



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: RP/00093/2017

THE IMMIGRATION ACTS

Heard at Birmingham Employment Tribunal
On 29th August 2018

Decision & Reasons Promulgated
On 13th September 2018

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

AA

(Anonymity Direction made)

Respondent

Representation:

For the Appellant: Ms H. Aboni, Senior Presenting Officer

For the Respondent: Mr Uddin, Counsel instructed on behalf of the Respondent

DECISION AND REASONS

I make an anonymity order pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Unless and until a Tribunal or court directs otherwise, the

Appellant 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.

The background:

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal (Judge Pooler) promulgated on the 24th January 2018. Whilst the appellant in these proceedings is the Secretary of State, for ease of reference I continue to refer to the parties as they were before the First-tier Tribunal.
2. There is also a cross appeal brought by the appellant who, in grounds settled on the 6th February 2018, seeks to challenge the decision to dismiss the appeal on Article 8 grounds. However in his submissions Mr Uddin on behalf of the appellant stated that if the Secretary of state's appeal was dismissed and the decision of Judge Pooler was to stand, then it would not be necessary to consider the grounds relating to Article 8.
3. The factual background is set out in the decision of Judge Pooler. The appellant is a citizen of Somalia, born in 1966. He arrived in the UK on 27th September 2001 and claimed asylum. His application for asylum was granted on the 3rd December 2001 and granted leave to remain following his recognition as a refugee.
4. On the 30th July 2015, the appellant was convicted of four counts of making or supplying articles for the use in fraud and on the 28th August 2015 he was sentenced to 14 months imprisonment concurrently for each count. He and his wife were co-defendants and the circumstances of the offending are set out in the sentencing remarks of the Circuit Judge and recorded at paragraph 4 of the First-tier Tribunal's decision.
5. On the 23rd October he was served with notice of liability to deportation and invited to submit reasons as to why he should not be deported. On the 29th February 2016 he was notified of the Secretary of State's intention to cease his refugee status and representations were submitted on his behalf on the 11th March 2016.
6. On the 19th June 2017, the respondent refused a protection and human rights claim, these being the Secretary of State's decisions to make a deportation order and to revoke the appellant's refugee status.

The decision of the Respondent:

7. The Secretary of State's position as set out in the decision letter dated 19th June 2017 states at [T3] his fear of persecution was no longer applicable on the basis that there has been a "fundamental and no-temporary change in Somalia and therefore you no longer continue to be a category of individual who would face treatment amounting to persecution in Somalia." The decision letter went on to set out and make reference to the letter from the UNHCR (dated 22 April 2016) and its reference to the country materials which the respondent considered pre-dated the CG decision of *MOJ & Ors*

(Return to Mogadishu) Somalia CG [2014] UKUT 00442 (IAC). The respondent stated that it had been noted that he had been granted refugee status on the basis of his ethnicity due to membership of the Benadiri-Shekhaal clan. In terms of whether he would be able to avoid treatment contrary to Article 3 of the ECHR upon return to Somalia, the respondent made reference to the letter of 29 February 2016 the findings in the case of MOJ and others were used to explain how he would be to avoid the worst exigencies of IDP camps as it was considered that he would have the option to access support from clan members. Furthermore, in the light of the fact that the clans could provide social support mechanisms and assist with access to livelihoods, the Secretary of State considered that he would be able to access help to look for employment.

8. The respondent then made reference to the Home Office Country Information and guidance (CIG) report dated July 2016 entitled "South and central Somalia country information security and humanitarian situation" which set out information concerning returns to Mogadishu: "The Tribunal in MOJ and others held that "the evidence indicates clearly that it is not simply those who originate from Mogadishu that may now generally returned to live in the city without being subjected to in Article 15 (c) risk of facing a real risk of destitution. (Paragraph 2.4.1). The Home Office CIG report dated March 2015 noted paragraph 1.3.7 that MoD and others additionally informs;

"perhaps a good indication of the very real change that has taken place in Mogadishu is that some commentators when referring to a "minority clan" now base that not on ethnicity but the fact of the Klan being in a numerical minority in a particular area, despite its status as a majority clan on a national basis. It is clear that there have been very significant population movements in Mogadishu in recent years." (Paragraph 77).

9. Therefore the respondent considered that the circumstances under which the appellant was granted refugee status had now changed and that he could return to Mogadishu without being persecuted due to his clan membership.
10. Consideration was also given to the general security situation in Mogadishu by reference to the decision in MOJ and others:

(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 showed an overdrawn account although father's account international organisation) on returning to Mogadishu after a period of absence will face no real risk of persecution or risk of harm such as to require protection under Article 3 of the ECHR or Article 15(c) of the Qualification Directive. In particular, he will not be at real risk simply on account of having lived in a European location for a period of time of being viewed with suspicion either by the authorities as a possible supporter of Al Shabaab or by Al Shabaab as an apostate or someone whose Islamic integrity has been compromised by living in a Western country.

