IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Appeal number:
RP/00114/2019

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 14 July 2023

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

M A M
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms A Radford, instructed by Turpin & Miller, Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

Heard at Field House on 28 April 2023

DECISION AND REASONS

1. The appellant appeals with permission against a decision of the Secretary of State made on 27 November 2019 to cease his refugee status and to refuse his human rights claim. His appeal against that decision was allowed by the First-tier Tribunal for reasons set out in the decision of Judge Loughran, promulgated on 6 January 2021.

2. For the reasons set out in my decision promulgated on 25 November 2021, that decision was set aside. A copy of that decision is annexed to this decision.

Background

3. The appellant was born on 10 January 1992, arriving in the United Kingdom in 1999 at the age of 7. He arrived here in the company of one of his brothers and they were reunited here with two older brothers (AA) and (AB) who had arrived before them. Some seven months later the rest of the family arrived.

4. The appellant is one of thirteen siblings. He has six brothers and six sisters.

5. The appellant and his family are from Merka although, unlike his siblings, he was born in Mogadishu. The appellant has no memories of his time in Somalia and no longer speaks Somali.

6. When the appellant was 16, in 2007, he had a very bad moped accident in which he fractured his femur and tore the ligaments in both knees. He still has ongoing health issues including nerve problems in his left foot and right knee pain as a result of that. He spent four months in hospital, six months in a wheelchair and stopped attending school. The athletic career that he was working towards was no longer possible and he believes this caused him depression. It also affected severely his academic studies.

7. Between 2007 and 2016 the appellant was convicted on eleven occasions of 22 offences, mostly concerned with drugs, the most recent and most serious being a conviction for possessing class A drugs with intent to supply for which he was sentenced to 57 months' imprisonment. Whilst in prison, the appellant says that he struggled with mental health issues; he was also stabbed and otherwise seriously assaulted. He was later diagnosed with PTSD as a result of what had happened.

8. The appellant is on medication for his depression and anxiety which has made it difficult for him to work.

9. The respondent's case is that the appellant can return to Somalia and that deporting him there would not be in breach of his rights pursuant to Article 3 or 8 of the Human Rights Convention. The reasons for those conclusions, and why he is to be excluded from the protection of the Refugee Convention are set out in the refusal letter.

First-tier Tribunal Judge's Findings

10. The appellant appealed to the First-tier Tribunal but did not attend his hearing. Nonetheless, and in the light of concessions made by the respondent at that hearing (to which I will turn in due course) the judge allowed the appeal.

11. The judge found that the appellant was excluded from the protection of the Refugee Convention pursuant to Section 72 of the Nationality, Immigration and Asylum Act 2002 as he had not rebutted the presumption that he had been convicted of a particularly serious crime and is a danger

to the community. She accepted also [35] that the circumstances which caused the appellant to be a refugee had ceased to apply and concluded, having directed herself in line with MOJ & Ors (Return to Mogadishu) [2014] UKUT 442 [43] concluded that the appellant would be unable to access the economic opportunities that had been produced by the economic boom in Mogadishu. In doing so she found that

12. The judge found:

(i) the appellant had no family associations to call upon in Mogadishu, accepting his evidence on that point given the length of time he had been away [44(iii)] and that would not have clan associations to call upon in Mogadishu;

(ii) the appellant had not been employed since his release and would therefore have no access to financial resources [44(iv)] and that his prospects of securing a livelihood without any familial or clan connections to assist him was very low [44(v)];

(iii) although the appellant was currently living with his cousin there was no evidence that she provides him with financial support, and she accepted the evidence of the sister despite her not being cross-examined that the appellant's family would not be able to help him given that the Secretary of State did not dispute the contents of that witness statement [44(vi)];

(iv) the appellant was living with his cousin but there was no evidence of financial support [44(vii)]

(v) the appellant's criminal history and mental health problems may present him with further barriers in accessing economic opportunities [45] noting the latter to the effect that he suffers from "mild-moderate depression with anxiety

Proceedings before the Upper Tribunal

13. The Secretary of State sought permission to appeal on the grounds that the judge had erred by making a material misdirection in law, submitting that:

(i) the judge had failed to have regard to the established case law in respect of Article 3 of the Human Rights Convention;

(ii) there was no evidence that the appellant would become destitute such as to result in a breach of Article 3 and inadequate reasons had been given as to why he would be unable to find employment in Mogadishu; that there was inadequate evidence he would have no clan support in Mogadishu and he was supported by a cousin in the United Kingdom and there is insufficient evidence to show why that would not continue when he is deported;

(iii) no reasons had been given as to why the appellant's mild-moderate depression and anxiety would prevent him from establishing himself in Mogadishu;

(iv) the judge had failed to have regard to SSHD v Said [2016] EWCA Civ 442, SB (refugee revocation; IDP camps) Somalia [2019] UKUT 00358 and SSHD v MA (Somalia) [2018] EWCA Civ 994.

14. On 13 April 2021 Upper Tribunal Judge Kekic granted permission to appeal on all grounds.

15. It was on that basis that the appeal first came before me on 19 November 2021 at a hearing which considered only whether the decision of the first-tier Tribunal involved the making of an error of law.

16. For the reasons set out in the attached decision, I found that the judge failed properly to explain why the appellant having to seek shelter in an IDP settlement would on that basis alone meet the high standard such that he would be subjected to treatment which would breach the high threshold to engage Article 3. I found further that the judge did impermissibly take into account the fact that the appellant has a criminal conviction and has a mild to moderate depression when assessing whether he could get employment.

17. I was satisfied that the decision of the First-tier Tribunal did involve the making of an error of law which was material in that it reached conclusions (a) that the appellant would not have support, and (b) would need to go into an IDP camp. Both of these were material to the outcome and for these reasons I set aside the decision of the First-tier Tribunal.

Subsequent developments

18. Although the decision that the First-tier Tribunal had erred in law was issued on 25 November 2021, the hearing proceeded only on 28 April 2023 as it had been adjourned on several occasions.

19. In addition, on 26 July 2022, the respondent sought to raise for the first time that she wished to withdraw the factual concession made in respect of the appellant and his witnesses. That was despite it being clear on the face of the decision, and not a point made at the error of law hearing.

20. The hearing before the First-tier Tribunal in this case took place on 2 December 2020 in the appellant's absence, and in the absence of witnesses whose statements were before the judge. The respondent was represented on that occasion by Mr Bose. The judge recorded that and wrote:

> 18. A full record of Mr Bose's submissions is contained in the Record of Proceedings. In summary Mr Bose relied on the reasons for refusal letter dated 27 November 2019 and summarised the respondent's case therein. Mr Bose highlighted that the appellant came from a large family with thirteen siblings and had also lived at his cousin's address since June. The number of siblings and cousin meant that they would able to provide the appellant with remittances in Mogadishu.

