed and had the documents. There were some technical issues with the appellant's mother appearing as a witness via video-link but she eventually was able to join by telephone and both parties confirmed that they were satisfied that there was no unfairness caused.

6. Mr Melvin applied at the start of the hearing for an adjournment. He asked that I adjourn the hearing in light of the appellant's arrest on charges of robbery and attempted robbery on 22nd and 23rd February 2022. He argued that it would be a potential waste of public money to proceed now as the appellant may be found guilty of further offences and deportation proceedings would then be very likely to be recommenced by the Secretary of State. I had sympathy with this position. It would have been preferable to wait

for the outcome of the current criminal proceedings if they were likely to be resolved in a reasonably short period of time. Unfortunately, despite an adjournment for 30 minutes for Ms Besso to make calls to the appellant's criminal solicitors, it was not possible to obtain any definite information about how quickly the current proceedings against the appellant were likely to proceed, and general information obtained by Ms Besso indicated it would be likely to be a minimum of ten months before the matter went to trial as the appellant has said that he intends to plead not guilty. These immigration proceedings have been going on since 2018 and considering all matters I concluded that it was in the interests of justice to continue with this hearing without an adjournment.

Evidence & Submissions – Remaking

7. The additional evidence from the appellant, in his statements of 2nd and 7th March 2022 and his oral evidence, with respect to whether it would be unduly harsh for the appellant to be deported and his partner and three children (H,Z and J) remain in the UK is, in short summary, as follows.

8. The appellant maintains that he plays a close and integral part in the upbringing of his three children, and has a loving and committed relationship with his partner of 13 years. He took on the role of teacher during the pandemic, and because they were all home together the family bonds grew even tighter over this period. In normal times he plays a vital role helping with homework, playing with the children, supporting them with their hobbies, taking them to the park, ensuring discipline and that they follow family rules including helping with chores, and taking them to the mosque. He has close relationships with all of them and feels that his older son confides in him when matters concern him and needs his support through adolescence, and that he has an ability to get cooperation from his daughter when sometimes her mother cannot do this. He also says that he is a vital emotional and practical support to his own mother helping her with hospital appointments and the like, even though two of his brothers live at home with her, and having regular contact with her.

9. The appellant says that although his partner and children have regular contact with his mother and his partner's mother he believes that his partner would not cope if he were deported as she was only just able to cope when he was in prison and that was a time limited period when he was not there to support her and this would be for an indefinite period.

10. The appellant explains that his children do not know that he faces potential deportation to Somalia, and he feels that they would be devastated if this were to happen, and he does not know how he could tell them that they would never see him again. They are not

aware that he was in prison, and have been used to his continuous presence for the past five years, and for his youngest child all of his life. He is very afraid that they would not be able to cope with never being able to see him again, and that this would affect their development and cause them to go off the rails. He also believes that his deportation would have a negative impact on his mother who would miss him a great deal as they are particularly close.

11. The appellant says that he is continuing to suffer from back pain which means he is reliant on medication which disrupts his sleep and reduces his mobility so he finds running and walking painful. He also continues to suffer from diabetes and depression, and takes medications for both conditions. He also attends a MIND group for his mental health problems on a weekly basis as a support for his feelings of stress and depression at his immigration situation. He is very worried he would not be able to cope in Somalia not speaking Somali, not knowing the country and given that there are attacks and bombings there.

12. Neither he nor his partner are working at the current time, and they are very short of funds for everyday expenses being reliant on universal credit and child benefit, and so sometimes they borrow small amounts of money such as £20 a month from his mother. His eldest son has had to stop going to football club as they cannot afford it. There is no way that his partner and children would be able to afford to visit him in Kenya were he to be deported, or would be able to send him any money in Somalia. Neither of his brothers are working and they have their own families to support; and his mother and mother-in-law are also reliant on benefits.

13. The appellant was arrested on 22nd and 23rd February 2022 for offences of robbery of beer cans and attempted robbery of a shoulder bag. He will attend at Wood Green Crown Court on 23rd March 2022 and intends to enter a not guilty plea on that date. As a result of these proceedings the appellant is on bail and is not permitted to live with his partner and children as he is not permitted to enter the London borough of Hackney where the family home is located. He currently lives with his mother in Woodford. He also has a tag and a curfew, and has to be home between 7pm and 7am. He says he speaks to his partner and children on the telephone every day, and has met up with them once for a weekend when the whole family stayed with his mother, and twice for supper in Bethnal Green at a restaurant.

