Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00154/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6 April 2022	**On 15 November 2022**

Before

UPPER TRIBUNAL JUDGE OWENS

Between

AHM
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Smyth, Counsel instructed by Kesar & Co Solicitors
For the Respondent: Ms Everet, Senior Presenting Officer

DECISION AND REASONS

History of the Appeal

1. This appeal comes before me for re-making. I set aside the decision of First-tier Tribunal Judge Clarke dated 3 March 2021 dismissing the appellant's appeal against the decision to refuse his protection and human rights claims on the basis that there had been a material error of law for the reasons given in the decision dated 23 June 2021 appended to this decision at Annex A. The judge's decision to uphold the Secretary of State's decision to certify the appeal pursuant to section 72 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") because

the appellant is a danger to the community of the UK was upheld. The judge's decisions that the appellant is excluded from Humanitarian Protection, that he does not succeed on an Article 3 ECHR health claim and that there would be no disproportionate breach of Article 8 ECHR to remove him from the UK were all similarly upheld.

The issues in this appeal

2. The judge's decision was overturned in respect of the cessation clause and Article 3 ECHR protection claim only, the remainder of the decision was upheld. It is agreed by both parties that the appellant has not rebutted the presumption that he has been convicted of a serious crime and is a danger to the community and that Section 72 Nationality, Immigration and Asylum Act 2002 applies to him; that he is excluded from protection under the Refugee Convention; and that he is excluded from humanitarian protection pursuant to paragraph 339D(iv).

3. The only issues outstanding are

a) whether the respondent has discharged the burden that there has been a significant and non-temporary change of circumstances such that the appellant is no longer at risk of harm as a minority clan member and thereby faces harm contrary to Article 3 ECHR.

b) whether the appellant would face a real risk of serious harm by reasons of the conditions in which he would be living on his return to Somalia contrary to Article 3 of the ECHR.

4. The effect of this would not be that he is entitled to Humanitarian Protection because he is excluded from this by reason of his risk to the community of the UK and his serious offending, but that he would not be removable to Somalia at the present time.

Appellant's Background

4. The appellant is a national of Somalia, who arrived illegally in the UK in 2001 and applied for asylum on 19 February 2001. The appellant was granted refugee status on 4 April 2001 on the basis that he was from the minority Benadiri clan (Reer Hamar) who were accepted by the Secretary of State at that time to be persecuted by majority clans.

5. On 12 January 2016 the appellant was convicted at Wood Green Crown Court of robbery and other offences. He was sentenced to four year's imprisonment. The respondent subsequently issued him with a notice of intention to deport and a notice of intention to revoke refugee status. On 20 March 2019, a decision was taken to revoke the appellant's refugee status and on 15 August 2018 a decision was taken to refuse the appellant's protection and human rights claim. This was served on the appellant on 15 September 2018 along with a Deportation Order and reasons for deportation.

6. The appeal was originally heard by the First-tier Tribunal on 23 April 2019. That decision was set aside due to a material error of law. The appeal was remitted to the First-tier Tribunal and heard on 19 January 2021 by First-tier Tribunal Judge Clarke. That decision was set aside and this is the re-making decision.

Position of the parties

7. The appellant's position is set out in counsel's skeleton argument. The appellant is a healthy 46-year-old Somali national who was born in Mogadishu and is a member of the Benadiri minority clan. He has not lived in Somalia for over 20 years. His mother and sisters live in Kenya, and he has no close relatives in Somalia. The correct approach to cessation is set out in PS(cessation principles) Zimbabwe [2021] UKUT 283 (IAC). It is for the respondent to demonstrate that the circumstances which justified the grant of refugee status have ceased to exist and there are no other circumstances which would now give rise to a well-founded fear of persecution. The phrase ceased to exist in this context means "permanently eradicated". The appellant's case is that the respondent has failed to demonstrate that the risk to the appellant on account of his Benadiri ethnicity has been permanently eradicated. The appellant falls into the risk category of "homeless".

8. The appellant relies on [339] of OA and submits that due to his personal characteristics it is reasonably likely that he will be compelled to live in an IDP camp in breach of Article 3 ECHR.

9. The respondent's position is that the Secretary of State has discharged the burden of demonstrating that the cessation clause applies to the appellant and it will not be a breach of Article 3 ECHR to remove the appellant to Mogadishu because he is a single healthy male who has sufficient skills to access casual employment and he will be able to access support from his clan in order to obtain employment and accommodation.

Evidence before me

10. I had before me the original respondent's bundle containing inter alia the appellant's asylum interview, his convictions and the respondent's decisions. I also had before me the appellant's 1057-page bundle including his witness statements dated 19 March 2019 and 14 August 2019. I have considered all of the evidence before me including items not specifically listed.

11. I also had before me the latest country guidance on Somalia, OA(Somalia) (CG)[2022] UKUT 33 (IAC) ("OA").

Oral evidence

12. I heard oral evidence from the appellant who gave his evidence in Somali through a court appointed interpreter. He confirmed that he could understand the interpreter. He was cross examined by Ms Everet. The

appellant's oral evidence was as follows: He last worked in the UK nine years ago. He believes that he will not be able to find work in Somalia because he left the country 20 years ago when he was in his 20's and has no idea how things are there now. He initially said that he has no Somali friends in the UK although he does know members of the Somali community. He then confirmed that he has many friends in the UK from the same clan, although they would not be able to help him because they are not related. He confirmed that he did not obtain the Construction Skills card which he had previously stated that he was studying for.