21. The judge also recorded [22] that:

> Mr Bose informed me that he had no comment on the lack of attendance by the Appellant. He confirmed that the contents of the Appellant's witness statements and that of the witnesses are not disputed.

22. It is of note that in those statements, K B (the appellant's sister) stated that:

> We are all in the UK and [the appellant] would have not help of support if he is sent back to Somalia. I am currently a student and would not be able to help Mohamed financially if he were to be sent back to Somalia, and I know that my family would also not be able to help

23. In her decision at 44 (vi), the First-tier Tribunal judge stated:

> Notwithstanding the fact that [KB] was not before me to be subjected to cross-examination, I accept her evidence. … Importantly, as detailed above, Mr Bose confirmed that the contents of the witness statement was not disputed

24. For the reasons set out in my decision of 23 November 2022 (copy attached) , I refused the respondent's application to withdraw the concessions made.

The Hearing on 28 April

25. I heard evidence from the appellant and one of his sisters. I also heard submissions from both representatives. In addition, I had the following before me:

(1) appellant's bundle;

(2) appellant's consolidated bundle;

(3) respondent's bundle.

(4) skeleton argument from Ms Radford with annex;

(5) extract from DSM-5 (in relation to the expert report)

26. The appellant gave evidence in English, adopting his witness statement.

27. In cross-examination he confirmed that he, unlike his siblings, was born in Merka. He said that he currently lives with his mother and father and six or seven of his siblings, maybe eight. He said he had ceased to live with a cousin with whom he had lived in the past, that he was not really a cousin describing him as he was part of his brother's wife's family. That had been his bail address and he had stopped living there.

28. The appellant confirmed that several of his sisters had graduated from Anglia Ruskin in early child studies but did not know when they graduated or if they were working. Asked why they were not working he said maybe perhaps they were waiting to get married which was a traditional thing in his family.

29. The appellant said a few in his family work, his brother Ahmed who has eight children works as an Uber driver. He said that those living at the same address as him did not work, being reliant on jobseeker's allowance and Universal Credit which also paid for the rent. He said he relied on jobseeker's allowance to which he was entitled.

30. He confirmed that he had planned to open a restaurant with others with the assistance of family friends. The plan had fallen through although he had been painting and decorating the shop for about a year and a half, that there had been no progress. He said they had found that out at the end of last year. Asked why this had not been mentioned in his witness statement he said that it had started to fall through at the end of last year but that that had only become final recently.

31. The appellant said that none of his siblings would be able to provide him with money nor would other members of the close family.

32. He said that he had told the psychologist the truth in the interviews he had had with her. It was put to him that he had said (page 44) that he had not drunk, he had received a driving ban in 2020 although the Police National Computer record showed that he had been convicted on 19 April 2021. He said he thought the psychiatrist had got it wrong and there was no need to lie about that to the psychiatrist, that drug driving and drink driving were the same thing. He said he was not taking drugs anymore and that he had attended an event, he had eaten sweets which had drugs in them. He said that this was not evidence that he had smoked. The blood test showed a level just above the limit. He said the psychiatrist also got the number of his siblings wrong (3.2.1).

33. The appellant said he could not recall exactly whether he came with one or two brothers and that there were four of them by the time they arrived in Liverpool. He did not recall how he had come to the United Kingdom, that his sisters arrived in a different way. He said that all of his siblings had their own stories about how they had arrived; his was different and this had all merged into one.

34. The appellant said that he had previously worked with his father in a travel agency but was not sure if he was still working in that business although he lived in the same house as him.

35. He said he could not get a job in Somalia as it was a very dangerous place and he would not be able to focus without the support from his family and that he suffers from PTSD and anxiety.

36. He was asked where he had received the diagnosis of PTSD. He said it was in the documents (page 67) and that the diagnosis would have to be in the health referral where the nurses had not agreed with this (page 201). He said he would not have been prescribed medicine had he not been diagnosed with PTSD and anxiety.

37. The appellant said that he speaks to his parents in English and that they speak Somali and Arabic to each other. He said he had forgotten Somali but remembers some Arabic which he had learnt from his brothers in the family home.

38. In re-examination the appellant said that none of the women in his house worked. He is close to his sisters but that his relationship with his brothers was on and off, rarely speaking to the older two who were married with their own children but he was not sure if AW was still married. He said he was close to his mother but he had put his parents through a lot when he had been sent to prison.

39. I then heard evidence from the appellant's sister AAB who adopted her witness statement.

40. In cross-examination she said that the appellant was not always in the house and that he comes and goes. She did not know where he goes and she did not ask him. Asked who did live with her she said that all of her sisters plus three of her brothers as well as her and her children and her parents. She said that one of the brothers works as a travel agent.

41. She said that her parents speak English at home, at other times the family do watch movies in Arabic. She was not sure why none of her other brothers and sisters had come to give evidence and that he may have more issues with some of them than her. She was not sure if he had asked them and that there may be some sensitive issues with the parents. She said she felt a bit awkward, but they do as much as they can to show him love despite what happened.

42. She confirmed that her sisters who had graduated from Anglia Ruskin were still looking for jobs. She confirmed they had all studied together and graduated at slightly different times.

43. Asked how the household got by financially she said that everyone supports themselves; she looks after her children and people do what they can and that they support each other if, for example, there was a need for food, they would try to provide that.

44. She said that if the appellant were to return to Somalia the family would not be able to support him as they were all struggling financially.

45. In response to my questions Ms AAB confirmed that she and the family spoke modern and standard Arabic, being the language of their religion but most of the time they spoke English.

Submissions

46. Mr Tufan submitted that it was not credible that the appellant no longer spoke Somali. His citizenship application indicated that his mother was from Mogadishu and that the family would have links with it, there was nothing to suggest the family do not speak Somali as well as Arabic. He

submitted that the appellant had worked in a travel agency and so was conversant with employment and, as an aspiring entrepreneur seeking to set up a restaurant, there was no reason why he could not work in Somalia.

47. Turning to support Mr Tufan submitted that the evidence that the family would be unable to support him was insufficient, there being no evidence that the family were, as he had said, on Universal Credit and that the sister's evidence was not supported by documentary evidence.

48. He submitted further that the appellant would be able to rely on the facilitated return scheme which would be assistance on return covering his expenses for a period long enough for him to find a guarantor. There was no reason why he would end up in an IDP camp and even if he did that did not necessarily result in the appellant facing an Article 3 risk.