14. The appellant's partner Ms A's evidence, in summary from her oral evidence and two statements is as follows.

15. Ms A gives detailed evidence in line with that of the appellant setting out his pivotal role in the family, and emphasising that she

would not have been able to cope with home educating the children in the pandemic alone, and that the appellant has particular closeness with both of the older children and supports their development in terms of their education, hobbies and emotionally, and that their youngest child is particularly concerned that the appellant be present and available to him. She says that the appellant is an amazing father. She says that alone with the children she would be very stressed, and believes that if he were deported she would become depressed. She has concerns about the appellant's health: his diabetes and his back problems which reduce his mobility, and his mental health as she perceives that he is very stressed at the current time.

16. Ms A details that the family are reliant on universal credit, and are in debt with electricity, water and to a credit card company. They are struggling financially at present and would not be able to afford to travel to Kenya, where her sister lives, to see the appellant if he were deported. She did travel in 2013 but at that time she only had one child. She could not borrow money for travel from her mother who is 65 years old, unemployed, unwell and on benefits, or the appellant's mother who is on pension credit, particularly as they already give her small amounts of money, maybe £50 a month, just for everyday needs. Ms A is hopeful that if the appellant wins his appeal he will be given permission to work and then he will be able to do some work, and as the children are getting older she maybe able to work too with the appellant's support with childcare, and thus that the family's financial situation will get better. Without the appellant being in the UK this prospect of financial improvement through work will not be possible.

17. Ms A confirms the bail arrangements for the appellant in relation to the pending robbery charges against him, and that he has the contact with her and the children as he has detailed in his evidence. The older children have some understanding about the appellant being on a tag and facing criminal charges, but believe that he will be able to return to the family home soon. She confirmed that the children are unaware of the deportation proceedings as she has not wish to distress them unless and until it becomes a certainty.

18. Mrs ZA, the appellant's mother, gave evidence orally and in her witness statement. In short summary she says as follows. She confirmed that the appellant is currently bailed to her address, and that the appellant's partner and children had come to see him there.

19. Mrs ZA has a lot of health problems including diabetes, high blood pressure, knee problems requiring an operation, and arthritis. She is reliant on pension credit, and could not pay for the appellant's

family to visit him in Kenya if he were deported. She provides them with small amounts of money, such as £20, to get by in the UK. She would also be very upset if the appellant were deported as she is very close to him, and his partner and children, and the appellant usually goes with her to hospital appointments. She believes that the appellant is a very good and involved father with his children, and that they love him very much, and that he has learned his lesson and won't be involved with criminal behaviour again. She is concerned that his health is not good and that he has mobility problems due to back pain. She is also concerned that the appellant's partner would struggle to cope bringing up the children alone if the appellant were deported. She lives with her other two sons, but they play a lesser role in looking after her.

20. Mr Melvin, relied upon the reasons for refusal letter and his two skeleton arguments, and made oral submissions. He submitted that it would not be unduly harsh for the appellant to be deported and his partner and children remain in the UK. Mr Melvin accepts that it would be in the best interests of the children for the appellant to remain in the UK as he has played a full role in their lives since he was released from prison in 2018, and they have a good relationship with him. It is argued however that the children, who are healthy and doing well at school, coped whilst the appellant was in prison and so it would not however be unduly harsh if he were deported.

21. Mr Melvin argues that whilst the appellant was in prison there was no social services involvement with the family, and no evidence their school attendance suffered either. The appellant's partner would have the support of her own mother and the appellant's mother. It is argued that the evidence in the updating evidence from Mr Horrocks (independent social worker) and in the psychological report of Dr Walsh that the mental health of the appellant's partner would deteriorate significantly if he were deported was entirely speculative both in respect of her having such problems when the appellant was imprisoned and being likely to develop mental health problems if he were deported. She was currently mentally well and coping well as a mother. It is also to be noted that the appellant had not lived with the family for 18 months prior to going to prison. It is argued that the older children have previously experienced the appellant being absent without serious impact on their development, and so are not therefore particularly vulnerable as argued by Mr Horrocks. The threshold of unduly harsh is not therefore met as it is not accepted that the health or behaviour of the children would deteriorate if the appellant were deported, and it is not accepted that their mother would suffer mental health problems without him, particularly given her emotionally and financially supportive family network. The appellant's partner and children would be distressed and would miss him, but it would not be unduly harsh. It is also argued

that as the appellant's partner has a sister living in Kenya it may be possible for the appellant to travel to meet her and his children there, although no particular reliance was placed on this point. The appeal should therefore be dismissed.