13. When he lived in Somalia he lived in Mogadishu in a family unit with his mother, father, two sisters and his wife. He was educated until secondary school level. He was not working because of the war. The appellant's father was working for the UN and supported the family financially, but he was killed. The appellant was 26 years old when he left Somalia with the help of a cousin of his father. He went to Kenya with his mother and sisters. His mother and sisters still reside in a camp in Kenya, and he contacts her 3 or 4 times a week. He does not send her remittances at present. He does not know anyone in Somalia. He has lost contact with his father's cousins. In the UK, he has been looking for work in factories and warehouses. He previously worked in warehouses, food factories, fixing washing machines and for the Royal Mail. It has been difficult for him to find work because he was in prison for 2 years. He also stated that he does not have permission to work in the UK and could work if he had permission. He then clarified that legally he has permission to work but he has a problem demonstrating this because of a lack of documentation. He is in receipt of benefits. He does not have any health problems.

Submissions

14. Ms Everet dealt firstly with the issue of cessation. OA the recent country guidance cases looked at this issue and upheld MOJ and Others(Return to Mogadishu) Somalia CG [2014] UKUT 00442 ("MOJ"). There has been no durable change since MOJ. There has been a decline in clan-based violence. There is no suggestion that the appellant would continue to be at risk as a member of a minority clan.

15. She then made submissions on Article 3 ECHR. A returnee to Mogadishu with family there would have support. She accepted that the finding that the appellant has no family in Mogadishu is preserved. She emphasised the importance of clan structures and submitted that she was sceptical that the appellant would have no support at all because of the nature of clan structures. She submitted that the preserved finding that the appellant had lost contact with everyone must be viewed in light of OA. She highlighted that the appellant left Mogadishu as an adult at the age of 26. He will have some knowledge if it. As a returnee he can access hotel accommodation for $25 dollars per day. She submitted that the appellant will be able to access support from his minority clan and that he would be able to build up links and networks. It would be relatively unlikely that this appellant would end up in a IDP camp because of his previous ties to

Mogadishu and his links to the diaspora. There are no additional risk factors. The appellant is a single male in good health and could find some employment in view of the expansion and boom in the city. It is acknowledged in OA that there will be people with certain features and characteristics who may end up in IDP camps in conditions which could result in a breach of Article 3 ECHR but such cases are likely to be rare. The appellant has none of these characteristics and is not likely to end up in an IDP camp. He is not at risk as a member of a minority clan and although he may face some discrimination there is no real risk of him receiving treatment contrary to Article 3 ECHR.

16. Mr Smyth relied on his skeleton argument, and he referred me to OA which he accepted was binding on the Tribunal. After three weeks in a hotel, this appellant will be homeless. He does not have any connections in Somalia and will not have a guarantor to assist him to find employment which would allow him to pay for accommodation. His father died when he was a young man. His mother left the country. He has not returned to Somalia for a period in excess of 20 years. He has no family and no connections. On the facts of this appeal there is a real risk that the appellant would not be able to find a guarantor. He has no meaningful employment skills and no qualifications. He will find Mogadishu disorientating and challenging. Notwithstanding the lack of clan violence, he falls into category [402] of OA at (d). The Secretary of State has not discharged the burden regarding cessation. The appellant falls into a particular social group of being homeless which is an "immutable characteristic". The appellant will be street homeless and unable to get into a camp.

17. It will be a breach of Article 3 ECHR to return the appellant to Somalia because he will not be able to find a guarantor either shortly after arrival or for a longer period, he does not have the skills to set himself up as self-employed and he would find himself without any means of support. Unlike OA he has no connections in Somalia which is unsurprising in the circumstances in which he left.

Preserved Findings

18. The following findings are agreed:

    (a) The appellant was born in Mogadishu. His father was murdered by the Hawiye clan when the family home was raided. His sister was subsequently raped and murdered. The appellant, his mother and his two sisters relocated to Kenya in 2001 with the assistance of a paternal uncle or cousin. He was granted asylum on arrival in the UK because he was at risk of persecution from a majority clan as a member of a minority clan. He was granted indefinite leave to remain in 2006. He has numerous convictions in the UK.

19. The following findings are preserved from the judge's decision:

(a) The appellant is from the Benadiri clan (also known as Reer Hamar), a minority clan.

(b) The appellant is in good health.

(c) He came to the UK in 2001. He has lived in the UK for 20 years and has not returned to Somalia since his arrival.

(d) He has worked in various manual jobs in the UK such as with DHL and the Royal Mail.

(e) His mother and sisters remain living in a refugee camp in Kenya.

(f) The appellant does not have a nuclear family or close relatives in Somalia.

(g) The appellant's ex-wife and children live in the UK, but he has had no contact with them since 2013.

20. I make some further findings. These are based on the appellant's own evidence and are not contentious.

(h) The appellant has many friends from his own clan in the UK.

(i) He contacts his mother several times a week by mobile phone/whatsapp.