49. Mr Tufan submitted that there was no formal diagnosis before me of PTSD, that the appellant had not been truthful to the psychiatrist. Similarly, the report was based on the appellant's account that he had not taken drugs which was not truthful. He submitted it was unlikely the appellant had not smoked and that the risk of suicide, such as it was, was insufficient to meet the high threshold established in the case law.

50. Turning to Article 8 Mr Tufan submitted that the appellant was no longer socially integrated into the United Kingdom thus could not meet Exception 1 although it was accepted he had been lawfully resident for most of his life. He submitted further that, relying on Kamara, and also on Mwesezi, that there were no significant obstacles to the appellant integrating into life in Somalia. He submitted further that there were not in this case very compelling circumstances and there was little evidence to suggest that the people from Brava were discriminated against.

51. Ms Radford relied on her skeleton argument submitting that in this case the appellant was not in effect from Mogadishu despite having been born there. The family were Bravanese from Merka, not Mogadishu. She submitted that there was no suggestion in the refusal letter or elsewhere that the appellant had not told the truth about his past, that that had been accepted previously. It was credible that neither the appellant nor his sister speaks Somali having been brought up speaking Arabic and that now English had become the main language of the house.

52. Ms Radford drew my attention to the fact that the Secretary of State had in 2020 accepted there was no financial support available to the appellant and the question therefore was whether that had changed. She submitted that there was insufficient evidence to show what had changed now and that the relationship between the appellant and his family was strained since his imprisonment. That, she submitted, was not implausible.

53. Ms Radford accepted that there was no formal diagnosis of PTSD in the medical evidence before me as they did not have access to the full detention records. She did, however, submit that there was a diagnosis of

severe depression and that the suicide risk in this case was, given the effect of deportation, likely to result in suicide, accordingly the appellant met the threshold for Article 3 on that basis too. Ms Radford submitted also that the appellant was not a member of the Reer Hamar but was from Brava and that he had little to offer on return to Mogadishu. He would be disadvantaged as explained in the expert report, and that the money available under the facilitated return scheme – only £1,500 if you apply during a custodial sentence, would at best delay his destitution by a few weeks. He had no employment history or vocational skills.

54. Turning to Article 8, Ms Radford submitted that the appellant's integration had not been lost and that the case law demonstrates that whether or not someone has lost integration is a fact-sensitive exercise. She submitted there will be significant obstacles to integration in this case given the whole family had left a long time ago and the country had changed significantly.

The Law

55. It is for the appellant to show, on the lower standard, that returning him to Somalia would be in breach of the United Kingdom's obligations pursuant to article 3 of the Human Rights Convention; or, that to do so would be in breach of his other rights under that convention, in particular Article 8 thereof.

56. The focus of this appeal is relatively narrow. It is, nonetheless, necessary to consider whether it would be reasonable to expect the appellant to relocate to Mogadishu, having had regard to the most recent country guidance case, OA (and taking into account also MOJ. In doing so, I adopt the approach to cessation as set out in MA (Somalia) [2019] 1 WLR 241. As was noted in MS [2019] EWCA Civ 1345 at [49]:

> 49. In summary, in a case in which refugee status has been granted because the person cannot reasonably be expected to relocate, a cessation decision may be made if circumstances change, so as to mean that that person could reasonably be expected to relocate, provided that the change in circumstances is, in the language of the Qualification Directive, "significant and non-temporary". Helpful guidance in relation to the assessment of the reasonableness of internal relocation is given in the recent decision of this Court in *AS (Afghanistan) v SSHD* [2019] EWCA Civ 873.

57. Much of the appellant's account has been accepted and a significant number of facts have been preserved as set out above. It is necessary, I consider, to focus in light of OA on a number of particular factors which are of particular reference. It is of note in this case that the appellant has never lived in Mogadishu, having left Somalia as a young child.

58. Much of what the appellant said has been accepted by Judge Loughran and her findings are preserved as set out above. There is a significant degree of consistency in the evidence before me as to what had happened

to the appellant in the past. The accident in which he suffered a serious injury is confirmed by the medical evidence and there is no good reason to disbelieve it. Similarly, the claim that the appellant was stabbed and assaulted in prison is one marked by an almost contemporaneous account set out in the medical notes. There is no suggestion from those notes that what he had said regarding the stabbing was untrue.

59. Equally, there was no real challenge to the appellant's account of when he and his siblings, and for that matter their parents, arrived in the United Kingdom.

60. With respect to the position of the Bravanese, I accept the expert evidence of Ms Riley, which was unchallenged on this point, that the Bravanese and the Reer Hamar both fall within the people referred to as the Benadiri. As Ms Riley notes [14] the Benadiri community do not all speak the same languages, Bravanese for example being spoken by the Bravanese, Af-Hamar being a dialect of Somali spoken amongst the Reer Hamar. The evidence also cited indicates that the Benadiri speak Somali as a second language [16].

61. I am satisfied from the material before me that the situation in the appellant's home area, Merka, is considerably worse than that which exists in Mogadishu. Ms Riley's evidence, backed up by the UN Office for the Coordination of Humanitarian Affairs is that the situation there is particularly dire with predicted famine, drought and a sharp uptake in diseases, lack of access to medical care. This appears to have deteriorated since the beginning of 2022 and the security situation in Merka appears not to have improved since 2020.

62. On that basis, I consider the focus of this decision must necessarily be whether the appellant could be expected to relocate to Mogadishu.

The Appellant's Credibility

63. In assessing this, I have taken into account the psychologists report, bearing in mind that he may be a vulnerable individual.

64. There are a number of differences between the appellant's evidence and that of his sister's. He gave no indication that he did not spend his time at home and he seemed unable to give clear evidence as to who actually lived in the house with him. His sister was clearer on that point but equally, I have no documentary evidence before me as to how her family survives. If, as is claimed, they are reliant on jobseeker's support or Universal Credit, documentation of that sort should be easily available. Similarly, if they hold bank accounts, bank statements could have been provided. As it is, I am left with the evidence of the brothers and sisters which has not been tested by cross-examination and which does not exhibit documentary evidence as evidence of what could easily be shown. I have no reason to doubt, however, AAB's evidence that she has three children to support. But, I bear in mind also, that there is clear evidence of a lack of family support due to the appellant's offending. That may also

account for the lack of documentary evidence from those family members other than Ms AAB.

65. That said, I bear in mind the preserved findings of fact. The issue is, in effect, whether there has been a change in circumstances.