22. Ms Besso relied upon her skeleton argument and made oral submissions. She argues that the logic of the findings before the First-tier Tribunal, in March 2020, was that the appellant succeeded in showing that his deportation would be unduly harsh if the finding that the family could meet in Kenya were removed. This should be seen as the starting point today, with the further evidence then being considered.

23. She argued that it would be unduly harsh for the appellant to be deported as the new evidence continued to support this position in the following ways:

- The psychological report of Dr Walsh documents the fact that the account of symptoms that the appellant's partner gives for the period he was in prison would have been likely to have meant that she could have had a diagnosis of depressive disorder and anxiety disorder at that time had she sought medical attention. Further if he were deported it is likely that she would develop significant mental health problems of this nature which would affect her daily functioning including her ability to enter work, run the household and parent her children.
- The independent social worker report of Mr Horrocks concludes that the deportation of the children would cause them harm. They had benefited from the presence of the appellant in the family unit, as had his partner, and his attachment to them all had become stronger over the past five years since his release from prison. All three children had strong attachment to their father. It would be an enormous shock to them if he were deported, and would be de-stabilising in terms of their functioning and emotional well-being, and would negatively affect their overall development particularly given the likely impact on their mother's mental health of the deportation, and given their level of poverty and the inner city life.
- It is argued that the evidence of these two experts means that the previous findings that if the appellant were deported the appellant's partner would not become mentally unwell and the family would not go off the rails were no longer tenable.
- The witness evidence of the on-going close and interwoven lives of the appellant and his partner and children, and the clear best interests of the children to remain with the appellant as a key part of their lives, which is not interrupted by the current bail conditions as they continue to be in daily telephone contact

and see each other very regularly, is also strongly supportive of the deportation being unduly harsh.

- It is relevant also that it is an impossibility that the appellant's partner could afford a trip to Kenya by which the appellant might be able to have face to face contact with his partner and children if he were deported to Somalia as the family have insufficient funds, and the extended family are also impoverished and not in a position to pay for it, and the last time the appellant's partner travelled there was 2013 when she only had one child. As such the separation would be far more profound that the appellant being in prison as it would be for a very long period with no possibility of visits.

24. Ms Besso therefore argued that the deportation of the appellant would clearly be unduly harsh as it would not just be difficult, uncomfortable and inconvenient but would amount to profound and sustained emotional, developmental and psychological harm for the whole family.

25. Ms Besso also argues, in the alternative, that the deportation of the appellant would be unlawful in accordance with s.117C(6) of the Nationality, Immigration and Asylum Act 2002 because there are very compelling circumstances over and above the exceptions to deportation. This is because of the matters argued above and the appellant's disabilities, his mother's disabilities and dependency on him, the appellant's rehabilitation (not having any convictions since 2015) and the fact that he is no longer a drug user.

26. At the end of the hearing I reserved my decision, but did inform the parties that I would find that the appellant and his partner did not have access to sufficient funds to meet in Kenya for family visits should he be deported.

Conclusions – Remaking

27. The unchallenged findings of the First-tier Tribunal in respect of issues which are not remade are in short summary set out in paragraphs 28 to 30 below.

28. The appellant is a persistent offender who committed offences between the ages of 14 and 31 and showed an utter disregard for the law. The index offence was found to be a particularly serious one, and despite his having not taken drugs since this conviction in October 2015 it is found that he remains a medium risk to the public and of offending. He is found to be a danger to the community following his sentence for a particularly serious crime.

29. It is accepted that the appellant's father was killed by a militia in 1992 but not that the appellant would be at real risk of serious harm as a result if he were returned to Somalia. It is not accepted

that he is a Shia Muslim, and so it was not found he would be at risk from Al Shabaab if deported to Somalia. It was found that he would have to relocate to Mogadishu due to his westernisation, and that he is a member of the minority Brava clan but that this would not pose a risk for him in Mogadishu. It was accepted that he suffers from depression and anxiety and some physical health problems, including some back/ mobility problems, but it was not accepted that he could not obtain any necessary medication in Somalia. It was found that he could obtain work to support himself and would be able to find some basic accommodation, and could get some support from his uncles in the UK, and that there could be some limited family support in Somalia. It was found that even though he did not speak Somali, that as he speaks Brava and English he would be able to overcome any linguistic obstacles to integration in Mogadishu. As a result, it was concluded that the appellant did not succeed in his asylum, humanitarian protection or appeals under Articles 2 and 3 ECHR.