(j) He has also worked in a food processing factory and fixing washing machines. The reason he does not currently work is because he is not able to provide documentary evidence of his permission to work.

(k) He speaks Somali.

(l) He remains in good health.

(m) He will not have access to remittances from friends in the UK or from his mother in Kenya. He will receive minimal financial assistance apart from the resettlement grant of £750.

Guidance in OA

21. I set out those headnotes which are relevant to this appeal:

> (2) The country guidance given in paragraph 407 of MOJ (replicated at paragraphs (ii) to (x) of the headnote to MOJ) remains applicable.
>
> (4) The Reer Hamar are a senior minority clan whose ancient heritage in Mogadishu has placed it in a comparatively advantageous position compared to other minority clans. Strategic marriage alliances into dominant clans has strengthened the overall standing and influence of the Reer Hamar. There are no reports of the Reer Hamar living in IDP camps and it would be unusual for a member of the clan to do so.

(5) Somali culture is such that family and social links are, in general, retained between the diaspora and those living in Somalia. Somali family networks are very extensive and the social ties between different branches of the family are very tight. A returnee with family and diaspora links in this country will be unlikely to be more than a small number of degrees of separation away from establishing contact with a member of their clan, or extended family, in Mogadishu through friends of friends, if not through direct contact.

(8) The economic boom continues with the consequence that casual and day labour positions are available. A guarantor may be required to vouch for some employed positions, although a guarantor is not likely to be required for self-employed positions, given the number of recent arrivals who have secured or crafted roles in the informal economy.

(9) A guarantor may be required to vouch for prospective tenants in the city. In the accommodation context, the term 'guarantor' is broad, and encompasses vouching for the individual concerned, rather than assuming legal obligations as part of a formal land transaction. Adequate rooms are available to rent in the region of 40USD to 150USD per month in conditions that would not, without more, amount to a breach of Article 3 ECHR.

(11) The extent to which the Secretary of State may properly be held to be responsible for exposing a returnee to intense suffering which may in time arise as a result of such conditions turns on factors that include whether, upon arrival in Mogadishu, the returnee would be without any prospect of initial accommodation, support or another base from which to begin to establish themselves in the city.

(12) There will need to be a careful assessment of all the circumstances of the particular individual in order to ascertain the Article 3, humanitarian protection or internal relocation implications of an individual's return.

(13) If there are particular features of an individual returnee's circumstances or characteristics that mean that there are substantial grounds to conclude that there will be a real risk that, notwithstanding the availability of the Facilitated Returns Scheme and the other means available to a returnee of establishing themselves in Mogadishu, residence in an IDP camp or informal settlement will be reasonably likely, a careful consideration of all the circumstances will be required in order to determine whether their return will entail a real risk of Article 3 being breached. Such cases are likely to be rare, in light of the evidence that very few, if any, returning members of the diaspora are forced to resort to IDP camps.

(14) It will 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 would be reasonable for internal relocation purposes.

Cessation

22. As far as cessation is concerned, I am obliged to follow the most recent country guidance in respect of this. Headnote 2 of OA confirms that paragraph 407 replicated in Headnote of MOJ is still applicable.

23. This states:

> a. 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 15(c) of the Qualification Directive or Article 3 of the ECHR. 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;
>
> b. 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,
>
> c. 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.
>
> d. 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 be expected to do so.
>
> e. There is no real risk of forced recruitment to Al Shabaab for civilian citizens of Mogadishu, including recent returnees from the West.

24. The appellant was granted refugee status because, as a member of a minority clan, he was at risk of serious harm from a majority clan. I have no hesitation in concluding that there has been a significant and non-temporary change in those circumstances, such that the original basis for recognising the appellant as a refugee no longer applies. As held in MOJ and upheld in OA, "[t]here are no clan militias in Mogadishu, no clan violence, and no clan based discriminatory treatment, even for minority clan members." It follows that the Secretary of State has demonstrated that the circumstances in connection with which the appellant was recognised as a refugee have ceased to exist; the required symmetry between the grant and cessation of refugee status is present, insofar as the basis for the appellant's initial recognition as a refugee is concerned. I

am satisfied that the Secretary of State has discharged the burden in respect of Article 1C(5) of the 1951 Convention in this respect. The appellant's previous fear from the Hawiye or other majority clans is no longer well-founded. Mr Symth did not attempt to submit that this is not the case given OA.

25. It is also necessary to consider whether there is another basis upon which the appellant could be recognised as a refugee. Mr Symth submitted that other some categories of individual who are members of a particular social group remain at risk of serious harm and that the appellant falls into the category of "homeless" as at [402] (d) of OA.

26. There is nothing before me to indicate that the appellant has ever been homeless in the 20 years he has resided in the UK. He has always provided an address. This is consistent with his lack of vulnerability. Further, as I set out below, he will have available to him upon his return to Somalia the possibility of initial residence in a hotel, and the potential to forge links with broader members of his network and clan, such that there is no real risk of him being rendered homeless by the Secretary of State's removal decision in circumstances which may causally be connected to the removal decision itself. I find that he does not fall into the category of homeless and cannot make out another basis on which he could be recognised as a refugee.