66. The evidence from the brother AA is simply that he works part-time and is struggling. No figures were given and no detail of his income or what support, if any, he receives by way of benefits. His sister K A M B says simply that she is 23 and unemployed and that she would not be able to help him financially. The evidence of his sister S A M A is similar but she gives no details as to how she supports herself or is supported, nor does W B or A A M B.

67. I recall that a finding by Judge Loughran that the appellant had no family association to call upon in Mogadishu is preserve. In any event given the length of time that the family have been away from Somalia and lack of any evident ties to Mogadishu of either a family, extended family or clan, that is unsurprising.

68. I accept also, given the preserved findings, that the appellant does not speak Somali and that he and his siblings now speak English or otherwise Arabic. That again is consistent with the family coming from a Bravanese background from Merka.

69. I have some difficulty with what the appellant told the psychologist about his most recent conviction. I accept the appellant's evidence that he would not have lied to her about the date . It is clear that he told her about the date of the incident, that is in 2020, albeit the conviction was not until 19 April 2021. The appellant's evidence is that he took some kind of sweet which had drugs in it is consistent with him not smoking but it is indicative of him taking drugs. He did not say that he was unaware that the sweets contained drugs and the indication is also from the conviction that the car was not roadworthy given the additional conviction for driving a car with bald tyres. That said, the detail of what was discussed is unclear.

70. The appellant's evidence as to him looking forward to opening a restaurant is also inconsistent. There is no mention of any danger to the plans in his witness statement made in February 2023 yet he now says that the plans had started to fall through well before that. Further, as Mr Tufan submitted, that is indicative of someone with a degree of entrepreneurial spirit.

71. That said, it is evident from the psychologist's report that the appellant was looking forward to the restaurant project, and that it was a positive factor in keeping his mood up.

72. Returning to the relevant country guidance set out at paragraphs (ix) and (x) of **MOJ**, I bear in mind the need to conduct a careful assessment. I accept the evidence that the appellant had not lived in Mogadishu for any

materially long period before he left Somalia. He and his family have been absent for some 24 years and neither he nor his family, let alone their clan, that is the Bravanese, have associations to call on in Mogadishu. He has limited experience of work and has no particular skills to offer. He does speak English but equally he does not speak Somali although I accept that he speaks some Arabic. It appears that he has been supported by family or benefits whilst in the United Kingdom rather than employment. The circumstances of the funding of his journey to the United Kingdom are now so long ago as to be of little or no relevance. The question then arises as to whether the appellant will be able to rely on remittances from abroad.

73. A further issue also arises as to his mental health and his ability to cope on return.

74. I have no reason to doubt and I accept Dr Symmonds' assessment that he has symptoms of PTSD having experienced multiple traumatic experiences (7.0.3). She observes an ongoing depression and symptoms of anxiety which is consistent with the previous material and also prescription of antidepressants. That diagnosis is consistent with the appellant's apparent difficulties with family.

75. In a careful and measured report, Ms Symmonds concluded that while it is difficult to determine the appellants level of impairment, following the trauma associated with his traffic accident and the assaults he suffered in prison:

> The main impairment appears to surround his ability to function daily on a consistent basis. Within this assessment Mr. Mohamed presents as experiencing ongoing depression and symptoms of anxiety that are above threshold for a diagnosis of mixed anxiety and depressive disorder [1.4]

76. It appears that the depression and other symptoms have persisted since his moped accident some years ago.

77. While not making a formal diagnosis of PTSD, the report records at [3.4.10]:

> In summary, assessment of [the appellant]'s mental health indicates the presence of symptoms consistent with Post Traumatic Stress Disorder (PTSD). However, this is limited by his self-reported narrative and the results of the TSI-2 cannot be reported. Due to this, I have commented below on how his narrative is associated with Criterion within the TSI-2, but I am unable to comment upon whether he would meet threshold for a formal diagnosis at the current time but symptoms of PTSD are considered to be present. [the appellant] has experienced multiple traumatic experiences in which he was exposed to serious injury, both in his adolescence with a moped accident and in prison due to a sexual assault [Criterion A]; he experiences Intrusion symptoms and reports the presence of intrusive memories of his experiences [Criterion B]; avoidance symptoms are present in that he avoids going out alone and avoids many aspects of his daily life, though this also appears to

> be associated with his mood [Criterion C], Cognitions and Mood symptoms are present in his negative beliefs about himself, others and the world and his mistrust of others and distorted self-blame for his experiences. He feels guilty and feels he has let his parents down; he feels he is not good enough and reported feelings of hopelessness and worthlessness and the belief that he is a burden to others [Criterion D], Arousal and Reactivity symptoms are present in his irritability and anger, his hypervigilance outside the home and his sleep disturbance and problems with concentration [Criterion E]; the duration of disturbance is greater than one month [Criterion G]. It is difficult to determine the level of impairment in functioning at present, though from his description, he appears to have difficulty engaging with basic day to day tasks; Mr. Mohamed reports spending time in the company of his family and indicated that he would socialise more frequently. Ongoing monitoring of his mental health is advisable. His living situation is currently uncertain, particularly in the event that he is deported, and he reports feeling stressed by his situation and the current Immigration Proceedings; both could be having a current impact upon his presentation.

78. Whilst I note Ms Radford's submissions, based on DSM-5, that the diagnosis of a major depressive disorder requires the symptoms to cause clinically significant distress or impairment in social, occupational or other important areas of functioning, there is no direct reference to that in Dr Symmonds' report. Against that there is the observation (7.0.8) that the appellant has some internal protective factors. There are also external factors which assist with his familial support and the availability of professional support and presence of external control. He does require additional coping skills and it is noted also (7.0.7) that employment is likely to be a protective factor for the appellant providing stability which earned an income for him.

79. Taking all of these factors into account, I conclude that because the appellant does not speak Somali; has no family contact with Mogadishu, and no clan links to that city; is from a minority clan originating from Merka, and with no obvious skills, that there is no real prospect of him getting any help or informal sponsorship/guarantor in Mogadishu.

80. The preserved finding is that, as at the date of the last hearing, that there would be no support from family. That, given then prevailing circumstances, is plausible. The issue is whether that is still the case.

81. There is some evidence is that there has been a breakdown in the family due to the appellant's criminality, and the absence of family from the hearings may well be as a result. Equally, in the psychologist records the appellant saying he gets support from his family emotionally.

82. Despite some doubts as to Ms AB's evidence due to the lack of documentary evidence, I am satisfied that she has severe financial constraints as the mother of three children to support.

83. Looking at the evidence as a whole, the picture is of parents and some siblings who feel morally obliged to assist the appellant, but of others who

in effect want nothing more to do with him. The parents are prepared to offer accommodation but little more.