30. The appellant could not succeed under the private life exception to deportation at s.117C(4) of the Nationality, Immigration and Asylum Act 2002 because he is not socially and culturally integrated because of his offending, and further he would not have very significant obstacles to integration if deported to Somalia.

31. With respect to the issue of the appellant's family life the First-tier Tribunal's unchallenged findings are as follows:

- It was found, on the basis of the concession of the respondent, that it would be unduly harsh for the appellant's partner and children to have to relocate to Somalia with him.
- It is accepted that the appellant has been in a relationship with his partner Ms A, who is a British citizen, since 2008.
- The appellant has four children: K who is 15 years old from a previous relationship whom he does not see; and H who is 11 years old, Z who is 8 years old and J who is 3 years old from his current partner with whom he has parental relationships.
- It was found that it was very difficult for Ms A whilst the appellant was in prison, even though she was supported by her mother and the appellant's mother.
- It was found that the family would not go off the rails and that Ms A would not suffer significant mental health problems if the appellant were to be deported.
- It was found that it would be in the best interests of the children (H, Z and J) to have their father living with them as they have a good relationship with him, and he has played a full role in family life since he left prison.

- It was found that the lives of the appellant's partner and children would be significantly affected and that it would be difficult for them emotionally and practically if he were deported given that he has been integrated into the family and that it would "very difficult" for Ms A to bring up the children alone despite family support, and even though she managed to do this whilst the appellant was in prison, due to the distress that this will cause her and the children, and the pressure that the children's distress would place upon her.
- It is accepted that the appellant's partner has family in Kenya but it is also found that she is reliant on Universal Credit, and so is on a minimum income. It is also accepted that the appellant was excused from travel from Hackney to Lambeth because this was not a short or straightforward journey for him to make, but it was not accepted that his mobility was very severely affected or that he has a disabling back problem.

32. The test of unduly harsh has been considered in a number of key judgments of the higher courts. In KO (Nigeria) v SSHD [2018] UKSC 53 the Supreme Court held that this test was looking for a degree of harshness beyond that which any child would face with the deportation of a parent and is a higher hurdle than reasonableness, and the determination of the issue must be done with reference to all of the consequences of deportation from the child's point of view. In HA (Iraq) v SSHD [2020] EWCA Civ 1176 the Court of Appeal held that there was no baseline of ordinary impacts of deportation and that it could be that unduly harshness may occur quite commonly. As set out by Popplewell LJ in KB (Jamaica) v SSHD [2020] EWCA Civ 1385, unduly harsh is an elevated test which goes beyond the undesirable, uncomfortable, inconvenient or difficult but the test is not as high as that of very compelling circumstances.

33. It is clear that it is in the best interests of the children H, Z and J for the appellant to remain in the UK. This is accepted by the respondent on the basis that he has a good relationship with his children and he has played a full role in their lives since he was released from prison. I find that this is the case. This is a primary consideration in weighing the factors and considering whether the appellant's deportation is unduly harsh.

34. In addition, I find, as I indicated to the parties at the end of the hearing, that the appellant and his partner and children would not be able to meet to have face to face contact if he were deported. The suggestion of the respondent that they could do this in Kenya, where the appellant's partner has a sister and was able to visit in 2013, is not realistic given their current circumstances. Whilst the appellant may be able to support himself at some level so he is not destitute in Mogadishu he would be most unlikely to be able to

fund such a visit, and may also struggle with the travel if it were overland given his chronic back pain. His partner is reliant on universal credit, and has debts to her water and electricity suppliers, and to a credit card company. She has to regularly borrow small amounts of money from mother and mother-in-law (both elderly, unwell and reliant on benefits themselves) simply to make ends meet in the UK. The appellant's son H has had to stop attending football club because the family cannot afford to pay the membership. If the appellant is deported the appellant's partner would lose the free childcare he provides, which might make a return to some part-time work otherwise possible in the future. I find, in these circumstances, that the appellant's partner has no probability whatsoever of access the money for four return air tickets to Kenya for herself and the children. As such a particular impact of deportation for these children, which would not be inevitable in every case, is that the contact the appellant's partner and children would have if he were deported would be limited to phone and internet with no periods of holiday face to face time together. This would be in great contrast to the last five years when they have all lived as a close nuclear family, and in particular contrast to the last two years during Covid restrictions where a lot of time was spent by all at home. I find that many of the activities that the appellant undertakes regularly and routinely with his children would cease, for instance: physical play with his boys; crafts with his daughter; discipline and ensuring they help in the home; going out to the park; discussions around emotionally difficult matters and assisting with homework; and joint trips to the mosque.