Article 3 ECHR

27. The crucial issue for me to decide in respect of Article 3 ECHR is whether the appellant would have no real prospect of securing access to a livelihood which would allow him to rent himself some accommodation, support himself and prevent him from falling into destitution and living in an IDP camp in living conditions which would breach Article 3 ECHR.

28. I take into account all of the appellant's individual characteristics as well as the general guidance in OA. It is accepted that the appellant has been absent from Somalia for a considerable period of over 20 years. Prior to leaving Somalia, his father and sister were killed in terrible circumstances and he, his mother and remaining sisters fled to Kenya in 2001 with the assistance of a paternal relative. It has been found, given the considerable passage of time since then, that the appellant does not have contact with any close family members in Somalia. He will also have no access to remittances. This is my starting point.

29. On arrival in Mogadishu, he will need to build a network of support from scratch in a relatively short period whilst he is living in hotels which he can pay for out of his resettlement grant. The appellant is from the Reer Hamar clan, a senior minority clan. The evidence in OA is that he would be likely to return to a Reer Hamar district in the old city such as Hamar Weyne. I note and take into account in this respect that in his initial asylum statement he described the family home being in Hamar Weyne and I find

that he would return to that area where many of the Reer Hamar clan members still reside and is an area of which he has knowledge.

30. Although the appellant has no family in the UK, he did confirm in his evidence that he has many friends from his clan in the UK who will have connections in the diaspora. His mother and sisters are based in Nairobi, Kenya and will also undoubtedly have friends in the diaspora in accordance with the background evidence in OA which stresses the importance of family and clan ties in Somali culture. The appellant's mother lived in Somalia for over 40 years by the time she left the country. Her husband worked for the UN. She was a member of a senior minority clan and lived in an area where that clan was based. I find on the lower standard that she will have retained some ties with Somalia. The appellant did not give evidence on this issue but my finding is consistent with OA in which the expert stated that even a Somali mother who had left Somalia over 30 years ago would be likely to have retained contact with extended family members and friends because of the culture of Somali society.

31. The appellant is in very regular contact with his mother. His evidence is that she has lost touch with her only sister, and this has been accepted. However, no doubt she will use any connections she has with friends or extended clan members to assist him given the close nature of their relationship as evidenced by the frequency of ongoing contact. His father previously worked for the UN from which I infer that the family were middle class. The appellant's evidence is that he has also lost contact with his father's only sibling, and this has also been accepted, as has the fact that his wife's family are unlikely to assist him given the fact that he separated from her in 2013 and the restraining order against him. It will fall to the appellant to utilise any distant connections he has in this respect, including any connections he can make through friends in the diaspora in the UK. I note and take into account that the appellant is not a vulnerable individual. He does not have any physical health problems and he does not have any mental health problems. He has been able to make many friends in the UK in the diaspora and there is no reason why he could not make new friends in Somalia particularly with members of his own clan. He speaks Somali and is familiar with Somali culture having left as an adult at the age of 26, maintaining links with the Somali diaspora in the UK as well as having close Somali relatives in Kenya.

32. OA confirms that most Somali families are very tight and that there is normally only a few degrees of connection between establishing contact with a clan member or with a member of his extended family. I find on the lower standard that the appellant is likely to be able to establish a connection with a member of his own clan who is likely to give some limited assistance and could act as an informal guarantor for the appellant to obtain modest accommodation either in Hamar Weyne or near an IDP camp.

33. The appellant is in good health and now in his late 40's. He lived in Mogadishu until he was 26 and thus was an adult prior to leaving and

would have some knowledge of Mogadishu, albeit Mogadishu has changed significantly since he left. He speaks Somali. He has demonstrated resilience by surviving in the UK. I accept that it is easier to survive in the UK where there is the safety net of a benefit system which is absent in Somalia Nevertheless his previous work in the UK has included working for the Royal Mail, the Post Office, working in warehouses, a food factory and also fixing washing machines. He describes attending the job centre to build up skills. The main reason he is not working at present is because of his criminal record and his lack of ability to document that he has permission to work. It is not said that he is currently unemployed for any other reason. Mr Smyth submitted that he has no skills, but I am not in agreement. He has skills working as delivery person, in factory work, fixing washing machines and labouring. He can continue to put these skills to use in Somalia. He is also educated to GSCE level and so is not entirely uneducated. He is literate and speaks some English. There is some casual work available in Mogadishu including labouring and manual work (see [268] of OA) which does not require a guarantor. The previous judge found that the appellant would be able to secure work in Mogadishu and this finding was not challenged by the appellant in his appeal to the Upper Tribunal. The findings of MOJ upheld in OA are that returning members of the diaspora may be viewed upon more favourably than other members of the labour market. This is also a factor in his favour. I find that he would be able to at least obtain some manual work relatively quickly in order to pay to house himself in basic accommodation. In the longer run it would be open to him to develop stronger links in his own community to obtain better paid work, or set up a small business perhaps as a delivery man or handy-man using the skills he learned in his employment in the UK.

34. On the facts of this appeal, notwithstanding the fact that he has been absent for so long; that his close family do not live in Somalia; that he has not been sending remittances to Somalia; nor will have any prospect of receiving remittances, I find that the appellant would have a real prospect of finding an informal guarantor and securing access to a livelihood which would allow him to rent himself some accommodation after his initial money runs out, support himself and prevent himself from falling into destitution. I find to the lower standard that this appellant will not be destitute and end up in an IDP camp. This is consistent with OA in which it is said that there are no reports of the Reer Hamar living in IDP camps and it would be unusual for a member of the clan to do so.