84. The picture presented of the significant support the appellant gets from his family presented to the psychologist is different from that presented in the oral evidence before me in that the appellant and to a lesser extent his sister present a picture of limited involvement.

85. Despite some misgivings as to the appellant's credibility, but given the preserved findings of fact, and viewing the evidence as a whole, I am satisfied that the appellant will not be in receipt of remittances from the United Kingdom from his family or others although he will have some funds from the facilitated returns scheme. Further, and in any event, I am not reliant on his or the witnesses' evidence as to the difficulties he faces in Mogdishu; the live issues in that regard are whether he would receive remittances from the UK and/or whether he could get a sponsor.

86. If returned to Somalia the appellant will be without support on the ground. I bear in mind what was written in OA(Somalia) at [262]-[265] and [275] – [285]. While the appellant may be able to obtain some financial support, he has no familiarity with Mogadishu. He does have significant mental health problems which are, on the basis of the medical evidence, likely to deteriorate significantly from the existing major depressive order if sent to a country with which he is not familiar, in difficult circumstances, and without the presence and moral support of family. He is unlikely to find a guarantor, given the particular circumstances of the family and length of time they have been absent, in addition to the lack of clan/extended family ties to Mogadishu.

87. Overall, taking all of these factors into account, I am satisfied that this appellant would, given the particular characteristics he has, be unable to benefit from the economic boom owing to a number of factors set out above.

88. The question then arises whether the appellant would have to rely on an IDP camp. In this regard I had paid attention to paragraph 286 to 340 of OA (Somalia). I note in particular:

> 338. The legal implications of our findings concerning the conditions in IDP camps vary according to the context of the analysis. We do not consider that the *MSS* Article 3 threshold applies to an "ordinary Somali" returning to Mogadishu. The humanitarian conditions likely to be encountered by most returnees upon their return are attributable primarily to poverty and the State's lack of resources and infrastructure, meaning the *N* threshold applies (including as modified by *Paposhvili*, and as applied to living condition cases, in line with *Ainte*). Even pursuant to the clarified post-*Paposhvili* Article 3 threshold, there are a number of likely features of most returnee's circumstances which combine to take the long-term responsibility for the returnee's circumstances out of the hands of the Secretary of State. They include (i) the availability of the FRS, which provides a returnee with an initial period of up to a month to begin to establish themselves; (ii) the

possibility of remittances; (iii) the economic boom; and (iv) in-country clan support. For most returnees, while the long term possibility of having to resort to accommodation in an IDP camp cannot be ruled out, the prospect of a returnee being forced to resort to an IDP camp or other informal settlement at some undefined future point is likely to be too remote, and too far removed, from the Secretary of State's removal decision to merit speculation as to whether the Secretary of State could properly be said to be responsible for the returnee's eventual (and potentially fluctuating) living conditions in such a camp or settlement. Such persons will be in the *Vilvarajah* territory of being no worse than a general member of the population.

339. 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 FRS 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.

340. Where an individual has established that they face a well-founded fear of being persecuted such that internal relocation is a live issue, the analysis is different. Such an assessment necessarily entails an examination of the prospective, longer term, living arrangements. In those circumstances, as was the case in *MOJ* as held by *Said*, the humanitarian conditions in the IDP camps and informal settlements acquire a greater potential relevance. It is established refugee law that the "unduly harsh" test for internal relocation entails a materially lower threshold than that necessary to establish an Article 3 ECHR claim, and to that extent it will be necessary to consider whether residence in an IDP camp or informal settlement will be unduly harsh, consistent with the guidance in *MOJ* at [408] which, as clarified by *Said*, was referring to internal relocation.

89. I bear in mind that the reasons that the appellant is said no longer to be a refugee were upheld by the First-tier Tribunal. This is not a case where an appellant is, although a refugee, excluded from protection. I am satisfied that the appellant will have access to some provision of support under the facilitated returns scheme, although he is not for a combination of factors likely to get employment or proper accommodation, or clan support. Given the particular factors of this case, and bearing in mind his position likely to be aggravated by a deterioration in his mental health, it is reasonably likely that he will end up in an IDP camp.

90. Accordingly, I have gone on to consider whether this appellant is at risk of an Article 3 breach as a result. I note the observation that such cases will be rare, but equally this appellant is returning to a country in which neither he nor his family have lived in nearly 25 years, with which he has few links, a significant mental health problem and no familiarity with the language let lone the circumstances of life there. The evidence of the

mental ill-health was not before the First-tier Tribunal. I consider that it adds significantly to the appellant's case.

91. Taking all of these factors into account, and viewing the material as a whole, I consider that there is a real chance, given the appellant's particular circumstances including his position as a minority clan member originating outside Mogadishu with no links there, that his removal will result in an article 3 breach owing to the particular and perhaps highly unusual circumstances in which he will find himself as a vulnerable individual in an IDP camp, and coming from an ethnic group with no supportive presence in the Mogadishu area, and not speaking Somali.

Article 8

92. As I have found that the appellant's deportation would be in breach of article 3, it is not strictly necessary to consider whether removal would be in breach of article 8 of the Human Rights Convention. I have, however, done so in the alternative, if I am wrong that article 3 is engaged, given that high threshold.

93. Section 117C of the 2002 Act provides as follows:

> **117C Article 8: additional considerations in cases involving foreign criminals**
>
> (1) The deportation of foreign criminals is in the public interest.
>
> (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
>
> (3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
>
> (4) Exception 1 applies where—
>
> (a) C has been lawfully resident in the United Kingdom for most of C's life,
>
> (b) C is socially and culturally integrated in the United Kingdom, and
>
> (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
>
> (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
>
> (6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.
>
> (7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

Paragraph 398 of the Immigration Rules replicates the framework.

94. In the case of individuals who have been sentenced to a period of imprisonment of four years or more or if neither Exception is to be met, the test is one of “very compelling circumstances, over and above those described in Exceptions 1 and 2”.

95. I accept that “over and above the Exceptions” does not exclude or restrict the analysis to factors relevant to the issues dealt with in the Exceptions and we adopt the approach endorsed by Jackson LJ in NA (Pakistan) v SSHD [2016] EWCA Civ 662 at [37]:

> 37. In relation to a serious offender, it will often be sensible first to see whether his case involves circumstances of the kind described in Exceptions 1 and 2, both because the circumstances so described set out particularly significant factors bearing upon respect for private life (Exception 1) and respect for family life (Exception 2) and because that may provide a helpful basis on which an assessment can be made whether there are "very compelling circumstances, over and above those described in Exceptions 1 and 2" as is required under section 117C(6). It will then be necessary to look to see whether any of the factors falling within Exceptions 1 and 2 are of such force, whether by themselves or taken in conjunction with any other relevant factors not covered by the circumstances described in Exceptions 1 and 2, as to satisfy the test in section 117C(6).

