



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

Case No: UI-2024-000362

First-tier Tribunal No: PA/00438/2022

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On 26<sup>th</sup> November 2024**

**Before**

**UPPER TRIBUNAL JUDGE MANDALIA**  
**UPPER TRIBUNAL JUDGE RASTOGI**

**Between**

**AMB**  
**(ANONYMITY ORDER MADE)**

Appellant

**and**

**The Secretary of State for the Home Department**

Respondent

**Representation:**

For the Appellant: Mr R. Toal, Counsel instructed by the Joint Council for the Welfare of Immigrants

For the Respondent: Ms S. Lecointe, Senior Home Office Presenting Officer

**Heard at Field House on 31 October 2024**

**Order Regarding Anonymity**

**Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.**

**No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.**

**DECISION AND REASONS**

1. For convenience we shall refer to the parties as they appeared before the First-tier Tribunal although the Secretary of State is, in fact, the appellant before the Upper Tribunal.

2. In this appeal, the respondent challenges the decision of First-tier Tribunal Judge Munonyedi (“the judge”) who, on 9 May 2023, allowed the appellant’s appeal against the respondent’s refusal of his protection and human rights claim (“the decision”).

3. In summary, the respondent challenges the decision on the following grounds (summarised):

Ground 1: The judge erred by failing to have regard to the country guidance in *OA (Somalia) Somalia CG* [2022] UKUT (IAC); made findings contrary to that country guidance and placed undue reliance on the country expert evidence contrary to the country guidance;

Ground 2: The judge erred by finding the appellant to be a member of a Particular Social Group (“PSG”) [87] contrary to the country guidance and *DH (Particular Social Group: Mental Health) Afghanistan* [2020] UKUT 00223 (IAC). The decision is inadequately reasoned and devoid of understanding;

Ground 3: The judge’s assessment of Article 3, at [94], is unsustainable as the judge failed to consider the Country Guidance and did not apply the test contained within *Paposhvili* [2017] Imm AR 867.

4. Permission was granted on all grounds by Upper Tribunal Judge Perkins on 18 July 2024.

5. It was the error of law hearing which came before us. We had the benefit of a 1034 bundle supplemented by the appellant’s Rule 24 response and a skeleton argument Mr Toal prepared and submitted the day before the hearing (with permission). At the hearing, we heard submissions on behalf of both parties and at the end of the hearing we reserved our decision.

#### The Legal Framework

6. Article 1A(2) of the 1951 Convention Relating to the Status of Refugees defines a “refugee” as any person who:

“...owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

7. The test as to whether someone may be a member of a PSG for asylum claims made before 28 June 2022 was confirmed in *DH (Particular social Group: Mental Health) Afghanistan* [2020] UKUT 223 IAC as being read in the disjunctive and can now be defined as:

“a group shall be considered to fall into a particular social group where, for example:

(i) members of that group share an innate characteristic; or a common background that cannot be changed, or share a characteristic so

fundamental to identity or conscience that a person should not be forced to renounce it; or

(ii) that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.”

8. If not a refugee, a person may be eligible for humanitarian protection if they can show substantial grounds for believing that they would face a real risk of suffering serious harm in their country of origin.

9. Article 3 of the ECHR says:

“No one shall be subjected to torture or inhuman or degrading treatment or punishment.”

10. It is for the appellant to demonstrate substantial grounds for believing that removing them would expose them to treatment of the sort described in Article 3. In health and destitution cases, the test is that set out in *Paposhvili* as explained and applied by the Supreme Court in *AM (Zimbabwe) v Secretary of State for the Home Department* [2020] UKSC 17 and as confirmed in relation to destitution cases in *OA* where, at headnote 1, the Upper Tribunal said:

“In an Article 3 "living conditions" case, there must be a causal link between the Secretary of State's removal decision and any "intense suffering" feared by the returnee. This includes a requirement for temporal proximity between the removal decision and any "intense suffering" of which the returnee claims to be at real risk. This reflects the requirement in *Paposhvili* [2017] Imm AR 867 for intense suffering to be "serious, rapid and irreversible" in order to engage the returning State's obligations under Article 3 ECHR. A returnee fearing "intense suffering" on account of their prospective living conditions at some unknown point in the future is unlikely to be able to attribute responsibility for those living conditions to the Secretary of State, for to do so would be speculative.”