35. I find that the appellant is not at real risk of being subject to intense suffering on account of his living conditions in any way which may be causally attributed to the Secretary of State's removal decision. While life in Somalia will be challenging and difficult and will entail conditions which are harsh by domestic standards, they will not engage Article 3 of the Convention in the case of this appellant.

36. I do not find that the removal from the appellant from the UK would be a breach of Article 3 ECHR.

Notice of Decision

37. I re-make the decision. The appeal is dismissed on cessation and Article 3 ECHR grounds.

Anonymity Direction

38. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the pubic to identify the appellant. Failure to comply with this order could amount to a contempt of court.

Signed R J Owens Date 15 November 2022

Upper Tribunal Judge Owens

Appendix A

IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00154/2018

THE IMMIGRATION ACTS

Heard at Field House
By Skype for Business
On 7 May 2021

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE OWENS

Between

AHM
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Symth, Counsel, instructed by Kesar & Co Solicitors
For the Respondent: Mr Whitwell, Senior Home Office Presenting Officer, instructed by the GLD

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Clarke sent on 3 March 2021 dismissing the appellant's appeal against the decision to refuse his protection and human rights claim. Permission to appeal was granted by First-tier Tribunal Judge Chohan on 22 March 2021.

2. The hearing was held remotely. Neither party objected to the hearing being held in this manner. Both parties participated by Skype for Business. I am satisfied that a face-to-face hearing could not be held because it was not practicable due to the current COVID-19 situation and that all of the issues could be determined fairly by way of a remote hearing. Neither party complained of any unfairness during the hearing.

Background

39. The appellant is a national of Somalia, who arrived illegally in the UK in 2001 and applied for asylum on 19 February 2001. The appellant was granted refugee status on 4 April 2001 on the basis that he is from the minority Benadiri clan who were accepted by the Secretary of State at that time to be persecuted by majority clans.

40. On 12 January 2016 the appellant was convicted at Wood Green Crown Court of robbery and other offences. He was sentenced to four year's imprisonment. The respondent subsequently issued him with a notice of intention to deport and a notice of intention to revoke refugee status. On 20 March 2019, a decision was taken to revoke the appellant's refugee status and on 15 August 2018 a decision was taken to refuse the appellant's protection and human rights claim. This was served on the appellant on 15 September 2018 along with a Deportation Order and reasons for deportation.

41. The appeal was originally heard by the First-tier Tribunal on 23 April 2019. That decision was set aside due to a material error of law. The appeal was remitted to the First-tier Tribunal to deal with the following issues:

    a. Has the respondent proved her case that the cessation provisions apply under Article 1C(5) of the Refugee Convention?

    b. Has the appellant rebutted the presumption that he has been convicted of a particularly serious crime and is a danger to the community of the United Kingdom pursuant to s72 of the Nationality, Immigration and Asylum Act 2002.

    c. Will the appellant's removal to Somalia breach his rights under Articles 2 and 3 of the ECHR?

42. In her decision remitting the appeal to the First-tier Tribunal UTJ Gill stated that the issues to be considered by the FtT following remittal do not include Article 8 ECHR because the appellant's representative conceded that the Article 8 ECHR claim was weak. The remitted appeal was heard by First-tier Tribunal Judge Clarke.

Appellant's case

43. It is the appellant's contention that there is no significant or non-temporary change in Somalia such that he ceases to be a refugee. He argues that although he has been convicted of a particularly serous crime, he is not a danger to the community in the UK and finally that it would be

a breach of Article 3 ECHR to deport him to Mogadishu because he would be living in an IDP camp and would face destitution.

The respondent's decision

44. The respondent relied on the Country Guidance of MOJ and others (Return to Mogadishu) Somalia CG [2014] UKUT 00442 in which it was found that there was no longer clan-based violence or clan based discriminatory treatment even for minority clan members. The respondent also relied on the Country Policy and Information Note Somalia: Majority clans and minority groups in south and central Somalia version 3 January 2019. The respondent's position is that those circumstances which gave rise the appellant's asylum claim no longer exist. The Refugee Convention ceases to apply to him and in any event s72 applies and the appellant should be excluded from protection from refoulement under the Refugee Convention. Further, there is no risk of Article 3 ECHR harm either by virtue of the reasons which gave rise to the original asylum claim nor as a result of the conditions in which the appellant would be living in Somalia. It was noted that he is a single male in good health with previous work experience.

The decision of the First-tier Tribunal

45. AHM gave oral evidence and both representatives made submissions.

46. The judge first considered the issue of cessation. The judge took into account evidence which post-dated MOJ including evidence from the UNHCR and US State report as to the treatment of minority clans in Somalia. The judge then departed from the Country Guidance finding that that the respondent had not proved that changes in Somalia were non-temporary or durable. The judge found that minority clans such as the Benadiri are still likely to face treatment in Somalia that amounts to persecution.

