



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00348/2014

THE IMMIGRATION ACTS

Heard at Field House
On 5 February 2015

Determination Promulgated
On 10 February 2015

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR JAMAC NOOR MAHAMED
(No Anonymity Direction Made)

Respondent

Representation:

For the Appellant: Mr E Tufan a Senior Home Office Presenting Officer

For the Respondent: Ms V Mascord a legal representative from Lawrence Lupin
Solicitors

DETERMINATION AND REASONS

1. The appellant is the Secretary of State for the Home Department (“the Secretary of State”). The respondent is a citizen of Somalia who was born on 21 October 1972 (“the claimant”). The Secretary of State was given permission to appeal the determination of First-Tier Tribunal Judge Cockrill (“the FTTJ”) who allowed the claimant’s appeal against the Secretary of State’s decision of 18 February 2014 to

make a deportation order against him by virtue of section 32 (5) of the UK Borders Act 2007.

2. The Secretary of State's appeal came before me on 4 November 2014. I found that the determination of the FTTJ contained errors of law and set aside his decision. My Decision and Directions is set out in the Appendix to this determination. I preserved the findings of credibility and fact made by the FTTJ and directed that the decision should be remade in the Upper Tribunal on submissions only. It is in these circumstances that the appeal comes back before me.
3. In addition to the material before the FTTJ Ms Mascord submitted a skeleton argument, the Immigration Directorate Instructions version 5.0 dated 28 July 2014 and a small bundle of reports from the International Policy Digest, Christian Science Monitor, and the Sudan Tribune. Mr Tufan submitted the Home Office Country Information and Guidance on Somalia dated December 2014 and the country guidance determination in MOJ and others (Return to Mogadishu) Somalia CG [2014] UKUT 00442 (IAC).
4. Ms Mascord relied on her skeleton argument and reminded me that the findings of credibility and fact had been preserved. Past persecution was indicative of current risk. The claimant had been persecuted for a Convention reason; his perceived political opinions. Since the hearing before the FTTJ Ethiopian forces had joined with AMISOM (The African Union Mission in Somalia). Earlier, Ethiopian forces had been involved in protracted fighting with Al-Shabab in Somalia and had occupied parts of the country. In the light of the report in the Christian Science Monitor the claimant would be perceived as having a link with the AMISOM forces and this would make his position even worse in the eyes of Al-Shabab. I was referred to the UNHCR guidelines in the claimant's bundle before the FTTJ starting at page 221 and in particular page 231. The claimant fell into the risk category identified there.
5. Ms Mascord argued that whilst that might be a generally improved security situation in Somalia the claimant faced a specific risk. This was identified in MOJ. The authorities would not and could not provide him with a sufficiency of protection. The claimant would be in no position to hire private security guards; he was not a rich man. She relied on AW (sufficiency of protection) Pakistan [2011] UKUT 31 (IAC).
6. Internal relocation was not available to the claimant. He could not relocate within Mogadishu which was where he faced the risk from Al-Shabab. AMM and others (conflict; humanitarian crisis; returnees; FGM) Somalia CG [2011] UKUT 00445 (IAC) was still good authority for the proposition that he could not relocate anywhere else in Somalia, Somaliland or Puntland.
7. In relation to the Article 8 human rights grounds, Ms Mascord said that the Secretary of State had conceded on pages 12 and 13 of the refusal letter that it would not be reasonable to expect the claimant's wife and children to relocate to Somalia. Given

the prevailing conditions in Somalia and the fact that the three children aged 8, 11 and 12 were British citizens she submitted that it would be unduly harsh to expect them to live there. They had never lived in Somalia and spent only a few months in Kenya with their mother. They came to the UK with her in July 1996. Their mother was an asylum seeker who obtained settled status in 2002 and became a British citizen in 2004. It would be unduly harsh for the claimant to be deported if the children remained here, as they were entitled to. There was a report from an independent social worker supporting this view. The children's best interests outweighed the public interest in deporting the claimant. Section 117C of the Immigration Act 2014 was now in force and paragraph 2.5.4 of the Immigration Directorate Instructions should be applied.