### Discussion and Conclusions

11. We start our discussion by observing that the judge was careful in parts of her decision to set out the issues in dispute and the evidence. We note with sympathy that, at the hearing before the judge, there was no challenge by the respondent to the evidence of the country expert, Mary Harper, a fact recorded by the judge at [67] as a result of which she accepted Ms Harper's expertise and evidence. It is only now that the respondent seeks to challenge the weight the judge gave to that evidence on the basis that Ms Harper was one of the experts in *OA*, but therein her evidence was not accepted in its entirety.

12. Mr Toal's position at the hearing was that there was no legal error as, notwithstanding the absence of any reference whatever to *OA*, the respondent was not able to identify where the substance of the judge's findings or that of the expert diverged from the country guidance in *OA*.

13. Although a blanket failure to refer to, or cite a country guidance decision is not in itself an error of law, it is now well established that a failure to identify and apply a relevant country guidance decision without good reason might amount to an error of law in that a relevant consideration had been ignored, and legally inadequate reasons had been given for the decision; *R (Iran) v. Secretary of*

*State for the Home Department* [2005] EWCA Civ 982. Country guidance decisions possess a status and significance comparable to that which declarations can have in public law cases; *HM (Iraq) v. Secretary of State for the Home Department* [2011] EWCA Civ 1536, at [39]. Country Guidance decisions impose a presumption of fact and unless there is cogent evidence to justify departure from the country guidance decision, the facts must be found in accordance with that decision; *SG (Iraq) v. Secretary of State for the Home Department* [2012] EWCA Civ 940.

14. We are entirely satisfied that the judge overlooked *OA*. At the time the respondent refused the appellant's claim, *OA* had not been published, so the refusal letter only refers to *MOJ & Ors (Return to Mogadishu) Somalia CG* [2014] UKUT 00442 (IAC). By the time of the judge's decision, it had been. Not only that, but *OA* was expressly referred to not only at [52] of the appellant's skeleton argument ("ASA") but also a copy appeared at page 353 of the First-tier appellant's bundle and it was referenced in the index of the bundle. Nevertheless, when listing the documents with which she had been provided, the judge did not include reference to *OA* (although she did refer to *MOJ*) [9]. Finally, when making reference to country guidance in her decision, the judge only referred to, and set out the guidance in, *MOJ* [74].
15. We see some force in the argument that, if the substance of the judge's decision does not amount to an unexplained departure from the country guidance, then the decision is not unsafe and any error immaterial. However, for the reasons we give below, we are satisfied the judge did err in law in failing to take into account a material matter, namely the country guidance case of *OA* and that error was material.
16. We deal first with the expert evidence provided by Ms Harper. Ms Lacointe's submissions effectively invited us to find that Ms Harper was rejected as an expert worthy of weight in *OA* so the judge here was in error in attaching weight to the evidence she gave. In other words, that in so doing she made findings contrary to the country guidance.
17. We accept there was a degree to which the Upper Tribunal found there to be limitations to Ms Harper's evidence in *OA* but at [194] the Tribunal confirmed that "in general we found many parts of Ms Harper's evidence to be helpful". The precise areas where the Tribunal decided her evidence suffered limitations are set out, in particular, at [196]-[197] when dealing with evidence from anonymous sources; [199] when dealing with evidence in relation to Somalia's economic boom and the extent of the same and [200] when dealing with Camp Coordination and Camp Management ("CCCM"). Otherwise, there was occasional reference to Ms Harper's evidence not dovetailing with other evidence (see for example [216]). However, in the main, where the Tribunal referred to Ms Harper's evidence it was either to refer to it as being consistent with other country material or that they accepted her evidence or they simply referred to it without comment either way.
18. In our judgement, and particularly when the judge's attention was not drawn to any part of Ms Harper's report which was contrary to the country guidance in *OA*, we are not satisfied the judge fell into error in placing weight on the evidence she gave. We do not read any part of *OA* as meaning that Ms Harper is not an expert on Somalia whose evidence is not worthy of any, or any real, weight.