(iii) There has been durable change in the sense that the Al Shabaab withdrawal from Mogadishu is complete and there is no real prospect of a re-established presence within the city. That was not the case at the time of the country guidance given by the Tribunal in AMM.

11. The decision letter again referred to the Home Office CIG report dated July 2016 and titled "South and Central Somalia country information security and humanitarian situation" in respect of Mogadishu stating "the situation has continued to improve since 2014 therefore there is no reason to depart from existing country guidance" (paragraph 2.3.21). The respondent therefore concluded that the appellant could return to Mogadishu without Article 3 of ECHR being breached in terms of serious harm.
12. The Secretary of State also considered that there were no significant obstacles to his reintegration in Somalia; taking into account that he was an adult male and in reasonable health. He demonstrated an ability to assimilate into a foreign culture following his entry to the UK in 2001 and therefore would be able to re-assimilate to Somali culture. He had spent his youth in formative years in Somalia and was therefore considered to have sufficient ties to his home country, including language, cultural background and social network, to be able to re-adapt to life in Somalia and form an adequate private life in the country. It was further asserted that the skills (including English language skills) gained during his time in the UK could be used in helping him gain lawful employment in Somalia.
13. Further to MOJ and others (paragraph 351) by virtue of being returning from overseas, the Secretary of State considered that he was also likely to have an enhanced prospect of gaining employment on return as it was noted that returnees will be considered to be better educated and more resourceful and therefore more attractive to employers, especially where the employer him or herself has returned to invest in a new business in Mogadishu. Furthermore, his relatives and UK could, if they choose to do so, support him in re-establishing himself in Somalia with financial assistance. The secretary of state noted that he may face challenges in adapting to life in Somalia, it was not accepted however that his return to Somalia would occasion treatment contrary to Article 3 of the ECHR as it was not accepted that he would face the prospect of living in circumstances falling below that which is acceptable in humanitarian protection terms.
14. Consideration was further given to the threat of persecution in Somalia from Islamic militant groups such as Al Shabaab. The Home Office CIG report dated March 2016 entitled "south and central Somalia: fear of Al Shabaab was cited as follows: "Al-Shabaab advocates a strict interpretation of Islamic law for Somalia and against the Western influence on Africa. Since the end of 2006 it is sought to discredit and destabilise the Federal government of Somalia. The group is composed of Somali recruits as well as a number of foreign fighters (paragraph 2.2.1). By reference to the CIG report dated July 2016 the respondent cited the following: "however during 2014

the Somali National Armed Forces and AMISOM launched a military offensive which is driven Al-Shabaab out of most of the main urban areas in south and central Somalia. During 2015 in 2016 the Somali federal government and AMISOM remained in control of Mogadishu and expanded areas under the control by establishing federal administrations in the Galmudug, south-west and Jubbaland states. The joint offensive by AMISOM and SNAF pushed Al-Shabaab out of towns in the Hiraan, Bay, Bakool Gedo and Lower Shabelle regions (paragraph 2.3 .27).

15. Further material taken from the CIG dated March 2016; Fear of Al-Shabaab was cited that “a person who is a high-profile member of an institution representing the international community or the Somali government may face the risk of serious harm from Al-Shabaab depending on the individual circumstances.” (Paragraph 3.1.2). “A person who is a supporter of, or perceived to be a supporter of the Somalia government may also be at risk of harm, but this will depend on their profile and individual circumstances” (paragraph 3.1.3). In this regard, the respondent considered that the appellant had not adduced any evidence of high-profile membership of an institution representing the international community or the Somali government or risk a persecutory behaviour because of his actual perceived political opinion. Therefore the circumstances on return to Somalia were not considered to engage his rights under the refugee Convention or Article 3 of the ECHR.
16. The Secretary of State they concluded that “in light of the objective evidence given hearing regarding the improved security landscape of Somalia, it is not considered that you continue to have an adverse ethnic profile to engage your rights under the 1951 Refugee Convention or Articles 2 or 3 of the ECHR upon your return to Somalia.”
17. In summary, the respondent stated that “further to the reasons given, the Home Office is satisfied that, subsequent to obtaining refugee status in 2001, you can no longer, because the circumstances in connection with which you are recognised as a refugee has ceased to exist, continue to refuse to avail yourself of the protection of the country of nationality. In light of the above, Paragraph 338A of the Immigration Rules applies which states “a person’s grant of refugee status under Paragraph 334 shall be revoked or not renewed if any of paragraphs 339A to 339AB apply.” In your particular case, after consideration of Article 1(C) 5 of the 1951 Refugee Convention, Paragraph 339A (v) of the Immigration Rules, has now been applied.
18. The remainder of the decision letter considered eligibility for humanitarian protection, eligibility for discretionary leave, family life with children, family life with a partner, private life and whether there were very compelling circumstances which included consideration of whether deportation would breach Article 3 (on medical grounds).