35. It is accepted that the appellant's deportation would be very emotionally and practically difficult for his partner, and would cause both her and the children distress despite the emotional support of the appellant's mother and the appellant's partner's mother. These are the preserved findings of the First-tier Tribunal. Ms Besso has argued that I can now make findings that go beyond this to find that it would be probable that the appellant's partner would suffer mental health problems were he to be deported and that the absence of the appellant and the mental health problems of their mother would probably cause emotional and developmental damage to the appellant's children in the context of their financially precarious inner-city lives. She argues this because of the expert evidence from Dr Walsh (clinical psychologist) and Mr Horrocks (independent social worker). Mr Melvin on the other hand argues that little weight should be given to these reports as their findings are speculative in nature.

36. Mr Melvin does not however seek to argue that Dr Walsh or Mr Horrocks are not properly qualified experts in their fields or that they have written reports that do not comply with the proper standards for reports in the Upper Tribunal, beyond the contention

that their findings are speculative and should not be given weight. I find that both experts are properly qualified and that the reports comply with the requirements and duties of expert witnesses.

37. I find that the report of Dr Walsh is very careful in its findings. She does not make a retrospective diagnosis with respect to how the appellant's partner felt at the time he was imprisoned, and only concludes that given the description of how she felt that it is likely that she would have been given a diagnosis of anxiety and depressive disorder had she seen a clinician at that time. Proper consideration is given to whether the appellant's partner was feigning symptoms, but it is concluded that she was not and further I note that she does not claim to have any serious mental health issues at the current time. I am also satisfied that it was properly open to Dr Walsh to conclude that the appellant's wife would be highly likely to develop significant mental health issues if he were deported from the UK given her probable history of mental health problems whilst he was in prison, and that in turn these would affect her ability to meet the practical needs of running a household and to meet the emotional needs of her children. I find that this evidence means that I conclude that the deportation would lead to the probability that the appellant's partner, who is in a long committed, cohabiting and loving relationship with him, would become anxious and depressed by his deportation in circumstances where he is accepted to have health issues and would be being deported to country which has suffered from war and chronic instability, and where she is left with the sole day to day care of three nursery/primary aged children to whom she will have to explain and compensate for the loss of their much loved father in impoverished financial circumstances notwithstanding the fact that she has some emotional support and a little financial support from her mother and mother-in-law.

38. The report of Mr Horrocks is likewise extremely thorough and well written, containing a lot of detailed information about the different activities that the appellant and his children undertake together, and setting out the strengths of the children academically and socially. I find it is a very balanced report which makes no attempt to down-play the strengths of the children and family.

39. I note that Mr Horrocks has been supplied with full background information including school reports so it will have been clear to him that the older children were doing well at school, and indeed this is set out in the report with respect to H particularly but also Z. I find that the information given to Mr Horrocks with respect to the children does not attempt to underplay their current strengths, and indeed concludes that they do not have any additional needs. Whilst Mr Horrocks did not speak to the two older children for this report, as they were at school and are not currently aware that the appellant may be deported, he did speak to them when he

compiled the previous report, and notes that Dr Walsh's conclusions regarding the psychological impact on the appellant's partner whilst the appellant was in prison is consistent with information provided to him by the child H at the time of that report, even though H was not actually aware of the appellant's imprisonment. Mr Horrocks also notes that absence of a parent through imprisonment is generally to be seen, in accordance with research, to be one of the ten adverse childhood experiences.

40. It is Mr Horrocks view that deportation leading to separation for an indefinite period will undoubtedly cause harm to the appellant's children. He considers that deportation would have very significant negative implications on the facts of this case because of the older children's previous, albeit unexplained to them, experience of the appellant being separated from them by imprisoned; because of the children living in a financially impoverished inner-city environment; and because of the close relationship between the appellant and the children built up over the past five years which will be unexpected ruptured; and because of the negative psychological impact of the appellant's deportation on their mother. I find weight should be given to Mr Horrocks' report and to his conclusion that the deportation of the appellant would pose a major risk of destabilising the children's functioning and emotional well-being not withstanding their own lack of current additional needs and current educational and social success.