96. I observe also the comments made by the Upper Tribunal in MS (s.117C(6): "very compelling circumstances") Philippines [2019] UKUT 122 (IAC) at [16] and [20]:

> 16. By contrast, the issue of whether "there are very compelling circumstances, over and above those described in Exceptions 1 and 2" is not in any sense a hard-edged question. On the contrary, it calls for a wide-ranging evaluative exercise. As NA (Pakistan) holds, that exercise is required, in the case of all foreign criminals, in order to ensure that Part 5A of the 2002 Act produces, in each such case, a result that is compatible with the United Kingdom's obligations under Article 8 of the ECHR.
>
> …
>
> 20. For these reasons, despite Ms Patyna's elegant submissions, we find the effect of section 117C is that a court or tribunal, in determining whether there are very compelling circumstances, as required by subsection (6), must take into account the seriousness of the particular offence for which the foreign criminal was convicted, together with any other relevant public interest considerations. Nothing in KO (Nigeria) demands a contrary conclusion.

97. I accept also that in determining the public interest, regard is to be had to what is said in Section 117C(2); namely, that the more serious the offence, the greater is the public interest in deportation (MS at [47]). Further, by making the seriousness of the offence the touchstone for determining the strength of the public interest in deportation, parliament, in enacting Section 117C(2), must have intended courts and Tribunals to have regard to more than the mere question of whether the particular

foreign criminal, if allowed to remain in the United Kingdom, would pose a risk to United Kingdom society(MS at [50]).

98. An element of the general public interest is the deterrent effect upon foreign citizens "of understanding that a serious offence will normally precipitate their deportation [might] be a more powerful aid to the prevention of crime than the removal from the UK of one foreign criminal judged as likely to reoffend" (MS at [69]).

99. It is not suggested that the appellant meets exception 2 in section 117C of the 2002 Act.

100. I am satisfied that the appellant does meet the first limb of Exception 1 of Section 117C. It is not in dispute that he has spent more than half his life in the United Kingdom.

101. In assessing whether he has lost his integrative links to the United Kingdom, I bear in mind that that is a matter of degree and is fact-sensitive. The appellant arrived at a young age and had the entirety of his education in the United Kingdom. Notwithstanding his criminal offending, this was at a relatively low level until the index offence which resulted in a term of imprisonment for 57 months. All of the appellant's family remain in the United Kingdom and he remains in contact with a large number of them. He has their active support in this appeal. The appellant is in effect someone who has been brought up in the United Kingdom. His fluency in English and the manner in which he gave evidence gave no indication that he had not been born and brought up in this country. There is little or no indication that the appellant has returned to his previous serious criminal ways since his release from prison absent a conviction for driving under the influence of drugs and in a car which was not roadworthy. While these are significant matters I find, looking at the evidence as a whole, that the appellant does continue to integrate into the United Kingdom.

102. The question then arises whether there will be significant obstacles to the appellant's integration into life in Somalia. Again, this is a fact-sensitive matter and I do not consider that Mwesezi v SSHD [2018] EWCA Civ 1104 adds significantly to what Lord Justice Sales said in Kamara v SSHD [2016] EWCA Civ 813

103. While I accept that the appellant has been brought up in a family of Somali origin, they are from a particular minority. He faces return to Mogadishu, an area with which he has no ties and where he does not speak the language. Almost the entirety of how he has grown up has been in the United Kingdom and, for the reasons given above, the combination of the appellant's mental health and lack of skills will, I find, make it very difficult for him to integrate into Somali society. He has now terms of reference which would allow him to become an insider and in the circumstances of this case I am satisfied that there are very significant obstacles to his integration.

104. Accordingly, I am satisfied that Exception 1 is made out. That, however, is not enough and I must go on consider whether there are very compelling circumstances over and above that.

105. In the light of my findings as set out above, the appellant would relatively soon after arrival in Somalia, end up in an IDP camp in very difficult circumstances, with deteriorating mental health. He has grown up in the United Kingdom and it would be very difficult for him to survive in anything other than the most difficult of circumstances, with no family to turn to, no adequate accommodation and no prospect of employment, in a precarious situation where he would be isolated.

106. In the circumstances, I am satisfied that removal would, even if the article 3 threshold is not met, removal would be in breach of article 8 as his circumstances would be very compelling, over and above exception 1, and bearing in mind the nature and seriousness of his offending.

Notice of Decision

(1) The decision of the First-tier Tribunal involved the making of an error of law. I set it aside.

(2) I remake the appeal by allowing it on Human Rights grounds.

Signed Date 22 June 2023

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul

ANNEX - ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00114/2019

THE IMMIGRATION ACTS

Heard at Field House
On 19 November 2021

Decision & Reasons Promulgated

.....

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

and

MAM
(ANONYMITY DIRECTION MADE)

Appellant

Representation:
For the Appellant: Mr T Lindsay, Senior Home Office Presenting Officer
For the Respondent: Ms A Radford, instructed by Turpin Miller Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against a decision of First-tier Tribunal Judge Loughran, promulgated on 6 January 2021 allowing MAM's appeal against a decision to deport him from the United Kingdom.

2. Between 2007 and 2016 the MAM (to whom I refer as the appellant as he was in the First-tier Tribunal) was convicted on eleven occasions of 22 offences, mostly concerned with drugs, the most recent and most serious being a conviction for possessing class A drugs with intent to supply for which he was sentenced to 57 months' imprisonment. Despite that and despite his failure to attend the hearing at which he was not represented, and despite the Secretary of State ((to whom I refer as the respondent as she was in the First-tier Tribunal) knowing that he had

been an absconder since 13 October 2020, she conceded that the contents of the appellant's witness statement and those of the witnesses were not disputed despite the fact they did not attend either, and the statements appear not even to have been signed.