The appeal before the First-tier Tribunal:

19. His appeal came before First-tier Tribunal Judge Pooler (“the FtJ”) on the 20th December 2017. He allowed the appeal in terms of the respondent's decision to cease refugee status and consequently concluded that the appellant was entitled to

protection under the Refugee Convention and/or Article 3 of the ECHR, but dismissed his appeal on Article 8 grounds.

20. The FtJ proceeded on what he described as the “unchallenged evidence” relating to the appellant and his original claim for asylum; that he was a member of the minority clan, that his parents and some of his immediate family died; and also that the majority of his clan left Somalia. He had no current contact with anyone in Somalia.
21. The judge considered the evidence relied upon by the respondent which consisted of the decision in M OJ and others and that the respondent had referred to country information of July 2016 but this had in turn relied on M OJ. The judge set out the CG decision of M OJ and others setting out the relevant paragraphs relating to the significance of clan membership noting that whilst it did not consider the issue of revocation, the findings in relation to the country situation would have direct relevance to the decision he was making (see (14)). The judge went on to consider the more recent evidence including that set out in the 2017 country policy and information notes on security and humanitarian situation in Mogadishu and the expert evidence of Dr Bekalo, which was not challenged.
22. Having considered the CG decision, the country materials in the context of the appellant’s personal circumstances he reached the overall conclusion that the respondent had not demonstrated that there had been a durable change in circumstances such that he can be no longer said to require international protection.
23. He thus concluded that the respondent had not shown that cessation of the appellant's refugee status was appropriate and that he therefore should continue to have protection under the Refugee Convention and/or Article 3, although dismissing the appeal on Article 8 grounds.

The appeal before the Upper Tribunal:

24. Both parties sought permission to appeal that decision and the grounds are set out in the papers. In relation to the application made by the Secretary of State Immigration Judge Farrelly granted permission to appeal on the 8th February 2018.
25. The Appellant also applied for permission to appeal and Immigration Judge Farrelly granted permission on the grounds which challenged the decision made on Article 8 only.
26. Thus the appeal came before the Upper Tribunal. Ms Aboni on behalf of the Secretary of State relied upon the written grounds for permission.
27. She submitted that the judge, in allowing the appeal had failed to apply the Country guidance decision of M OJ and others despite what the FtTJ had stated at paragraph 14 that the decision was relevant and that there had been durable changes with relation to the withdrawal of Al-Shaabab but at paragraph 29 found there was no durable change in relation to clan based violence. She submitted that the significance of the clan membership was set out at paragraphs 337-343 of MOJ and others and thus the

finding made by the FtT J on the situation in Mogadishu regarding clan violence was inconsistent with that set out in MOJ and others. The judge had therefore failed to give clear reasons as to why he had departed from the CG decision and why that evidence was preferred to that of the CG decision.

28. As to Article 3, she submitted that the FtT J had allowed the appeal on the basis of Article 3 and that he would be forced to live in conditions that fell below acceptable humanitarian standards as he would be unable to obtain employment in Mogadishu (see paragraph 36 of the decision). In particular, she made reference to paragraph 36 as referring to the lack of a teaching or professional qualification and that this contradicted the previous paragraph where there was reference to the appellant having completed university education and employment in a school.
29. She relied upon the grounds where it was stated that the CG decision confirmed that it was for the appellant to explain why he would not have access to the economic opportunities provided by the economic boom and this the CG decision concluded that only 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 who will face the prospect of living in circumstances falling below that which is acceptable in humanitarian protection terms. Given his level of education it was necessary for the FtTJ to explain on what evidence the finding that the appellant would not have prospects of employment was based.
30. The FTTJ also failed to make any reference to the Facilitated Returns Scheme as set out in the decision letter and that the sum of money is not an insufficient sum if used to establish life in Mogadishu (see paragraph 423 of MOJ and others: the sum of up to £1500 may be available for voluntary returnees and may be of significant assistance to a returnee).
31. There was a rule 24 response on behalf of the Appellant which is set out in the papers. Mr Uddin submitted that the judge had properly had regard to the country guidance decision as set out in the determination at paragraphs 12 - 18. He observed that that was a decision made three years ago and that it was open the judge to consider the more recent country materials and also the expert evidence of Dr Bekalo to which there had been no challenge. He submitted that the judge did have a sufficient evidential basis to find that the situation in relation to clan membership and the significance of that and also clan-based violence had changed and that the judge was careful to explain why this demonstrated a risk to the appellant.
32. In his skeleton argument (provided post hearing) it was submitted that the judge had properly determined the issue of cessation in the way in which Arden LJ had concluded it should be. The appellant had been recognised as a refugee following his interview based on the membership of a minority clan. Whilst the respondent relied upon the case of M OJ and others to persuade the judge that there had been a durable and non-temporary change in Somalia such that the requirement in Article 1C (5) of the Refugee Convention (and paragraph 339A (v)) had been met, the judge concluded that there had not been a durable non-temporary change in relation to the persecution