41. Ultimately, I conclude that the deportation of the appellant would go beyond what any child would necessarily face if their parent were deported, and would be far beyond being simply undesirable, uncomfortable, inconvenient or difficult. This is for the following reasons: there would be no possibility of any face to face physical contact for holidays; because it would involve the rupture of a particularly close relationship between the appellant and his three young children after a settled period of five years close cohabitation; because the appellant's partner would be likely to suffer depression and anxiety as a result of his deportation and is already struggling with keeping the family together financially and would be left in day to day sole care of three demanding young children; because there is a probability that removal of the appellant would destabilise the functioning and emotional well-being of the children which would further add to their mother's anxiety and depression and her ability to provide for them; and because whilst the appellant's partner does have supportive relationships with her mother and mother-in-law both of these women are elderly and have health issues which mean they are not in a position to provide day-to-day hands on support with the children.

42. I therefore conclude that the appellant has shown that he can meet the requirements of the second exception to deportation as set out

at s.117C(5) of the Nationality, Immigration and Asylum Act 2002 as his deportation would be unduly harsh to his qualifying children with whom he has genuine and subsisting parental relationships. As such I find his deportation is a disproportionate interference with his right to respect to family life as protected under Article 8 ECHR.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. I set aside the decision of the First-tier Tribunal at paragraph 108 dismissing the appeal on Article 8 ECHR grounds and the findings at paragraph 95 of the decision.
3. I remake the appeal by allowing it under Article 8 ECHR.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Signed: Fiona Lindsley Date: 9th March 2022
Upper Tribunal Judge Lindsley

Annex A: Error of Law Decision

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Somalia born in 1984. He arrived in the UK in March 1993 with his mother and two brothers, and the family applied for asylum. They were refused asylum but granted exceptional leave to remain, and subsequently, in April 2003, indefinite leave to remain.

2. The appellant has been convicted of 17 offences starting in September 1999 when he was 14 years old. The offences range from motoring, possession of control drugs, assaults, theft, possession of an offensive weapon and threatening and abusive behaviour. In October 2015 the appellant was convicted of the index offence, three charges of burglary and sentenced to 27 months imprisonment. In October 2015 he was notified of a decision to deport, and in response he raised a human rights' claim and claimed asylum. His appeal against the decision refusing his protection and human rights claim dated 9th August 2018 was dismissed by First-tier Tribunal Judge Reid in a determination promulgated on the 9th April 2020.

3. Permission to appeal was granted by the Vice President of the Upper Tribunal, Mr CMG Ockelton, on 21st April 2021 in light of the decision of the High Court granting permission for judicial review in a Cart judicial review of the refusal of permission to appeal by Upper Tribunal Judge Sheridan dated 29th July 2020. Permission was granted by The Hon. Mr Justice Mostyn on one sole ground (ground 7) relating to an arguable erroneous assessment of whether the appellant's deportation would be unduly harsh to his partner and children, as the First-tier Tribunal had arguably found, at paragraph 95 of the decision, that it would not to be unduly harsh for the appellant to be deported and his family to remain in the UK as they could visit him in Kenya when there was arguably no evidence that this would be an option available to the family.

4. The matter came before me to determine whether the First-tier Tribunal had erred in law, and, if so, whether that error was material and required the decision to be remade. The hearing took place via Teams, a format to which no party raised an objection. Ms Besso's video connection was not very good, but I was satisfied that all parties were able to adequately put forward their submissions and that the hearing was fair.

Submissions – Error of Law

5. It is argued by the appellant, in the grounds of appeal and oral submissions from Ms Besso, in short summary as follows.

6. The First-tier Tribunal failed to adequately explain at paragraph 95 of the decision how the appellant and his partner and children could meet in Kenya given his accepted mobility issues (it was accepted by the respondent that he did not need to travel from Hackney to Lambeth for bail reporting) and their accepted limited financial means (she is on Universal Credit and he has no savings). The possibility of meeting in Kenya was also not put to the appellant or his partner at the hearing for comment either.