8. However, Ms Mascord accepted that if the appeal was allowed on asylum grounds the humanitarian protection, Articles 3 and 8 grounds would not be pursued and I need not consider them.
9. Mr Tufan reviewed the facts of the case and submitted that the claimant was no more than an ordinary lorry driver. He would not be at risk from Al-Shabab. He relied on the Country Information and Guidance in particular the Policy Summary, paragraph 1.4 at page 11 and paragraph 2.6.12 to 2.6.19 at page 40. The claimant did not fall within any of these risk categories. An enormous number of people were returning to Somalia. I was referred to the head note summary in MOJ and paragraphs 366 to 375, in particular 369. Taking into account this guidance he submitted that the claimant would not be at risk.
10. Mr Tufan accepted that the Article 8 human rights grounds needed to be decided under the provisions of the Immigration Act 2014 and the new Immigration Rules which came into effect at the end of July 2014. The claimant could go back to Somalia and make an entry clearance application to join his wife and children.
11. Ms Mascord did not wish to reply and I reserved my determination.
12. I will not repeat the facts which formed the basis of the claimant's claim for asylum which are outlined in paragraphs 4 to 8 of the Appendix to this Determination. The FTTJ found the appellant to be a credible witness and his findings of credibility and fact, summarised here, are preserved.
13. Both representatives accept that in connection with the claim for asylum I need to apply a threefold test. Firstly, does the claimant now face a real risk of persecution from Al-Shabab for a Convention reason? Secondly, will the authorities provide him with a sufficiency of protection? Thirdly, is internal relocation available to him? I must consider the position now. The burden of proof falls on the claimant and the standard of proof is that of a real risk or a reasonable likelihood.
14. I find that the claimant is not, as Mr Tufan suggests, just an ordinary lorry driver. He may have been an ordinary lorry driver but in addition, for reasons which are not

clear because they are within the knowledge of Al-Shabab, but may have included the opportunities to gather information which travelling as a lorry driver gave him, they came to suspect him of working as a spy for the Ethiopian government. His first period of detention and serious ill-treatment was not the only occasion on which he Al-Shabab showed an adverse interest in him. Subsequent to his escape efforts were made through his father and elders in his village to come to some form of reconciliation with Al-Shabab and an undertaking was given that the claimant did not belong to any Ethiopian group and did not work for the Ethiopians. The claimant was arrested by Ethiopian troops in 2009 and only released on condition that he work for them, which he did for about 10 days. This came to the attention of Al-Shabab and they raided the claimant's village and killed his father. Subsequently, the claimant heard that Al-Shabab were still looking for him. In January 2011 he heard gunshots outside the place where he was living in Mogadishu. He fled and later discovered that in this incident Al-Shabab had killed a friend of his. He returned to Mogadishu in 2012 and received a phone call telling him that Al-Shabab were looking for him and threatening to kill him. He fled to Kenya but in a raid by Al-Shabab on the home he was occupying his brother was shot in the leg and badly injured.

15. The December 2014 Home Office Country Information and Guidance on Somalia: Security and Humanitarian Situation in South and Central Somalia states:

“1.3.5 However in Mogadishu Al-Shabaab continue to target those perceived to be associated with the security forces, any aspect of government or official administration or any NGO or international organisation. UNHCR identifies amongst its profiles of those at potential risk: “Individuals associated with, or (perceived as) supportive of the Somali Federal Government (SFG) and the international community, including the AMISOM forces; individuals in certain professions such as journalists, members of the judiciary, humanitarian workers and human rights activists, teachers and staff of educational facilities, business people and other people (perceived to be) of means; members of minority groups such as members of the Christian religious minority and members of minority clans.” [See Country Information for full list of UNHCR's potential risk profiles]”

16. The Policy Summary in the same document at paragraph 1.4, while stating that ordinary civilians returning to Mogadishu after a period of absence will in general face no real of persecution or risk of harm, sets out in the following bullet points some caveats to which Mr Tufan referred:

“However, in Mogadishu Al-Shabab continues to target those perceived to be associated with the security forces, any aspect of government or official administration or any NGO or international organisation.” And “those returning to, raw travelling through, areas in south and central Somalia outside of Mogadishu may, nevertheless, face a real risk of harm because of their individual circumstances, particularly those with no recent experience of living

in Somalia, if they are returning to live in, or travel through, and Al-Shabab controlled area. They will be at real risk of persecution by Al-Shabab because of actual or imputed religious or political opinion.”