of minority clans in Somalia. In coming to a conclusion he had taken into account the decision of M OJ but had considered the more up-to-date information on the country expert report. The respondent's evidence (dated July 2017) stated that clan violence is widespread that clans and government militia continued to carry out extrajudicial killings, arbitrary arrests and rape and the part of the country remain trapped in unresolved inter-clan conflicts. The judge quoted the expert evidence in relation to the availability of clan protection and the overall security situation "is getting more complicated and worse" at paragraphs 20 - 21. At [26] the judge found the focus of the Tribunal M OJ related to the risk from Al Shabaab and clan violence; that personal security arrangements will probably via that person's own clan and that the appellant in this case would return as a member of minority clan with no financial resources to hire commercial security. At [28] the judge found that the respondent did not rely on any evidence beyond M OJ in contrast with the appellants evidence and that [29] the judge accepted the determination of the Tribunal M OJ that there had been durable changes in relation to Mogadishu in relation to Al Shabaab but that a durable and non-temporary change in relation to clan-based violence had not been established.

33. It was submitted that it was open to the judge to make those findings and that in particular, he considered the role of the clans as set out in MOJ and others but bore in mind that the evidential basis that findings based upon the material that was dated between January 2011 and January 2014. In summary, it was submitted that it was difficult to fault the judge's reasoning on the cessation issue.
34. The rule 24 response set out the submissions relating to Article 3. In the updated skeleton argument it was submitted at paragraph 8 that in relation to Article 3, it was plain that it did not play a part in the judge's cessation decision. The judge to take account of the appellant's personal circumstances at paragraph 22 but was careful only to identify the personal circumstances that related to the refugee claim and not Article 3 and that this could be seen in the way that the judge took into account other aspects of the appellants' personal circumstances at paragraph 35 when he carried out a separate Article 3 assessment.
35. It is further submitted that the judge took into account matters that he was entitled to and that at paragraph 36 the appellant would live in an IDP camp and it would be the conditions in the camp that would violate Article 3. He did not conclude that general living conditions in Somalia fell below humanitarian standards and that this was a crucial distinction because if he had determined the latter, his reasoning would be contrary to that which is decided by Arden LJ but the judge on his analysis did not fall into error.
36. As to Article 8, it was submitted that the judge had made a number of positive findings in relation to his relationship with his six children; three of them are adults and three who are minors which was summarised at paragraph 5 of the written grounds. The adverse findings made related to his lack of financial independence, that the offences were sufficiently serious that the custody threshold was crossed that there was a strong public interest in the deportation of foreign criminals. However it was submitted that the findings made at paragraph 51 relating to the public interest that the judge

conflated the different issues that fell to be considered under Article 8. The judge stated that the effect on the appellant's children could not be described as "unduly harsh" when viewed against the "unquestionable public interest in deportation". It was submitted that the judge had applied the law incorrectly and applied the wrong test. The question was not as framed by the judge "is the effect of deporting the appellant unduly harsh? But rather, the judge was obliged to firstly consider and make findings on what was in the best interests of the appellant's three minor children. Having found that the best interest of all three lie in living with both parents, the judge then should have asked the questions posed by paragraph 399 (a) but the judge in fact did not answer the second of the two questions posed by paragraph 399 (a) which was an error of law.

37. In essence it was submitted that the judge failed to make findings regarding the best interest of all three children is a primary consideration and give it significant weight and that it should be weighed in the balance against the public interest in deportation.
38. It was further asserted that there were flaws in the judge's assessment of paragraph 399 (b) paragraph 52 and that the judge did not make any assessment or make any specific findings in respect of this and given the judge's findings that the best interest the children was reported by both parents, it was important in determining whether it will be unduly harsh the appellants wife to go to live in Somalia with him or be in the UK without him.
39. Ground 3 set out that there was a flawed assessment of Article 8 outside the Immigration Rules and in particular the judge failed to take into account his finding at [55] that there would be very significant obstacles to his reintegration into Somalia given that he was significantly disabled, that he could not rely on financial support from his adult children, would not find employment and would have to live in an IDP camp with a real risk that these conditions breached Article 3. A further exceptional compelling factor was that the appellant had three minor children, all of whom would be adversely affected by his deportation. It was submitted that these were "exceptional and compelling factors" which should have been considered as a separate Article 8 proportionality assessment.