7. The First-tier Tribunal thus made an erroneous and unreasoned factual finding which amounted to an error of law. This was because when finding the appellant's separation from his partner and children. via his deportation whilst they remain in the UK, would not be unduly harsh reliance was placed on the potential for meetings in Kenya to counterbalance the other findings of undue harshness made at paragraph 94 of the decision. The appellant argues that Mr Justice Mostyn found that the First-tier Tribunal found at paragraph 94 of the decision the deportation of the appellant to Somalia would lead not merely to hardship but to excessive and undue hardship, and the balance was only tipped so that it would not be unduly harsh because of the erroneous factual finding that they could meet in Kenya. It is argued in the context of the decision of the Court of Appeal in HA (Iraq) & RA (Iraq) v SSHD [2020] EWCA Civ 1176 that undue harshness may occur quite commonly and that there is no baseline of ordinariness, and that the findings at paragraph 94 meet this test as there is nothing that precludes emotional harm being sufficient. It is argued that what was said at paragraph 95 was therefore a material error in the decision, leading to the appeal being dismissed on the basis of the family life exception to deportation. The dismissal of the human rights appeal should therefore be set aside and the appeal either allowed on the basis of the findings at paragraph 94 or should be adjourned and remade with further up-dating evidence.

8. The respondent argues in the Rule 24 notice and in oral submissions from Mr Melvin that the First-tier Tribunal does not err in law as contended by the appellant.

9. Mr Melvin firstly tried to persuade me that there was no error of fact at paragraph 95 of the decision of the First-tier Tribunal as perhaps the visits could be funded by the UK based relatives of the appellant and his partner, and as is correctly said in the decision the appellant's partner has relatives in Kenya.

10. Secondly, Mr Melvin argued that paragraph 94 of the decision of the First-tier Tribunal should not be seen in isolation from the findings made at paragraphs 72-81 and 85. If looked at holistically

it is clear that the family were able to handle changes and separation in the past: the children have no health issues: the appellant's partner is, and has been the primary carer for the children, she is caring and responsible and had coped well whilst he was in prison with the children; the appellant's partner has wider family support from the appellant's mother, her mother and grandparents and uncles in the UK and these people can provide emotional and financial support; the appellant does not provide financially for his partner and children so his deportation would not have a financial impact; and the social worker evidence that the family would go off the rails without the appellant is specifically rejected. Ultimately the deportation of the appellant would not therefore cause undue or excessive hardship, and this is clear from the totality of the findings without paragraph 95 of the decision, and so any error in that paragraph is immaterial to the outcome.

11. At the end of the hearing I told that parties that I found that the First-tier Tribunal had erred in law for the reasons argued by the appellant, and in line with the reasoning of Mr Justice Mostyn. but I did not give an oral judgment, and instead set out my reasoning in writing below. I informed the parties that the remaking hearing would take place in the Upper Tribunal due to the relatively narrow issue involved. I considered submissions from both parties about what elements of the decision should be set aside, and concluded that it was only the decision dismissing the appeal under Article 8 ECHR and paragraph 95 which had been shown to err in law and thus should be set aside. I made clear however that the remaking hearing would have to consider whether Article 8 ECHR was breached at the date of hearing so updating evidence might mean a preserved finding was changed by such evidence.

Conclusions – Error of Law

12. The unchallenged findings of the First-tier Tribunal in respect of issues which are not challenged are in short summary as follows.

13. The appellant is a persistent offender who committed offences between the ages of 14 and 31 and showed an utter disregard for the law. The index offence was found to be a particularly serious one, and despite his having not taken drugs since this conviction in October 2015 it is found that he remains a medium risk to the public and of offending. He is found to be a danger to the community following his sentence for a particularly serious crime. It is accepted that the appellant's father was killed by a militia in 1992 but not that he would be at real risk of serious harm as a result. It was not accepted that he was a Shia Muslim, and so it was not found he would be at risk from Al Shabaab if deported to Somalia. It was found that he would have to relocate to Mogadishu due to his westernisation, and that he is a member of the minority Brava clan but that this would not pose a risk for him in

Mogadishu. It was accepted that he suffers from depression and anxiety and some physical health problems, including some back/ mobility problems, but it was not accepted that he could not obtain any necessary medication in Somalia. It was found that he could obtain work to support himself and would be able to find basic accommodation, and could get some support from his uncles in the UK, and that there could be some limited family support in Somalia. It was found that even though he did not speak Somali as he speaks Brava and English he would be able to overcome any linguistic obstacles in Mogadishu. As a result it was concluded that the appellant did not succeed in his asylum, humanitarian protection or appeals under Articles 2 and 3 ECHR.