17. Paragraphs 2.6.12 to 2.6.19 at page 40 of the same report, whilst indicating that improvements in the security situation in Mogadishu and an increasing number of areas in the country has been reflected in the return of “an impressive number of people from the diaspora,” still indicates an implacable continuing hostility by Al-Shabab towards the returnees who come within the categories in which they have an adverse interest as well as threats to kill them.
18. The summary of the Country Guidance in MOJ prepared by the authors of the determination states:

“(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 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 Shabab’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.”

19. Paragraphs 366 to 375 of MOJ relied on by Mr Tufan state:

Al Shabaab

366. That is the backdrop against which we consider the level of risk posed by Al Shabab for civilians in Mogadishu today. Significant numbers of people have chosen to return to Mogadishu and fewer people are choosing to leave. The question we address next is the level of risk they have apparently been willing to confront by doing so.

367. As we have observed, an analysis of the reach of Al Shabaab into Mogadishu for the purpose of carrying out its violent attacks and their selection of targets is at the very heart of any assessment of risk facing those living in the city today and those facing the prospect of returning there after a period of absence.

368. It is established by the evidence that the approach taken by Al Shabaab following withdrawal from Mogadishu has changed. There has been a cessation of confrontational warfare and with it, generally, an end to the use of artillery which, when used in an urban area, was certain to cause very significant levels of civilian casualties. Instead, Al Shabaab has adopted what has been termed asymmetrical warfare, sometimes launching what are referred to as complex attacks, for example with a suicide bomb attack being followed up by a second explosion.

369. It is plain from the evidence that when planning attacks in Mogadishu, Al Shabaab selects its targets carefully. Dr Mullen spoke in oral evidence of an “international Jihadist trend” emerging, involving a seeking out of strategic

targets such as the High Court and hotels expected to be frequented by military and police personnel and prominent politicians. Dr Mullen described this as:

“... a much more sinister form of targeting geared towards peacemakers...”

370. Dr Hoehne agreed. He detects evidence of significant changes in the structure and ideology of Al Shabaab since their withdrawal from Mogadishu. He explained how, since May or June 2013 it has purged from its ranks those that stood in the way of its version of jihad, including some senior commanders. “Pragmatists” have given way to “radical purists”. Those eliminated from Al Shabaab:

“were those standing for a less extreme course; at least they were not so much in favour of international or “global jihad” but were rather concerned about Somali (national) issues.”

371. There is ample evidence to establish precisely what the targeting strategy of Al Shabaab is and in our judgement neither civilians nor returnees are specifically targeted. For example:

“The international NGO (B), Mogadishu, stated that al-Shabaab does not kill civilians indiscriminately. On the other hand, when it is staging large scale attacks it does not mind if civilians are killed.”

“UNDSS, Mogadishu, explained that there are no recent reports of al-Shabaab having attacked or killed civilians deliberately through armed attacks....

Regarding IED attacks UNDSS, Mogadishu, explained that remote controlled IED attacks or roadside bombs tend to target AMISOM, SNAF and convoys and such attacks sometimes result in the killing of civilians, i.e. collateral damage.”

And in an Aljazeera news report dated 11 September 2013 a spokesman for Al Shabaab, speaking after an attack on the Parliament building in Mogadishu, is reported as saying that their attacks in Mogadishu:

“... have nothing to do with... stopping Somalis coming back to their country.”

372. Dr Mullen said in oral evidence that, generally, the targets selected have a link to government or international aid agencies. In his evidence, Dr Hoehne drew upon the report of the joint mission of the African Union and the United Nations conducted in Somalia between August and September 2013:

“They target particularly the Government, State institutions and the international presence working in Somalia, including the United Nations.”

The omission of any reference to ordinary civilians or returnees from the diaspora from this list of primary targets is to be noted. Similarly, we consider significant that neither civilians nor diaspora returnees are included in the list of those at risk set out in the 2014 UNHCR report which we discussed when summarising submissions advanced by Mr Gill. There is reference to those opposing Islamic Sharia and “apostates” and there is evidence before the Tribunal from some sources that Al Shabaab is likely to regard those returning from the west as “poisoned” by exposure to an anti-Islamic way of life so as to be regarded as spies or apostates. However, if that approach were thought to be taken towards returnees generally we would expect a more specific reference to have been made. For those reasons we consider the omission of such a specific reference to diaspora returnees to be significant. Further, as the evidence simply does not establish that returnees to Mogadishu experience such targeted difficulties at the hands of Al Shabaab, we are satisfied that there is no real risk arising on that account.