The applicable law:

40. Article 1C(5) provides that the 1951 Convention shall cease to apply to any person falling under the terms of Article 1(A) if:

"He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

Provided that this paragraph shall not apply to a refugee falling under section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality".

41. Paragraph 339A(v) of the Rules reflects the terms of Article 1C (5) and provides that a person's grant of asylum will be revoked or not renewed if the Secretary of State is satisfied that:

“(v) he can no longer, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of nationality”.

42. Paragraph 339A goes on to state that:

“In considering (v) and (vi), the Secretary of State shall have regard to whether the change of circumstances is of such a significant and non-temporary nature that the refugee's fear of persecution can no longer be regarded as well-founded”.

43. The relevant provision of the QD is Article 11(1)(e) ("the QD ceased circumstances clause").

Article 11
Cessation

1. A third country national or a stateless person shall cease to be a refugee, if he or she:

(e) can no longer, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, continue to refuse to avail himself or herself of the protection of the country of nationality;

2. In considering points (e) and (f) of paragraph 1, Member States shall have regard to whether the change of circumstances is of such a significant and non-temporary nature that the refugee's fear of persecution can no longer be regarded as well-founded.

44. Article 1C(5) and paragraph 339A(v) both refer to “the circumstances in connection with which he has been recognised as a refugee have ceased to exist”. As quoted above, paragraph 339A states that the Secretary of State shall have regard to whether “the change of circumstances” is of such a significant and non-temporary nature that the refugee's fear of persecution can no longer be regarded as well-founded. Thus, the “circumstances” in connection with which a person has been recognised as a refugee and the “change of circumstances” must be considered.
45. The FtT Judge did not have the advantage of the decision of the Court of Appeal in *SSHD v MA (Somalia)* [2018] EWCA Civ. Neither party had made any reference to this decision after permission has been granted before the appeal hearing before the Upper Tribunal. The parties were therefore provided with time to consider that decision. Furthermore, I invited each of the advocates to provide a skeleton argument in respect of any further submissions made relating to decision of MA (Somalia). Mr Uddin on

behalf of the appellant sent a skeleton argument which I have taken account of. There were no further submissions made on behalf of the respondent.

46. In *SSH v MA (Somalia) [2018] EWCA Civ* the issues the Court had to decide on this appeal are set out at paragraph 1 of the judgment and the relevant questions for this appeal included:

(1) the test to be applied by the state which recognised a person as a refugee ("the recognising state") when determining whether (or that) a refugee's status can be ended ("a cessation decision") under the Qualification Directive (see paragraph 3 below),

(2) whether a cessation decision can be made without also considering the question whether the refugee's rights under Article 3 of the European Convention on Human Rights ("the Convention") would be violated if he were to be returned to his country of origin,

(3) whether Article 3 would be violated if a person to be returned is at risk of being subjected to living standards which fall below humanitarian standards in his country of origin,

(4).. and

(5)..

The Court set out a summary of its conclusions at [2] as follows:

(1) A cessation decision is the mirror image of a decision determining refugee status. By that I mean that the grounds for cessation do not go beyond verifying whether the grounds for recognition of refugee status continue to exist. Thus, the relevant question is whether there has been a significant and non-temporary change in circumstances so that the circumstances which caused the person to be a refugee have ceased to apply and there is no other basis on which he would be held to be a refugee. The recognising state does not in addition have to be satisfied that the country of origin has a system of government or an effective legal system for protecting basic human rights, though the absence of such systems may of course lead to the conclusion that a significant and non-temporary change in circumstances has not occurred.

(2) It is not appropriate to refer this matter to the CJEU for a preliminary ruling.

(3) The question whether Article 3 would be violated by the refugee's return to his country of origin is not part of the cessation decision but separate from it, and there is no violation by reason only of the absence of humanitarian living standards on return.

At [61] the court stated "[61]it must follow from the analysis of the CJEU in *Abdulla* that the recognising state does not have to investigate whether there would be an

Article 3 violation if the refugee was returned to his country of origin. That would have to be considered, but as an independent matter.”

(4) Article 3 is not normally violated by sending a refugee back to his country of origin where there is a risk that his living conditions will fall below humanitarian standards.