14. With respect to the issue of the appellant's family and private life the First-tier Tribunal's unchallenged findings are as follows. It was found that, on the basis of the concession of the respondent, that it would be unduly harsh for the appellant's partner and children to have to relocate to Somalia with him. It is accepted that the appellant has been in a relationship with his partner Ms A, who is a British citizen, since 2008. The appellant has four children: K who is 15 years old from a previous relationship whom he does not see; and H who is 9 years old, Z who is 6 years old and J who is 15 months old from his current partner whom he has a parental relationship with. It is found that it was very difficult for Ms A whilst the appellant was in prison, but she was supported by her mother and the appellant's mother. It was found that the family would not go off the rails and that Ms A would not suffer significant mental health problems if the appellant were to be deported. It was found that it would be in the best interests of the children (H, Z and J) to have their father living with them as they have a good relationship with him, and he has played a full role in family life since he left prison three and a half years ago. The appellant could not succeed under the private life exception to deportation at s.117C(4) of the Nationality, Immigration and Asylum Act 2002 because he is not socially and culturally integrated because of his offending and he would not have very significant obstacles to integration if deported to Somalia.

15. The conclusion findings at paragraph 94 with respect to the family life exception at s.117C(4) of the Nationality, Immigration and Asylum Act 2002 are, in summary, as follows. The lives of the appellant's partner and children would be significantly affected and that it would be difficult for them emotionally and practically if he were deported given that he has been integrated into the family for the past three and a half years, and that it would "very difficult" for Ms A to bring up the children alone despite family support, and even though she managed to do this whilst the appellant was in prison, due to the distress that this will cause her and the children, and the pressure that the children's distress would place upon her.

16. I find that the way in which paragraphs 95 and 96 are worded makes it plain that ultimately the unduly harsh standard is not met because at paragraph 95 it is found that the appellant, his partner and children could meet up in a third country, namely Kenya where the appellant's partner has relatives. I find that the logic of the decision is that paragraph 94 summarises the findings in relation to the family life exception which show difficulty and distress, and that the use of the word "nonetheless" at paragraph 96 of the decision implicitly indicates that the reason why it was not concluded that the difficulties and distress would not amount to the deportation being unduly harsh was the finding at paragraph 95 of the decision with respect to the possibility of these family meetings in Kenya. An error with the findings at paragraph 95 therefore is material to the decision-making on the family life exception to deportation.

17. I find that the First-tier Tribunal errs at paragraph 95 of the decision when making the factual finding that the appellant, his partner and children would be able to meet in Kenya because the finding is insufficiently reasoned in the context of other findings in the decision. It is accepted that his partner has family in Kenya but it is also found at paragraph 78 of the decision that she is reliant on Universal Credit and so clearly is on a minimum income; it is also accepted that the appellant was excused from travel from Hackney to Lambeth because this was not a short or straightforward journey at paragraph 61 of the decision (although it was not accepted that his mobility was very severely affected or that he had a disabling back problem). It follows that I must set aside that paragraph, and the decision at paragraph 108 of the decision dismissing the appeal on Article 8 ECHR grounds.

18. I preserve all other findings and decision of the First-tier Tribunal, but find that I cannot simply allow the appeal on the basis of the family life exception to deportation as it is not explicitly stated at paragraph 94 and 96 that absent paragraph 95 the deportation of the appellant would be unduly harsh to the appellant's partner and children. I therefore adjourn the appeal so that updating evidence can be provided by either party covering the period March 2020 to the present. It follows that although findings are preserved from the First-tier Tribunal my conclusions might be different in light of evidence from this subsequent period.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. I set aside the decision of the First-tier Tribunal at paragraph 108 dismissing the appeal on Article 8 ECHR grounds and the findings at paragraph 95 of the decision.

3. I adjourn the re-making of the appeal.

Directions:

1. Any updating evidence relevant to whether it would be unduly harsh for the appellant to be deported whilst his partner and children remain in the UK from either party must be filed with the Upper Tribunal and served on the other party ten days prior to the date of the remaking hearing.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Signed: Fiona Lindsley Date: 15th September 2021
Upper Tribunal Judge Lindsley