47. The judge then found that the s72 presumption applies to the appellant because he has been assessed as being of medium risk of offending and there was no evidence of rehabilitation. The judge concluded that the appellant was a danger to the community of the UK and therefore that he does not qualify for a grant of asylum under paragraph 334 of the immigration rules. He also found that the appellant was excluded from humanitarian protection pursuant to paragraph 339D of the immigration rules.

48. The judge went onto consider Article 8 ECHR despite the fact that it had been agreed that the appellant could not succeed on this basis. The judge found that neither exception applied and that there were no very compelling circumstances. The judge then found that Articles 2 and 3 ECHR did not apply because the appellant can secure employment in Mogadishu, would not end up in an IDP camp and thus would have access to basic living standards. His return would not be contrary to Article 3 ECHR on this basis.

49. Finally, the judge found, pursuant to the Asylum Policy Instruction, that the respondent should consider giving the appellant a shorter period of leave in line with his findings that he is still at risk on return to Somalia. The judge dismissed the appeal on asylum, humanitarian protection grounds and dismissed the appeal under Articles 2 and 3 of the ECHR.

The Grounds of Challenge

Ground 1 - Irrationality

50. The judge's finding that the appeal should be dismissed on Article 3 ECHR grounds is irrational in the light of his finding that the appellant continues to face a real risk of persecution because the respondent failed to discharge the burden of proof that the cessation provisions apply to the appellant.

51. The appellant contends that this is a "slip" which is capable of correction under rule 31 of the Tribunal Procedure (First-tier Tribunal)(Immigration and Asylum Chamber) Rules 20014.

Ground 2 - Failure to take into account material considerations

52. It is said that the judge failed to take into account that since the appellant has no family in Somalia because his mother lives in Kenya and he has been absent for such a long time that he would be likely to go to an IDP camp whilst he is looking for work. Given the modification in Article 3 healthcare cases following AM(Zimbabwe) v SSHD [2020] UKSC 17 in conjunction with the Covid situation, the appellant would be subject to treatment contrary to Article 3 ECHR.

The Rule 24 Response

53. The respondent produced a rule 24 response in which it is asserted that the judge materially misdirected himself in law in various respects. Firstly, the judge failed to follow the country guidance of MOJ in respect of the risk of persecution to minority clans. The evidence before the judge was not sufficient to depart from the country guidance. If the judge considered that MOJ did not rely on reputable sources, it was incumbent on the judge to set out the sources.

54. The judge has applied opposing burdens of proof in relation to the cessation clauses.

55. Having found that the appellant had not rebutted the presumption under s 72 of the Nationality Immigration and Asylum Act 2002 or paragraph 339D (iv) of the rules and further did not succeed under Article 3 ECHR it is unclear on what basis the judge had jurisdiction to find that consideration should be given to granting the appellant a shorter period of leave.

56. Although not material, the judge dealt with Article 8 ECHR when this issue was settled.

Discussion and Decision

Ground 1 - Irrationality

57. It is agreed by both representatives that there is an apparently irrational contradiction between the judge's finding that the appellant has a well-founded fear of persecution and his decision to dismiss the appeal under Article 3 ECHR and recommend that the respondent gives consideration to granting a short period of leave to the appellant.

58. The representatives both have different approaches to this error.

59. Mr Smyth contends that given the judge's findings at [107] and [108] that the respondent had failed to discharge the burden of proof that the cessation provisions apply to the appellant and that the appellant continues to have a well-founded fear of persecution in Somalia on the basis of being a member of a minority clan, the only logical conclusion is that the judge intended to allow the appeal under Article 3 ECHR and that this should be corrected under the 'slip rule'.

60. Mr Whitwell contends that given that the judge dismissed the appeal on all grounds, it was irrational for the judge to suggest that the respondent grant a short period of leave.

61. The conclusions by the judge at [105], [106], [107] and [108] that the appellant as a minority clan member is still at risk of treatment in Somalia amounting to persecution and that any changes as found in MOJ are not non temporary or durable in my view do not sit at all well with the judge's conclusion at [156] that the appeal is dismissed pursuant to Article 3 ECHR. These findings directly contradict each other and are manifestly irrational.

62. From reading the decision as a whole, it is not entirely clear what the judge intended to do. One possible interpretation is the judge did not give consideration to the Article 3 risk of ill treatment resulting from the appellant's clan origin, another is that the judge mistaken believed that since the appellant was excluded from humanitarian protection under 339D(iv) he could not allow the appeal on Article 3 treatment-based grounds. It would be for the First-tier Tribunal to decide what was meant by the decision. However, I am not in agreement with Mr Symth that this error can be corrected by the slip rule which is clearly designed to rectify accidental clerical mistakes and errors of expression. The judge's decision is that the appeal is dismissed under Articles 2 and 3 of the ECHR. This is not a case of a straightforward error where it is clear what has gone wrong and how it should be corrected.

63. I prefer Mr Whitwell's submission that the fact that the decision does not flow logically on from the judge's reasoning means that the judge has

erred in law by reaching a perverse decision or one that it is not adequately reasoned.

64. I am satisfied that Ground 1 is made out in respect of a material error on the basis of the respondent's arguments. I am not satisfied that decision can be simply remade under the slip rule.