The Court set out at the reasoning at paragraphs [63] and [64] as follows:

63. The analysis in *Said*, 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 which for economic reasons cannot provide him with basic living standards. Mr Sills however contends that that situation is brought about by conflict, which is recognised by the European Court of Human Rights as an exception to this analysis. It is true that there has historically been severe conflict in Somalia, but, on the basis of *MOJ*, that would not necessarily be the cause of deprivation if the respondent were returned to Somalia now. The evidence is that there is no present reason why a person, with support from his family and/or prospects of employment, should face unacceptable living standards.
64. Mr Waite submits that the decision of this Court in *FY (Somalia) v SSHD* [\[2017\] EWCA Cave 1853](#) could be read as departing from *Said* and as accepting that it was sufficient for Article 3 purposes that a person returning to his country of origin might end up living in an IDP camp. Although the holding of the FTT in that case (paragraph 22), which this Court held had not erred in law (paragraph 23), could be read as so holding, *Said* was not cited and therefore in my judgment to the extent that there is any conflict between the decision of this Court in *Said* and that in *FY Somalia*, the decision of this Court in *Said* should be followed.”

Discussion:

47. As set out above there are cross appeals in this case. I therefore propose to deal with the Secretary of State’s appeal first of all.
48. It is submitted on behalf of the Respondent that the judge failed to have regard to the country guidance, *MOJ & Others (Return to Mogadishu) CG* [2014] UKUT 00442 when reaching his decision to allow the appeal.
49. I was referred to the country guidance head note and set this out below for convenience:
- (i) The country guidance issues addressed in this determination are not identical to those engaged with by the Tribunal in *AMM* and others (conflict; humanitarian crisis; returnees; FGM) *Somalia CG* [\[2011\] UKUT 445](#) (IAC). Therefore, where country guidance has been given by the Tribunal in *AMM* in respect of issues not addressed in this determination then the guidance provided by *AMM* shall continue

to have effect.

(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 showed an overdrawn account although father's account international organisation) on returning to Mogadishu after a period of absence will face no real risk of persecution or risk of harm such as to require protection under Article 3 of the ECHR or Article 15(c) of the Qualification Directive. In particular, he will not be at real risk simply on account of having lived in a European location for a period of time of being viewed with suspicion either by the authorities as a possible supporter of Al Shabaab or by Al Shabaab as an apostate or someone whose Islamic integrity has been compromised by living in a Western country.

(iii) There has been durable change in the sense that the Al Shabaab withdrawal from Mogadishu is complete and there is no real prospect of a re-established presence within the city. That was not the case at the time of the country guidance given by the Tribunal in AMM.

(iv) The level of civilian casualties, excluding non-military casualties that clearly fall within Al Shabaab target groups such as politicians, police officers, government officials and those associated with NGOs and international organisations, cannot be precisely established by the statistical evidence which is incomplete and unreliable. However, it is established by the evidence considered as a whole that there has been a reduction in the level of civilian casualties since 2011, largely due to the cessation of confrontational warfare within the city and Al Shabaab's resort to asymmetrical warfare on carefully selected targets. The present level of casualties does not amount to a sufficient risk to ordinary civilians such as to represent an Article 15(c) risk.

(v) It is open to an ordinary citizen of Mogadishu to reduce further still his personal exposure to the risk of "collateral damage" in being caught up in an Al Shabaab attack that was not targeted at him by avoiding areas and establishments that are clearly identifiable as likely Al Shabaab targets, and it is not unreasonable for him to do so.

(vi) There is no real risk of forced recruitment to Al Shabaab for civilian citizens of Mogadishu, including for recent returnees from the West.

(vii) A person returning to Mogadishu after a period of absence will look to his nuclear family, if he has one living in the city, for assistance in re-establishing himself and securing a livelihood. Although a returnee may also seek assistance from his clan members who are not close relatives, such help is only likely to be forthcoming for majority clan members, as minority clans may have little to offer.

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

Mogadishu, no clan violence, and no clan based discriminatory treatment, even for minority clan members.

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

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

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

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

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

50. Evidently each case is fact specific and the various and particular circumstances of the Appellant need to be taken into account.
51. As set out earlier, the judge did not have the advantage of the decision in the *SSHD v MA (Somalia)* (as cited). However the test that he went on to apply when considering the issue of cessation was set out at [25] and [29] and whether there had been a significant and non-temporary change in circumstances so that the circumstances

which caused the person to be a refugee have ceased to apply and there is no other basis on which he would be held to be a refugee.