3. The judge found that the appellant was excluded from the protection of the Refugee Convention pursuant to Section 72 of the Nationality, Immigration and Asylum Act 2002 as he had not rebutted the presumption that he had been convicted of a particularly serious crime and is a danger to the community. She accepted also [35] that the circumstances which caused the appellant to be a refugee had ceased to apply and concluded, having directed herself in line with MOJ & Ors (Return to Mogadishu) [2014] UKUT 442 [43] concluded that the appellant would be unable to access the economic opportunities that had been produced by the economic boom in Mogadishu. In doing so she found that:

   (i) the appellant had no family associations to call upon in Mogadishu, accepting his evidence on that point given the length of time he had been away [44(iii)] and that would not have clan associations to call upon in Mogadishu;

   (ii) the appellant had not been employed since his release and would therefore have no access to financial resources [44(iv)] and that his prospects of securing a livelihood without any familial or clan connections to assist him was very low [44(v)];

   (iii) although the appellant was currently living with his cousin there was no evidence that she provides him with financial support and she accepted the evidence of the sister despite her not being cross-examined that the appellant's family would not be able to help him given that the Secretary of State did not dispute the contents of that witness statement [44(vi)];

   (iv) the appellant was living with his cousin but there was no evidence of financial support [44(vii)]

   (v) the appellant's criminal history and mental health problems may present him with further barriers in accessing economic opportunities [45] noting the latter to the effect that he suffers from "mild-moderate depression with anxiety".

4. The judge then went on to consider the humanitarian situation in Mogadishu reliant on the Secretary of State's CPIN "Somalia (South and Central): Security and humanitarian situation November 2020" noting in particular paragraphs 2.4.6, 2.4.12 and 2.4.13.

5. The judge found that in consequence the respondent would have to seek shelter in an IDP settlement [50] and that, following AMM and MOJ & Ors, the very high standard required in N v United Kingdom is met by the conditions that he would be subjected to. The judge therefore allowed the appeal on Article 3 grounds.

6. The Secretary of State sought permission to appeal on the grounds that the judge had erred by making a material misdirection in law, submitting that:

   (i) the judge had failed to have regard to the established case law in respect of Article 3 of the Human Rights Convention;

(ii) there was no evidence that the appellant would become destitute such as to result in a breach of Article 3 and inadequate reasons had been given as to why he would be unable to find employment in Mogadishu; that there was inadequate evidence he would have no clan support in Mogadishu and he was supported by a cousin in the United Kingdom and there is insufficient evidence to show why that would not continue when he is deported;

(iii) no reasons had been given as to why the appellant's mild-moderate depression and anxiety would prevent him from establishing himself in Mogadishu;

(iv) the judge had failed to have regard to SSHD v Said [2016] EWCA Civ 442, SB (refugee revocation; IDP camps) Somalia [2019] UKUT 00358 and SSHD v MA (Somalia) [2018] EWCA Civ 994.

7. On 13 April 2021 Upper Tribunal Judge Kekic granted permission to appeal on all grounds.

The Hearing

8. Mr Lindsay submitted in respect of the evidence of financial support that the judge had failed to take into account that the appellant is from a family of thirteen and the submissions to that effect from the Secretary of State. He submitted that the broader concern was that the judge had relied on an absence of evidence rather than noting that it was for the respondent to prove that he did not have access to funds. He submitted further the judge had at paragraph 44(v) accepted the evidence of the expert evidence that "employment is limited" which is clearly different from there being a boom and nowhere notes the tension between that and the country guidance and thus had departed from MOJ without proper reasons for doing so.

9. Mr Lindsay submitted that the judge had erred in treating an IDP camp as necessarily being an Article 3 breach contrary to what was noted in Ainte (material deprivation–Article 3–AM (Zimbabwe)) [2021] UKUT 203 and that the judge misdirected herself as to the authorities.

10. Ms Radford submitted that the judge had proceeded on the basis that the Secretary of State confirmed that the contents of the statements were not disputed thus there are agreed facts which included the evidence that neither the appellant's sister nor other family could send money; the lack of clan support was reliant on MOJ and the inability for the family to send money back is dealt with in the sister's statement at paragraph 12. She submitted that in light of that and the other evidence that the judge's reasoning with respect to inability to obtain employment was adequate, supported with the other observations that he had limited education, the lack of family and clan connection and the lack of employment history in the United Kingdom. She submitted further that the criminal record and mental health problems were only said to be a factor and did not require further evidence. She submitted that the judge had properly followed the principles set out in the relevant case law.

11. In response Mr Lindsay accepted that the respondent was recorded as having accepted the evidence but submitted that what was said by the respondent's sister about lack of support was accepted as genuine evidence but that was not the same as saying it was sufficient, that the thirteen siblings of the respondent could provide no support at all and that that concession by the Secretary of State

needs to be read in the light of what was submitted at paragraph 18. He submitted further that what the judge had relied upon at paragraph 44(vi) was insufficient, that the absence of evidence goes only to the respondent not making out his case and that the burden had not been properly applied.

Discussion

12. In addressing the decision of the First-tier Tribunal I bear in mind the usual stricture that an Appellate court should be loathe to overturn the findings of fact made by a lower Tribunal albeit that in this case the lower Tribunal had not heard evidence from the appellant or his sister; the copies of the witness statements on file are not even signed.

13. As was held in Ainte, the guidance in MOJ has to be read in line with the decision in Said (see paragraphs 9- 12). The Upper Tribunal further held:

...

> 13. The first matter can be shortly dealt with, since it is uncontentious. It would seem that just as the decision in MOJ has been misconstrued by decision makers, so subsequently has the decision in Said. Mr Toal informed us that the decision has been interpreted by some as authority for the proposition that 'naturally occurring' socio-economic deprivation can never, as a matter of *law*, found a claim under Article 3. As Mr Anderson readily accepted, such an interpretation would plainly be wrong. It would be contrary to Strasbourg authority [3], the decision in Said itself [at §18 and §31], and we note that a submission to the same effect was carefully considered, and rejected, by the Tribunal in AM and AM (armed conflict: risk categories) Rev 1 Somalia CG [2008] UKAIT 00091 [at §87]. The N threshold is undoubtedly an extremely high one, but it is not insurmountable. Insofar as cases subsequent to Said have been read to the contrary, such readings are inaccurate. We are told, for instance, that the following passage in Secretary of State for the Home Department v MA (Somalia) [2018] EWCA Civ 994, [2018] Imm AR 1273 has been cited as authority for the proposition that Article 3 can never be engaged in instances of non-intentional socio-economic deprivation:
>
> "63. The analysis in Said's case [2016] Imm AR 1084, by which this court is bound, is that there is no violation of article 3 by reason only of a person being returned to a country for which economic reasons cannot provide him with basic living standards. …"
>
> The key to this passage is the term "only": there should be an analysis of the impact on the individual concerned, and living conditions must be bad enough to reach the minimum level of severity required to engage the article. Neither Said nor MA (Somalia) close the door on such cases.