Ground 2

65. Mr Whitwell attempted to persuade me that I could not consider Ground 2 because Judge Chohan had not referred to it in her grant of permission. However, in accordance with Safi & Others (permission to appeal decisions) [2018] UKUT 388, the grant of permission is not limited unless it expressly states this in the decision notice itself which is not the case here. Permission has accordingly been granted on all grounds.

66. I am satisfied that the judge did not make findings on what would happen to the appellant immediately on his arrival in Mogadishu before he had the opportunity to find work and that this was a relevant consideration in view of the judge's findings that the appellant's mother and sister live in Kenya, that the appellant has been absent from Somalia for a very lengthy period, that he is of minority clan status and does not have extended family or support networks in Somalia. On this basis I am also satisfied that the judge's approach to the risk of treatment contrary to Article 3 ECHR in terms of the appellant being destitute is flawed and that this is material to the outcome of the appeal.

67. I am satisfied that there are material errors and that the decision should be set aside.

Respondent's submission

68. Pursuant to Binaku (s11 TCEA; s 117C NIAA; para399D) [2021] UKUT 34 (IAC) the respondent has the right to challenge aspects of the decision in the rule 24 response.

Failure to follow county guidance/ inadequate reasons for departing from Country Guidance

69. I turn to this alleged error because it is relevant to whether the judge's factual findings can be upheld.

70. Mr Whitwell's argument is that the basis on which the judge decided that the appellant would be at risk of ill treatment as a minority clan member is also flawed. His submission is that the judge misdirected himself in law by departing from the country guidance. He also submitted that having found that the appellant was excluded from protection, the judge did not have to make any further findings on the Refugee Convention.

71. MOJ is authority for the proposition that the situation in Mogadishu had improved significantly for minority clan members. It is not in dispute that

MOJ remains the extant country guidance. Extracts of the headnotes state as follows;

> *(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.*
>
> *(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.*
>
> *(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.*

72. The judge was aware of MOJ which he cites at [78]. Between [75] and [82] the judge set out the respondent's evidence as to how circumstances had changed since the appellant was granted refugee status in 2001 including the fact that Al-Shabab had retreated from Mogadishu, that the clan structure had broken down as the dominant form of protection and that a number of the Benadiri clans were operating businesses in Mogadishu and holding positions in the National government.

73. Section 12 of the Practice Directions of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal of the Senior President of Tribunals dated 10 February 2010 concerns the status of starred and Country Guidance determinations. So far as is relevant, it provides:

> "12.2 A reported determination of the Tribunal, the AIT or the IAT bearing the letters "CG" shall be treated as an authoritative finding on the country guidance issue identified in the determination based upon the evidence before the members of the Tribunal, the AIT or the IAT that determine the appeal. As a result, unless it has been expressly superseded or replaced by any later "CG" determination, or is inconsistent with other authority that is binding on the Tribunal, such a country guidance case is authoritative in any subsequent appeal, so far as that appeal:-
>
> (a) relates to the country guidance issue in question; and
>
> (b) depends upon the same or similar evidence.
>
> 12.3 A list of current CG cases will be maintained on the Tribunal's website. Any representative of a party to an appeal concerning a particular country will be expected to be conversant with the current "CG" determinations relating to that country.
>
> 12.4 Because of the principle that like cases should be treated in like manner, any failure to follow a clear, apparently applicable country guidance case or to show why it does not apply to the case in question is likely to be regarded as grounds for appeal on a point of law."

74. These principles are reiterated in SG (Iraq) v SSHD [2012] EWCA Civ 940 at [46] and [47] where it is said;

> "The system of Country Guidance determinations enables appropriate resources, in terms of the representations of the parties to the Country Guidance appeal, expert and factual evidence and the personnel and time of the Tribunal, to be applied to the determination of conditions in, and therefore the risks of return for persons such as the appellants in the Country Guidance appeal to, the country in question. The procedure is aimed at arriving at a reliable (in the sense of accurate) determination."
>
> "It is for these reasons, as well as the desirability of consistency, that decision makers and tribunal judges are required to take Country Guidance determinations into account, and to follow them unless very strong grounds supported by cogent evidence, are adduced justifying their not doing so."

75. MOJ gives clear guidance that the situation in Mogadishu has changed such that a Benadiri clan member who is an 'ordinary civilian' such as the appellant is not at risk of serious harm.

76. The judge considers the UNHCR evidence at [84] to [96]. The UNHCR evidence in turn refers to various reports including a UN Report dated 2016, a Minority Rights Group International report dated 2015 and the US State Department Report for 2016 dated 3 March 2017 which he quotes at [87] and which at [96] he categorises as a "well known credible source". The UNHCR report concludes that Benadiri minority clans may still be at risk of persecution on return to Somalia. The judge ultimately prefers the evidence cited by the UNHCR because it is more "recent" and because UNCHR is relying on reports from "reputable" sources. The judge places weight on these reports in order to find that the changes in Somalia have not been non-temporary or durable.

77. Mr Smyth argued that it was open to the judge to reach this conclusion and that his findings are adequately reasoned. He submitted that the respondent did not engage with the UNHCR report which post-dated MOJ. The respondent simply disagrees with the judge's findings which are sustainable on the evidence before him. The situation remains volatile in Somalia

78. The evidence before the judge was in general that members of the Benadiri clan in Mogadishu are not subject to the kind of targeted violence which previously took place and that many Benadiri are now residing safely in Mogadishu and he was mandated to follow the Country Guidance in this respect.