52. In applying that the test, the judge clearly had regard to the decision of M OJ and others and cited at paragraphs 12 – 13 the summary of the decision which included the conclusions reached on the issue of durable change, the significance of clan membership and the circumstances relating to Al-Shabaab.
53. Whilst the grounds make reference to the judge failing have to have regard to the decision of M OJ and others and its importance of it as a country guidance decision, at [14] the judge expressly rejected a submission that it was of no relevance and stated that the country guidance decision was of assistance to the Tribunal in reaching its overall conclusions.
54. The judge began his analysis by expressly considering the evidence set out in the country guidance case but did so in the context of the documentary evidence that post-dated the decision to which he made reference at [15], which included the respondents own country materials (the country information notes on the security and humanitarian situation Somalia from 2016 in 2017). He also had an expert report from Dr Bekalo dated 13 November 2017. There was no dispute between the parties that Dr Bekalo was to be regarded as an expert and the judge set out at [16] and [17] his qualifications and expertise in this area.
55. At [18] the judge set out the relevant parts of M OJ and others which considered the significance of clan memberships at paragraphs 337 – 343 which is cited in the respondent’s grounds of challenge. This made reference to the lack of inter clan violence in Mogadishu and that clan protection had no longer become important as there were no clan-based militias. However the Tribunal at paragraph 339 did make reference to the continuing significance of clan membership to those living in Mogadishu.
56. The judge then gave consideration to the updated evidence in the respondent’s own country information at [19] citing the July 2017 report. The evidence made reference to the issue of clan violence and at [20 – 21] the judge had regard to the expert evidence of Dr Bekalo to the effect that clan and/or family support networks remain critical for protection to avoid discriminatory treatment and exploitation and ill-treatment. As a result of being a member of minority clan the appellant had no such protection. The expert stated at paragraph 4.1 and 4.5 as follows:

“On the overall security situation in Somalia, Dr Bekalo stated:

“4.1 Since the appellant left Somalia, the overall country security situations and the protection of human rights in Somalia have barely improved. It rather seems to me getting complicated and worse. This is despite the efforts made by numerous previous temporary and semi-permanent successive Somali governments, including the present one elected early this year in February 2017. This is also despite the fact that the seemingly large ineffective deployments of AMISOM troops. In addition, it is also despite the deflection of a senior Al-Shabaab leader.

...

- 4.5 Unfortunately, the century old clan based discriminatory culture which led to the collapse of the Somali state earlier and which still contributes to both stability and instability of the country, coupled with the lack of strong central authority and credible law enforcement and judiciary system, continually put vulnerable people (e.g. minority clan members, women and children, elderly and returnees from abroad with no in-country clan or family support) in added greater risks of discrimination as well as exploitations and ill-treatments."

57. It is plain from the determination that there had been no challenge to the appellant's evidence and his particular circumstances on behalf of the respondent (see paragraphs 22 and 24). Therefore the judge properly had regard to the basis upon which he had previously been granted refugee status which was that he was a member of a minority clan and that his parents and some of his immediate family had died and that the majority of his clan had left Somalia and that it had no current contact with anyone in Somalia since he had left.

58. As to his circumstances the judge summarised them at [23] as follows:

"23. As for access to financial resources, the appellant's wife was in receipt of benefits. Of his six children, three were adult and of those, two were in employment. The eldest, N, was a teacher and said in a statement that she was unable to send any funds to support her father if he were returned to Somalia. Ahmed was also working but he too lived in London where life was more expensive and had no savings. He planned to return to university and would also be unable to make any financial contribution to the appellant.

24. Mr Shea did not challenge the appellant's evidence in this respect nor did he make any submissions in relation to the written evidence of the appellant's children. This evidence therefore stands unchallenged and I accept it."

59. The respondent had not challenge that evidence and it was accepted by the judge as the factual basis. Having summarised the relevant parts of M OJ and others and having considered that evidence in the light of the more updated evidence and against the backdrop of the unchallenged evidence relating to the appellant, the judge then drew together his conclusions at paragraphs [25 - 30] as follows;

"25.I return to the test to be applied by the Tribunal. I do not, initially, have to consider whether the appellant would be at real risk on return to Somalia. The test is whether the respondent has proved on the balance of probabilities that there has been a durable change in the circumstances in Somalia.

26. In *MOI* the Upper Tribunal was considering the issue of risk at the time of the hearing before it. Its focus was much more on the risk from Al-Shabaab than of clan-based violence. The evidence before the Upper Tribunal was that the clan had become a social structure rather than a protective structure; although the Upper Tribunal noted at [340] that clan membership retained some relevance in relation to protection. A person who needed to make arrangements for personal security would probably look first to his own

clan, especially if he did not have the resources with which to pay for “commercial” security. I observe that the appellant would return as a minority clan member with no financial resources and no subsisting family in Mogadishu. Indeed, on his unchallenged evidence most members of his clan had fled Somalia.