19. Of course, if Ms Harper's evidence before the judge contradicted the findings in *OA* and the judge accepted them without explanation, we find that capable of amounting to a material error.
20. We have considered whether it is incumbent on us, in these circumstances, to evaluate the specific challenges raised in the grounds of appeal against the submissions Mr Toal made at the hearing.
21. However, we have decided such an analysis is not required here. In our view, whilst the judge was entitled to have regard to Ms Harper's evidence, it was incumbent upon her to evaluate that evidence in light of *OA*. We simply cannot say what the judge would have made of that evidence if she had properly directed herself to the country guidance in *OA*. For that reason, we conclude that the judge's error in failing to direct herself to *OA* was material both to her assessment of Ms Harper's evidence, but also to her assessment of all the evidence before her.
22. Likewise, it is clear that although *MOJ* remains extant country guidance, it cannot be considered in isolation. It is plain from [405] of *OA* that when carrying out a "careful assessment of all the circumstances" the tribunal must consider not only [407(h)] of *MOJ* but also the matters set out at [356] of *OA*. The reason for that is that the Upper Tribunal in *OA* added to the country guidance in *MOJ* when considering the factors contained within [407(h)] of *MOJ*.
23. In this appeal, as she overlooked *OA*, the judge plainly did not carry out that fuller assessment and we do not know what the outcome would have been had she done so.
24. The error we have identified is material as it goes directly to the issue of risk on return. Accordingly, the error is sufficient to justify setting aside the judge's decision. It follows that it is not necessary for us to consider Grounds 2 and 3 in any detail.
25. Suffice to say, in our judgement, Ground 2 reveals an obvious material legal error concerning the judge's assessment of whether or not the appellant fell within a PSG and qualified as a refugee. At [87] the judge said:

"The Appellant is a member of a particular social group, that is a member of a despised minority clan, without any connections in Somalia, without any means of financial support from family in the United Kingdom, suffering from mental health condition, exposed to stigma and ostracization due to his mental health condition, a criminal with several criminal convictions and part of the 'bad diaspora'".
26. This represented the entirety of the judge's discussion and reasoning about PSGs. When the judge set out the legal position at [2]-[7], she made no reference to the definition or test to be applied to establish if someone is able to show membership of a PSG. Whether or not the appellant is able to meet the definition also relies on his being able to establish a nexus between that and the fear of persecution or absence of protection (see *DH* [74]). Here, the judge did not say expressly on what basis she found the appellant to fall within the definition of PSG nor did she explain in the decision what the nexus was save at [85] the judge said:

“it is the cumulative effect of all these factors identified by the expert evidence and the particular characteristics of this Appellant that forces me to find that there is a very reasonable likelihood that he would be exposed to and face persecution and destitution”.

27. We are satisfied that this part of the judge’s decision revealed a misdirection in law as the judge failed to apply the test to decide if the appellant could show his fears arose for a Convention reason. In any event, even if we are wrong about that, the judge’s findings are infected by the legal error we have found in ground 1 as her findings at [85] are infected by the failure to apply the country guidance in OA to the appellant’s circumstances.
28. We turn only briefly to Article 3. The judge’s assessment at [94] is brief and, in our respectful judgement, inadequately so. In any event, it is also infected by the error the judge made as discussed within Ground 1 above. The evidence is all to be considered in accordance with the country guidance in OA. The nature of the ‘persecution’ or ‘treatment’ the judge found the appellant to suffer is simply not clear. If the basis of the Article 3 findings is either on grounds of destitution or mental health, then the appropriate framework for that assessment to be carried out is set out in *AM (Zimbabwe)* and OA as we have already set out. The judge failed to approach the Article 3 assessment in that way.
29. For these reasons we are satisfied that all three grounds are made out and the judge’s decision is to be set aside pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 (“the 2007 Act”).
30. As to disposal, we have considered which, if any, of the judge’s findings can be preserved. In so doing we have had in mind the decision of the Presidential Panel in *AB (preserved FtT findings; Wisniewski principles) Iraq* [2020] UKUT 268 (IAC) and *Begum (Remaking or remittal) Bangladesh* [2023] UKUT 00046. Having regard to the errors of law we have found, which include errors as to the assessment of evidence relevant to the risk upon return, in fairness to the appellant, the appropriate course is for the appeal to be remitted to the First-tier Tribunal for hearing afresh, with no findings preserved.

### **Notice of Decision**

31. The decision of FtT judge Munonyedi is set aside.
32. The appeal is remitted to the FtT for hearing afresh with no findings preserved. It is to be listed before any judge save FtT judge Munonyedi.
33. The parties will be notified of a fresh hearing date in due course.

***SJ Rastogi***  
Judge of the Upper Tribunal  
Immigration and Asylum Chamber

25 November 2024