373. It has been submitted on behalf of the appellants that the bombing of hotels and restaurants does demonstrate that civilians and returnees from the diaspora in particular, are targeted by Al Shabaab. In oral evidence Dr Mullen spoke of civilians being regarded by Al Shabaab as being “fair game”. But as our analysis of the attacks highlighted in those submissions illustrates, invariably the establishment has been said to have been selected because it is a venue used by government/official or NGO associated personnel. There is no reason to suppose that would not be known by others who choose to patronise those establishments. Indeed, there are a number of examples of such venues, which include the more expensive hotels and restaurants, being targeted more than once, frequently followed by publicly reported pronouncements from Al Shabaab explaining why that target had been attacked.

374. We are satisfied that the evidence does not establish that “ordinary civilians” including diaspora returnees are targeted by anyone. Specifically, we are satisfied that the evidence does not establish that “ordinary civilians” including returnees, are targeted by Al Shabaab or the authorities or criminal elements. We are satisfied that it matters not that a returnee who has been absent for some considerable time would be recognisable as such by his dress, behaviour or language. That perhaps explains the news report from May 2013 we discussed above:

“After two decades of anarchy and misery, Mogadishu is enjoying something of a renaissance. The spectacular ruins are being patched up. Hotels are being built. There are even streetlights in some places. And everywhere you hear accents: Texan, Geordie, Minnesotan, south London, Scandinavian. Somalia’s far-flung Diaspora is coming back - in big

numbers – to visit, to help out, to make money, and to find out if this renaissance has any chance of lasting. The jury is still out on that one.”

375. Having said that, we accept that whenever an attack involving explosives or gunfire is carried out within an urban city area there will be a risk of civilian “collateral damage” and it is clear that civilians are killed and injured in the attacks that continue to be perpetrated in Mogadishu. We accept also that some attacks have been carried out at venues such as a football stadium and a retail shop, which appears to at least indicate some level of targeting of civilians. However, there are other reasons motivating violence in Mogadishu, the evidence suggesting that even Al Shabaab members are sometimes available as “guns for hire” to those with the resources and motivation to hire them to settle personal disputes. In any event, such attacks are the exception, not the norm.”

20. I find that Al-Shabab had an adverse interest in the claimant which is likely to continue to this day. They perceive him to be a spy who has worked for their long-standing enemies, the Ethiopian authorities. If that is possible Al-Shabab’s view of the Ethiopian authorities and military is likely to have become even more hostile after Ethiopian joined with the AMISOM forces in January 2014.
21. In one sense were the claimant to return to Mogadishu he would be an ordinary citizen or an ordinary returnee. However, there is an important factor particular to him which is relevant to risk. It is the adverse interest in him by Al-Shabab arising from their perception that he has been a spy for the Ethiopian authorities. It is clear that Al-Shabab can and do target individuals in Mogadishu. Because the Ethiopians are now part of AMISOM he is now likely to be perceived as associated with an international organisation with whom Al-Shabab are in conflict. He is likely to be identified as a returnee from abroad. This, whilst it will not on its own put him at risk, is likely make him stand out to an extent which will increase the risk of his being identified and the connection made with his past problems with Al-Shabab. Clearly Al-Shabab are ruthless. They have tortured him in the past. They are capable of and likely to do this again or kill him. I find that he has established a real risk of persecution for a Convention reason. The Convention reason is his perceived political opinions as an opponent of Al-Shabab.
22. Mr Tufan did not seek to argue that the authorities would provide the claimant with a sufficiency of protection. I agree with what Ms Mascord sets out in her skeleton, that whilst MOJ was primarily concerned with the general security situation in Mogadishu in relation to Articles 3 and 15(c), it contains important findings directly relevant to the claimant. I find that is no efficient and effective police force is available to help civilians in Mogadishu; AMISOM and the Somali National Army do not exist to provide protection to individual civilians and, whilst is possible for gaps in protection or security to be addressed by private security personnel, the claimant will not be in a position to procure this sort of help.