27. It was found in MOJ that there had been durable change in the sense that the Al Shabaab withdrawal from Mogadishu was complete and there was no real prospect of a re-established presence within the city.
 28. I cannot see that any of the other material relied on by the respondent goes directly to the issue of whether any change in circumstances is durable. The evidence adduced by the appellant, including that from Dr Bekalo, indicates on the contrary that the situation in Somalia has become more complex and possibly worse. The country continues to suffer from unstable government. I find on the evidence as a whole that the respondent has failed to discharge the burden of proving that such changes as have occurred in Somalia are shown to be durable. Moreover, in the appellant’s particular circumstances, there is similarly no evidence to indicate a durable change in circumstances such that he can be said no longer to require international protection.
 29. Although the Upper Tribunal in MOJ referred to there having been a durable change in relation to the withdrawal of Al-Shabaab from Mogadishu that is not the basis of the appellant’s original asylum claim. It is for the respondent to demonstrate a durable change in relation to the risk of clan based violence. That she has, in my judgment, failed to do.
 30. For these reasons the appellant must succeed in his appeal on asylum grounds. I nevertheless propose briefly to rehearse the arguments in relation to the other grounds of appeal and to indicate my findings in those respects.
60. The respondent’s grounds are without merit. The judge was entitled to reach the conclusion on the more recent evidence before him that the situation had changed in relation to clan violence since 2014 (see paragraph [26]) and that the conclusions reached in M O J at (viii) was not of a durable or non-temporary change which was the correct test to apply. He gave express consideration to the previous evidence in M O J and others and that the change in the significance of the clan membership to those returning to Somalia. The judge observed that there was no other material relied upon by the respondent which went directly to the issue of whether the change in circumstances was durable and it was open to him to rely upon the more recent evidence and that of Dr Bekalo which made reference to the situation in Somalia as having become “more complex” and that there was no evidence to conclude that a durable change in the circumstances were such that the appellant could be said to no longer require international protection.
 61. Dealing with the second ground, the respondent challenges the judge’s assessment of the conditions that he would be forced to live in as a returnee. In this context, the respondent challenges the factual findings made as to whether he could obtain employment. Ms Aboni submitted that the judge had made contradictory findings as to his ability to obtain employment by making reference to his university education

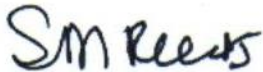
and having had employment in the school at [36] but had then made a reference to the lack of teaching experience or a professional qualification.

62. However those submissions fail to have regard to the other findings made by the judge which related to the appellant's significant disability which the judge set out at paragraph 35. The appellant had been deemed unfit for work having lost the sight in his right eye, he was suffering from a cataract in the left eye which greatly diminished his sight and the unchallenged evidence was that he needed assistance when walking.
63. Therefore the judge did have proper regard to the circumstances set out in M OJ as to why he would not have access to the economic opportunities if available. The unchallenged evidence before the judge was that he was a member of minority clan who had no family or clan associations upon which he could call upon in Mogadishu (see paragraphs 22, 34), that he had no access to any family support from the UK and no savings or remittances (23 - 24 and 34). He had a significant disability (35 - 36) therefore it was open to the judge to find that he fell into the category of someone who would not have a prospect of securing access to a likelihood on return. The grounds are therefore no more than a disagreement with those factual findings which were properly open to him on that unchallenged evidence.
64. As to the failure to make reference to the Facilitated Returns Scheme, it is correct that there was no reference made in the determination to this. However such failure is immaterial to the outcome. The scheme refers to voluntary returns - a category which the appellant does not fall into. Furthermore any assistance given does not show that it would provide long lasting assistance given the the factual findings made upon the appellants particular circumstances including his lack of family support from the UK and in Somalia and his significant disability and that any assistance would be of a short term nature.
65. I am therefore satisfied that the grounds are not made out and that there is no error of law demonstrated in the decision of the judge as asserted in the Secretary of State's grounds. In those circumstances it is not necessary to consider the cross appeal whereby it is asserted that he failed to consider Article 8 correctly as it is immaterial in the light of the submission made by Mr Uddin as set out at paragraph 3 herein and in the light of my conclusion that the judge's decision to allow the appeal was open to him.

Decision:

The decision of the First-tier Tribunal did not involve the making of an error on a point of law and the decision of the First-tier Tribunal shall stand.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him. The direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Handwritten signature in black ink that reads "SM Reeds".

Signed
Upper Tribunal Judge Reeds

Date: 5/9/2018