79. The evidence from the UNCHR spoke more to the marginalization and discrimination of the Benadiri, as well as general clan tensions and addressed the issue of internal relocation as well as cessation. The report did not assert that large numbers of the minority Benadiri clan cannot live safely in Mogadishu. The evidence from the UN State Department Report

about continued attacks on minority clans was in relation to Somalia as a whole rather than Mogadishu in particular. The evidence in the UNHCR report also dated from 2016 and 2017. I also take into account that the respondent's decision referred to the 2019 CPIN which was produced in the respondent's bundle. This document was before the judge and references a more recent US state report 2017 as well as the other reports referred to in the UNHCR report including the UN report and the Minority Rights group reports as well as more recent background material.

80. I am in agreement with Mr Whitwell that there were no very strong grounds supported by sufficient cogent evidence for the judge to depart from the Country Guidance. On this basis I am satisfied that the judge's decision to do so was inadequately reasoned and an error of law. I am satisfied that this error undermines the judge's finding that the appellant has a well-founded fear of persecution in Somalia on the basis of being a member of a minority clan and that the changes in Somalia are not durable or non-temporary. Manifestly the appellant could not have succeeded under the Refugee Convention given the s72 decision, but had the judge's finding that the appellant was at real risk of serious harm as a minority clan member been sustainable, this would have affected the outcome of the appeal. I am satisfied that these findings are so flawed as to be unsustainable.

81. I briefly give consideration to the other errors raised by the respondent.

Article 8 ECHR

82. The judge gave consideration to Article 8 ECHR from [139] to [153]. The appeal was remitted by the Upper Tribunal on the basis that the appellant could not succeed under Article 8 ECHR. However, I am not in agreement that the judge erred by giving consideration to Article 8 ECHR because the previous decision was set aside in its entirety with no findings preserved. The judge could have simply dealt with Article 8 ECHR by stating that the appellant did not pursue this aspect of his appeal. In any event it is agreed that any error in this respect would not be material to the outcome of the appeal.

Opposing burden of proof

83. I am not satisfied that the judge misdirected himself with respect to the burden of proof in respect of the various components. There is an obvious typographical error at [159].

84. I set aside the decision of First-tier Tribunal Judge G Clarke on the basis that there has been a material error of law. I also set aside those findings which relate to the issue of cessation and Article 3 ECHR risk because the judge's approach to his findings is flawed.

Disposal

85. This appeal has already been heard twice by the First -tier Tribunal and the law is complex. There is no substantial fact-finding exercise to undertake and accordingly the appeal should be re-made by the Upper Tribunal in line with statement 7 of the Senior President's Practice Statements of 10 February 2010.

Preserved findings of fact

86. The following findings are preserved:

i. The appellant has not rebutted the presumption that he has been convicted of a serious crime and is a danger to the community and that s 72 Nationality, Immigration and Asylum Act 2002 applies to him.

ii. The appellant is excluded from protection under the Refugee Convention.

iii. The appellant is excluded from humanitarian protection pursuant to paragraph 339D (iv).

iv. The findings in respect of the s72 certificate from [109] to [136].

v. The appellant's deportation is not a disproportionate breach of Article 8 ECHR.

vi. The findings in respect of Article 8 ECHR from [139] to [153].

vii. The findings at [97] that the appellant was born in Mogadishu and is a member of the Benadiri minority clan. He is aged 46 and is in good health. He has not returned to Somalia during 20 years. He has worked in various manual jobs in the UK such as with DHL and Royal Mail.

viii. The findings at [98] that the appellant's ex-wife and children live in the UK but the appellant has not been in contact with them since 2013.

ix. The finding at [104] that the appellant's mother lives in Kenya with his sister and at [105] that the appellant does not have any close relatives in Somalia.

87. The resumed hearing will be in relation to the following issues only.

A - Cessation – Has the respondent proved that the cessation provisions apply? This is relevant to Article 3 ECHR.

B - Will the appellant's removal to Somalia be a breach of Articles 2 and 3 ECHR.

Decision

88. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

89. The decision of the First-tier Tribunal is set aside.

90. The preserved findings are set out above at [46].

91. The appeal is adjourned for re-making before the Upper Tribunal at a date to be notified.

Directions

92. Despite the present need to take precautions against the spread of Covid-19, and the overriding objective expressed at rule 2(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 and also at rule 2(2) to (4), I have reached the provisional view that it would in this case be appropriate to hear the appeal by means of a face-to-face hearing because AHM will be giving evidence through an interpreter.

93. I therefore make the following directions:

    i. The appellant is to file and serve, no later than 14 days before the resumed hearing, a skeleton argument together with any authorities addressing the issue of cessation and Article 3 ECHR. Any further evidence is to be accompanied by the relevant notices.

    ii. The respondent is to file and serve a position statement/skeleton argument in respect of the same issues no later than 7 days before the resumed hearing.

    iii. Liberty for the parties to provide reasons as to why a remote hearing is required in this matter no later than 7 days after this notice is sent out (the date of sending is on the covering letter or covering email).

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

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

Signed R J Owens Date 23 June 2021

Upper Tribunal Judge Owens