23. Furthermore, Mr Tufan did not seek to argue that internal relocation would be available to the claimant. I find that he will not be able to relocate within Mogadishu which is where he had his problems with Al-Shabab in the past. AMM Somalia still provides guidance. The claimant's home area was Mogadishu where he faces the current risk from Al-Shabab. He cannot go to Somaliland or Puntland and the Secretary of State has not suggested that he could relocate to any other part of Somalia. I find that internal relocation is not available to the claimant.
24. In summary, I find that the appellant has established a well-founded fear of persecution for a Convention reason. The authorities in Somalia cannot or will not provide him with a sufficiency of protection and internal relocation is not available to him.
25. Ms Mascord accepted that if the claimant succeeded on asylum grounds he would not pursue and it was not necessary for me to address any other grounds.
26. I have not been asked to make an anonymity direction and can see no good reason to do so.
27. Having set aside the decision of the FTTJ I now remake the decision and allow the claimant's appeal on asylum grounds.

Signed:

Date: 8 February 2015

Upper Tribunal Judge Moulden

APPENDIX

1. The appellant is the Secretary of State for the Home Department ("the Secretary of State"). The respondent is a citizen of Somalia who was born on 21 October 1972 ("the claimant"). The Secretary of State has been given permission to appeal the determination of First-Tier Tribunal Judge Cockrill ("the FTTJ") who allowed the claimant's appeal against the Secretary of State's decision of 18 February 2014 to make a deportation order against him by virtue of section 32(5) of the UK Borders Act 2007.
2. The claimant came to this country on 18 June 2013 using a Swedish passport to which he was not entitled. He claimed asylum on the basis that he feared persecution in Somalia from Al-Shabab. His asylum claim was refused on 10 December 2013. The claimant was prosecuted for using the false passport, pleaded guilty and was convicted at Chelmsford Crown Court on 16 July 2013 of having in his possession or control an identity document with intent. He was sentenced to 12 months imprisonment.
3. The claimant appealed and the FTTJ heard his appeal on 8 August 2014. Both parties were represented, the claimant by Ms Mascord who appeared before me.
4. The basis of the claim was that the claimant was born in Somalia not far from Mogadishu. He lived there with his family. He did not attend school and is illiterate. His father worked as a court Registrar but was killed by Al-Shabab in 2009. The claimant worked as a lorry driver out of Mogadishu. He married in late 2002 or early 2003 and had a son. His marriage ended some years ago.
5. He claimed that his problems started in 2007 when Ethiopian troops came to Somalia. He drove his lorry between Somalia and Ethiopia. He was accused by Al-Shabab of working as a spy for the Ethiopian government. They arrested him and he was held for a month, beaten up, interrogated and accused of belonging to a group opposed to Al-Shabab. He managed to escape and went to stay in his aunt's house in Mogadishu, in hiding, for about six months. He contacted his father and attempts were made to come to some form of reconciliation with Al-Shabab. An undertaking was given that he was not involved the Ethiopians.
6. The claimant said that in 2009 he was arrested by Ethiopian troops on the Ethiopia/Somali border. He was detained, held for 10 days and released on condition that he worked for the Ethiopians. Al-Shabab came to hear about what he was doing, raided his home and killed his father. The claimant went back to Mogadishu where he stayed effectively in hiding for about two years. In 2010 he heard that Al-Shabab were still looking for him. In January 2011 he heard gunshots outside his aunt's house where he was staying. He fled and managed to get to Kenya. Later he heard that a friend who had helped him get away had been killed by Al-Shabab.

7. The claimant lived in Kenya from 2011 for about 2 ½ years. He lived illegally with a maternal aunt in Nairobi. Whilst there he met the woman who later became his wife. He went back to Mogadishu in 2012 believing that the situation had improved and that he would be able to live there with his wife and stepchildren. He received a call on his mobile phone from Al-Shabab threatening to kill him. He fled Mogadishu and went back to Kenya. He discovered that there had been a raid on the home where his brother lived and that his brother had been shot in the leg, suffering severe injuries.
8. The claimant contacted his mother in Mogadishu, she sold her house and the money was used to pay an agent who provided the appellant with a Swedish passport. He flew to Sweden, stayed there for about 25 days and then flew to London where his false passport was detected. He claimed asylum. His wife and three stepchildren had come to the UK before him.
9. The Secretary of State did not accept the claimant's account of events and concluded that because Al-Shabab had in effect withdrawn from Mogadishu and the claimant had a low profile he would not be at risk.
10. The FTTJ heard evidence from the appellant, his wife and her children. He found that the claimant had given a detailed, consistent and coherent account of events. He concluded that the claimant was a credible witness and accepted his account of events. As a result he was entitled to refugee status. The FTTJ went on to consider the appeal on Article 8 human rights grounds. He found that the claimant's stepchildren had a close and loving attachment to him and that he had become their father figure. His removal would have a strongly detrimental effect on them. His stepchildren were British citizens who could not be expected to go and live in Somalia. The family should be allowed to stay together. His offence was at the "very bottom end" of the scale. It was concluded that the situation was exceptional, outweighed the public interest and that it would be unduly harsh for the family and the children if the claimant was deported.
11. The FTTJ allowed the appeal against the making of the deportation order, on asylum and human rights grounds.
12. The Secretary of State applied for and was granted permission to appeal. It is argued that the FTTJ erred in law in his assessment of the claimant's circumstances in relation to both his asylum claim and his Article 8 human rights grounds. The FTTJ had applied an incorrect test by asking whether the government in Somalia could "exercise full and effective control". The claimant had failed to seek government protection from Al-Shabab. There had been a failure to give proper consideration to the current situation in Somalia in the light of the material before the FTTJ. In relation to the Article 8 claim, the FTTJ had erred in law by failing to give adequate reasons why the deportation of the claimant would be unduly harsh. There had been a failure to give proper weight to the public interest in the deportation of foreign criminals.

13. Mr Wilding relied on the grounds of appeal and drew my attention to paragraph 371 of AMM and others (conflict; humanitarian crisis; returnees; FGM) Somalia CG [2011] UKUT 00445 (IAC) where it was said; “Accordingly, except as regards the issue of FGM, it is unlikely that a proposed return to Mogadishu at the present time will raise Refugee Convention issues. Fact-finders will, nevertheless, need to be alive to the possibility of such issues emerging in the future if, for example, the city were (as in the past) to become prey to powerful clans, enforcing their rule over weaker clans by means of armed militias.”
14. Mr Wilding argued that the FTTJ had failed to engage with all the relevant issues. He appeared to have muddled up the risk test in paragraph 51. At the hearing before the FTTJ the Secretary of State had submitted that there had been a durable changes in Mogadishu in the context of Article 15C humanitarian protection. In effect, in paragraph 54, the FTTJ had said that the position had not changed since AMM. The FTTJ should have had regard to KAB v Sweden [2013] ECHR 814 at paragraphs 89 to 91 dealing with the position in about March to July 2013.
15. In reply to my question, Mr Wilding agreed that the test which the FTTJ should have asked himself was threefold. Firstly, did the claimant face a real risk of persecution from Al-Shabab for a Convention reason? Secondly, would the authorities provide him with a sufficiency of protection? Thirdly, was internal relocation available to him? Mr Wilding also agreed that if the answer to the first question was yes then, in the current circumstances in Somalia, the answer to the other two questions would have to be no. Mr Wilding submitted that in the light of the Swedish LANDINFO report as to security and protection in Mogadishu and south central Somalia dated May 2013 it was not necessarily the case that the claimant would be targeted by Al-Shabab in 2014 even in the light of what happened to him in 2011 and 2012. He submitted that the FTTJ had failed to give proper reasons for his conclusion.
16. In relation to the Article 8 grounds, Mr Wilding accepted that part of the FTTJ’s reasoning in paragraph 55 relating to paragraph 399 of the Immigration Rules was correct at the date of the Secretary of State’s decision. However, in the light of the Immigration Act 2014 and the Immigration Rules in force at the date of the hearing there were circumstances in which it could be appropriate to separate the family. Where the provisions of paragraphs 399 and 399A did not apply it would only be in very compelling circumstances that the public interest would be outweighed. He argued that the reasoning demonstrated muddled thinking and failed to take into account the fact that the claimant’s wife did not have to go with him but could remain with the children. It was unhelpful to describe the offence as being at the lower end of the scale.
17. Ms Mascord relied on her skeleton argument and accepted that the threefold test which I suggested to Mr Wilding was the one which the FTTJ should have applied. In that context she pointed out that the FTTJ found the claimant entirely credible. That finding was not now disputed by the Secretary of State who was confusing the position for the general class of persons who might return to Mogadishu with the

particular circumstances of the claimant. The LANDINFO report had been superseded by the Danish report which was before the FTTJ. Whilst Al-Shabab no longer controlled Mogadishu they were still carrying out attacks and targeted killings. The killings were not just targeted at a narrow class of individuals.

18. It was argued that the finding of the Tribunal in AMM as to Refugee Convention claims should be read in the context of what was said in paragraphs 370 and 371. The Tribunal was not saying that nobody could succeed on Refugee Convention grounds. Clan issues were no longer as important as they once were. KAB was not binding on me and in any event was mainly directed to the question Article 3 risk.
19. In relation to the Article 8 grounds, Ms Mascord accepted that both the Immigration Act 2014 and a new Immigration Rules coming into effect on 28 July 2014 should have been applied by the FTTJ at a hearing after that date. Clearly it would be unduly harsh to expect the children to go to Somalia and it was open to the FTTJ to conclude that it would also be unduly harsh for the family to be split up. The FTTJ's description of the offence as being at the bottom end of the scale was appropriate, properly leading to the conclusion that less weight should be given to the public interest.
20. I was asked to find that there was no error of law, but if there was such an error it was not material. Ms Mascord submitted that if I concluded that there was a material error of law I could re-determine the appeal without hearing further evidence or submissions.
21. In his reply Mr Jarvis submitted that the new country guidance case of MOJ and Others (Return to Mogadishu) Somalia CG [2014] UKUT 00442 (IAC) at paragraph 355 to 365 was relevant to the asylum issues in this case. It was also relevant because if, on the facts, the appellant was not entitled to asylum then his appeal would need to be considered on Articles 3 and 15 C grounds. These were still part of the claimant's appeal. If I concluded that there were material errors of law further submissions would be needed. He suggested that this should be done in the Upper Tribunal. Ms Mascord then agreed that this would be the appropriate course in the circumstances.
22. I reserved my determination.
23. I find that the determination does contain errors of law. There has been confusion as to the proper test to be applied to consideration of the asylum claim. In paragraph 51 the FTTJ said; "If the appellant is truthful in that account then it seems to be plain that he is entitled to refugee status. I should clear up the issue as to the present country conditions. I do not consider, looking at the totality of the material, that there has been such a marked change in the situation in Somalia that it can rightly be said that the government can exercise full and effective control. Particularly in the circumstances of this appellant's case, where Al-Shabab are targeting him, the risk to the appellant, if he is truthful, is extremely high, as I see it. They are a violent group

who have obviously been involved in a number of violent terrorist acts. This is not a question in other words the appellant been caught up in some general mayhem or an innocent victim of some street grenade incident, this is quite deliberate picking out of the appellant as someone who is seen to be opposed to Al-Shabab because of perceived association with the Ethiopians." And, in paragraph 54, "I conclude, therefore, that as the appellant is credible as to the core features of his account that he is indeed entitled to refugee status. I conclude that there has not been such a durable change in Somalia to mean that the appellants somehow is not going to be at risk from Al-Shabab. I repeat that they are a highly dangerous organisation and, given that they have targeted him, that he does require international protection."

24. In relation to the asylum claim what should have been applied was a three-step test. Firstly, did the claimant face a real risk of persecution from Al-Shabab for a Convention reason? Secondly, would the authorities provide him with a sufficiency of protection? Thirdly, was internal relocation available to him? Instead the question asked was whether "it can be rightly said that the government can exercise full and effective control". The FTTJ appears to have intermixed some elements of the requirements for asylum on the one hand and humanitarian protection on the other.
25. I find little merit in the submission based on paragraph 377 of AMM that "it is unlikely that a proposed return to Mogadishu at the present time will raise Refugee Convention issues." AMM is mainly directed to issues of Article 15C protection and does not focus on issues such as those faced by the claimant. There is no reason why this claim should not be one of the unlikely ones.
26. I find that there was an error of law in the conclusion that there had not been a durable change in the situation in Somalia, presumably since AMM, although this is not entirely clear. There has not been proper consideration of all the material before the FTTJ as to how circumstances might have changed since AMM. It might have been open to the FTTJ to come to this conclusion, but not without proper consideration of this material and a reasoned conclusion.