14. I find that the judge has failed properly to explain why the appellant having to seek shelter in an IDP settlement would on that basis alone meet the high standard such that he would be subjected to treatment which would breach the high threshold to engage Article 3. In doing so she appears to rely on Ms O'Reilly's expert report but fails properly to explain why she preferred that over what was said in MOJ and the other case law in respect of the situation in camps.

That is not to say that the situation in the camps may not for a particular individual amount to inhuman or degrading treatment contrary to Article 3, merely that it requires to be decided. The basis of which the respondent seeks to justify the decision is that the CPIN Report as noted above says that those of minority groups who end up in IDP camps are "generally likely to face difficult living conditions that amount to serious harm or persecution" but does not engage with the specifics of this case.

15. I find further that the judge has failed properly to engage with the submissions made by the Secretary of State recorded at paragraph [18]:

> "18. A full record of Mr Bose's submissions is contained in the Record of Proceedings. In summary Mr Bose relied on the reasons for refusal letter dated 27 November 2019 and summarised the respondent's case therein. Mr Bowes highlighted that the appellant came from a large family with thirteen siblings and had also lived at his cousin's address since June. The number of siblings and cousin meant that they would able to provide the appellant with remittances in Mogadishu".

16. There is significant merit in Mr Lindsay's submission that paragraph at paragraph [44(vi)] the judge simply accepted this at face value as indeed she accepted at face value that he is living with his cousin but with no evidence of financial support. It was for the respondent to provide evidence of support.

17. That said, I do note that the Secretary of State appears to have accepted, for no rational reason, the statement from the sister that "I know my family would also not be able to help" as being sufficient. The other sister, Arwa says nothing about support but, bizarrely, says that her brother is "a man who learns from mistakes and I'm 100% sure he will never reoffend again" and refers to her brother's arrest being a real shock. Why she should have come to that conclusion given his history of offending over a number of years is unclear

18. Contrary to Ms Radford's submissions I consider that the judge did impermissibly take into account the fact that the appellant has a criminal conviction and has a mild to moderate depression when assessing whether he could get employment. There is no adequacy of reasoning on this point and I do not consider that they were peripheral.

19. I am satisfied for these reasons that the decision of the First-tier Tribunal did involve the making of an error of law which was material in that it reached conclusions (a) that the appellant would not have support, and (b) would need to go into an IDP camp. Both of these were material to the outcome and for these reasons I set aside the decision of the First-tier Tribunal.

20. Having considered the matter carefully I note that the Secretary of State has not withdrawn the concession made by Mr Bose. And, for that reason I do not consider it would be appropriate to remit this case to the First-tier Tribunal.

Notice of Decision

(1) The decision of the First-tier Tribunal involved the making of an error of law. I set it aside.

(2) The appeal will be re-made in the Upper Tribunal on a date to be fixed.

Signed Date 25 November 2021

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul

ANNEX – RULING ON APPLICATION TO WITHDRAW A CONCESSION

DECISION ON APPLICATION TO WITHDRAW A CONCESSION

1. On 26 July 2022, the Upper Tribunal gave directions that if, the respondent wishes to withdraw the factual concession with respect to the appellant and his witnesses' (see error of law decision at [15] to [17]), then any such application must be in writing and made within 10 working days. It was further directed that the appellant has 10 working days after that in which to serve any response. Both parties have made submissions.

2. The hearing before the First-tier Tribunal in this case took place on 2 December 2020 in the appellant's absence, and in the absence of witnesses whose statements were before the judge. The respondent was represented on that occasion by Mr Bose. The judge recorded that and wrote :

   18. A full record of Mr Bose's submissions is contained in the Record of Proceedings. In summary Mr Bose relied on the reasons for refusal letter dated 27 November 2019 and summarised the respondent's case therein. Mr Bose highlighted that the appellant came from a large family with thirteen siblings and had also lived at his cousin's address since June. The number of siblings and cousin meant that they would able to provide the appellant with remittances in Mogadishu.

3. The judge also recorded [22] that:

   Mr Bose informed me that he had no comment on the lack of attendance by the Appellant. He confirmed that the contents of the Appellant's witness statements and that of the witnesses are not disputed.

4. It is of note that in those statements, K A M B (the appellant's sister) stated that:

   We are all in the UK and [the appellant] would have not help of support if he is sent back to Somalia. I am currently a student and would not be able to help [the appellant] financially if he were to be sent back to Somalia, and I know that my family would also not be able to help

5. In her decision at 44 (vi), the First-tier Tribunal judge stated:

   Notwithstanding the fact that [K A M B] was not before me to be subjected to cross-examination, I accept her evidence. … Importantly, as detailed above, Mr Bose confirmed that the contents of the witness statement was not disputed"

6. The respondent submits that there was in fact no concession, and what is recorded as such is partly inconsistent with what Mr Bose is recorded as having said in paragraph 18 of the decision. It is submitted further that it is inconsistent with what Mr Bose had recorded in his notes, which is that he had submitted that there was not reason given why the appellant's siblings would be unable to support him in the United Kingdom. It is submitted, in the alternative, that it is in the interests of justice to permit the respondent to withdraw the concession.

7. The appellant submits that there is no reason to go behind what is recorded in the decision. And, that discretion should not be exercised to permit the

concession to be withdrawn, not least as there has been a failure to explain both promptly and frankly what the concession was made, why it is mistaken and why it is now just and fair to permit it being withdrawn.

8. I bear in mind that this point was raised only at the hearing on 26 July 2022, without notice. The apparent tension between the effective concession and what had been recorded elsewhere has been clear since my error of law decision, promulgated in November 2021. I consider that, for whatever reason, the respondent did in fact through her representative accept the factual account given by the appellant and his witnesses. He may have been unwise to do so, but that is what he did.

9. In assessing whether it would be fair to permit the respondent to withdraw the concession, I bear in mind that the factual concession is as to the ability of the appellant's family to support him at a fixed point in time, that is in 2020 in the midst of the COVID lockdown and pandemic. When the appeal is remade, it will be for the Upper Tribunal to consider whether, at that date, the appellant's siblings are able to support him. While a finding that they could not in December 2020 will be relevant, it cannot be determinative of the position some 2 years or more later, any more than a finding that they had been able to support him would be determinative of the position now.

10. Having had regard to the principles set out in SSHD v Davoordipanah [2004] EWCA Civ 106 NR (Jamaica) v SSHD [2009] EWCA Civ 856 and AM (Iran) v SSHD [2018] EWCA Civ 2706, and the observation in the paragraph above, I consider that it would not be fair to permit the respondent to withdraw her concession.

....

Signed Date: 23 November 2022

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul