Neutral Citation Number: [2019] EWCA Civ 1345

Case No: C5/2018/1348

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL
(**IMMIGRATION AND ASYLUM CHAMBER**)
UPPER TRIBUNAL JUDGE KOPIECZEK
RP/00084/2015 AA014612015

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/07/2019

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE HAMBLEN
and
LORD JUSTICE NEWEY

- -

Between :

SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant**
- and -	
MS (SOMALIA)	**Respondent**

- -
- -

John-Paul Waite (instructed by **Government Legal Department**) for the **Appellant**
Stephen Vokes and Emma Rutherford (instructed by **Turpin & Miller LLP**) for the **Respondent**

Hearing date: 11 July 2019

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Approved Judgment

Lord Justice Hamblen :

Introduction

1. The Respondent, MS, was granted asylum on 8 October 2012. On 15 September 2015, the Appellant ("the SSHD"), informed MS that she had ceased his refugee status and that he had been made subject to a deportation order. MS appealed against that decision and his appeal was allowed by the First Tier Tribunal ("FTT") in a decision promulgated on 20 September 2017. The SSHD's appeal to the Upper Tribunal ("UT") was dismissed in a decision promulgated on 22 March 2018.

2. The SSHD appeals against the UT decision on three grounds: (1) the FTT and the UT erred in concluding that the SSHD cannot "in principle" rely upon the availability of internal relocation as the basis for the cessation of refugee status under Article 1C(5) of the Refugee Convention ("the Convention"); (2) the FTT and the UT erred in failing to apply s.72 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") to MS's case, and (3) the FTT erred in concluding that the removal of MS to Somalia would breach this country's obligations under Article 3 of the ECHR, and the UT should have so found.

3. Section 72 of the 2002 Act involves a statutory presumption for the purpose of the construction and application of Article 33(2) of the Convention (exclusion from protection) that a person, such as MS, who has been sentenced to a period of imprisonment for at least two years has been convicted of a particularly serious crime and constitutes a danger to the community of the UK. It also involves a procedure whereby the SSHD issues a certificate that the presumption applies.

Factual background and immigration history

4. MS is a national of Somalia who was born on 14 March 1989.

5. He entered the UK with his mother and 6 siblings on 21 November 2002 at the age of 13 and claimed asylum as his mother's dependant. The application was refused but the family were granted exceptional leave to remain. His mother applied for asylum in May 2007, with the appellant and his siblings again cited as dependants upon that application. The application was refused on 28 November 2010 but his mother's appeal was allowed on 15 July 2011 and both she and her children (with the exception of MS) were granted asylum on 28 July 2011.

6. In allowing the mother's appeal, the FTT noted that she resided in a town called Goob Weyn which is located in the Lower Juba region of Southern Somalia. The reason for allowing the appeal was that she was at risk of persecution as a member of the minority Ashraf clan and would be returning to Somalia as a lone woman.

7. MS was not initially granted asylum in line with that of his mother due to the need to give further consideration to his criminality and as a consequence of the parallel immigration proceedings in his case. That decision was subsequently withdrawn and he was granted asylum in line with the remainder of his family on 8 October 2012.

8. On 24 September 2012, MS had been convicted of conspiracy to defraud. There was a delay in the passing of sentence because MS absconded, but on 31 March 2014 MS was sentenced to 21 months imprisonment for this offending.

9. On 13 November 2014, MS was served with a decision to deport. The decision certified the case under s.72 of the 2002 Act although the SSHD acknowledges that this appears to have been in error because the sentence which was passed was for less than two years imprisonment.

10. On 1 May 2015, MS was notified of the SSHD's intention to cease his refugee status and he was invited to submit representations in response. Notification was also provided to the UNHCR. Representations were received from MS on 8 June 2015 and from the UNHCR on 17 June 2015.

11. On 15 September 2015, MS was made the subject of a deportation order and a decision to refuse his protection and human rights claim. Included within this was a decision to cease MS's refugee status.

12. On 15 April 2016, following an appeal being lodged against the decision to deport, MS was sentenced to 25 months imprisonment following convictions for assault occasioning actual bodily harm. MS also received a three-month consecutive sentence in respect of a separate conviction for battery.

13. On 15 June 2017, the FTT adjourned MS's appeal in order for the SSHD to take account of his most recent sentence.

14. On 1 August 2017, the SSHD served a supplementary decision letter maintaining the original decisions to deport and to refuse his human rights claim.

15. In the supplementary decision letter the SSHD stated that she considered the offences of beating and assault occasioning actual bodily harm as extremely serious, as reflected in the Judge's sentencing remarks and the sentence imposed.

16. It was noted that since MS's arrival in the UK, he had accumulated 18 convictions comprising 25 offences and that his most recent conviction clearly demonstrated an escalation in seriousness. In summary, between 7 January 2006 and 20 September 2015, he had committed the following offences: 3 offences against the person; 2 offences against property; 1 fraud and kindred offence; 5 theft and kindred offences; 3 public disorder offences, 3 offences relating to police/courts/prisons; 1 drug offence; 1 firearms/shotguns/offensive weapons and 7 miscellaneous offences. For those offences he received various sentences including imprisonment; detention and training orders; conditional discharges; suspended sentences; supervision orders; curfew requirement – electronic monitoring; fines; costs and victim surcharges. His driving licence was also endorsed. The SSHD stated that it was therefore considered that he was an habitual offender who has very little, if any, regard for the wellbeing and safety of the UK public.

17. It was further noted that MS had failed to report to Immigration on 11 January 2017, after being granted bail by the IAC on 5 January 2017 and had been recalled to prison on 25 February 2017 on non-compliance grounds. Previous to this he had breached a suspended sentence and failed to surrender to custody at the appointed time.

18. The letter concluded:

> "Your most recent convictions clearly indicate that you have not addressed your offending behaviour despite the past penalties imposed by the courts. It is also evident that the threat of deportation has done nothing to curb your propensity to re-offend.
>
> In light of the foregoing, the Notice of Decision to Refuse your Protection and Human Rights claim dated 15 September 2015 is hereby maintained. It is considered that your deportation from the UK continues to be in the best interests of the UK public."

19. The SSHD accepts that the letter ought to have certified the case under s.72 of the 2002 Act, but this was not done. It would appear that the reason for this was that the author of the letter considered that there was no necessity to certify the claim under s.72 because MS's refugee status had already been ceased. The SSHD can, however, both cease status and certify the claim under s72, and this is commonly done.

20. On 20 September 2017, MS's appeal was allowed by the FTT on the basis that the criteria for cessation of refugee status had not been made out, that MS should continue to have protection under the Convention and Article 3 of the ECHR and that he was therefore excluded from deportation. The FTT also held that the requirement to consider s.72 did not arise as the SSHD could not rely on a certificate relating to a conviction which pre-dated the grant of asylum to MS.

21. The SSHD appealed to the UT on the basis that the FTT's approach to cessation and Article 3 was erroneous. That appeal was dismissed by the UT on 22 March 2018.

22. Permission to appeal to the Court of Appeal was granted by Haddon-Cave LJ on 10 December 2018.

The grounds of appeal

23. The grounds of appeal are:

(1) *Ground 1 - Cessation of refugee status*.
The FTT erred in its approach to the question of cessation of refugee status in concluding that a cessation decision could not in principle turn upon the availability of internal relocation. Internal relocation can be relied on for the purpose of ceasing a person's refugee status.
(2) Ground 2 - Failure to apply s.72 of the 2002 Act.
The FTT erred in not considering whether MS had rebutted the statutory presumption in s.72(1) and (2) of the 2002 Act. MS had committed a serious offence and constituted a danger to the community and accordingly should have been excluded under Article 33(1) of the Convention. The FTT concluded in error that MS fell outside s.72(1) and (2) because the SSHD had failed to certify his case under s.72(9). The operation of s.72 is not contingent upon a certificate, and in any event, there was one in place in respect of an earlier criminal offence.

(3) *Ground 3 - Article 3 ECHR.*

The FTT erred in its approach to Article 3 of the ECHR. It treated the guidance in *MOJ & Ors (Return to Mogadishu) Somalia CG* [2014] UKUT 00442 (IAC) as determinative of whether humanitarian conditions upon return to Mogadishu would breach MS's rights. This approach was incompatible with *Secretary of State for the Home Department v Said* [2016] EWCA Civ 442.

(1) Ground 1 - Cessation of refugee status.

The legal framework

24. Article 1A(2) of the Convention defines a refugee as being a 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."

25. It is well recognised that if a person, who has a well-founded fear of persecution at the place where he lives, can reasonably be expected to relocate to a place within his country where the protection of his country would be available to him, then he will not fall within the Convention definition of refugee – the principle of internal relocation.

26. As explained by Lord Bingham in *Januzi v SSHD* [2006] 2 AC 426 at [7]:

> "7. The Refugee Convention does not expressly address the situation at issue in these appeals where, within the country of his nationality, a person has a well-founded fear of persecution at place A, where he lived, but not at place B, where (it is said) he could reasonably be expected to relocate. But the situation may fairly be said to be covered by the causative condition to which reference has been made: for if a person is outside the country of his nationality because he has chosen to leave that country and seek asylum in a foreign country, rather than move to a place of relocation within his own country where he would have no well-founded fear of persecution, where the protection of his country would be available to him and where he could reasonably be expected to relocate, it can properly be said that he is not outside the country of his nationality owing to a well-founded fear of being persecuted for a Convention reason."

27. The internal relocation principle is reflected in Article 8 of EU Council Directive 2004/83/EC ("the Qualification Directive"). Article 8 of the Qualification Directive provides:

> "**Internal protection**

> 1. As part of the assessment of the application for international protection, Member States may determine that an applicant is not in need of international protection if in a part of the country of origin there is no well-founded fear of being persecuted or no real risk of suffering serious harm and the applicant can reasonably be expected to stay in that part of the country.
>
> 2. In examining whether a part of the country of origin is in accordance with paragraph 1, Member States shall at the time of taking the decision on the application have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant.
>
> 3. Paragraph 1 may apply notwithstanding technical obstacles to return to the country of origin."

28. Effect is given to Article 8 in the UK by paragraph 339O of the Immigration Rules as follows:

> **"Internal relocation**
>
> 339O
>
> (i) The Secretary of State will not make:
>
> (a) a grant of refugee status if in part of the country of origin a person would not have a well founded fear of being persecuted, and the person can reasonably be expected to stay in that part of the country; or
>
> (b) a grant of humanitarian protection if in part of the country of return a person would not face a real risk of suffering serious harm, and the person can reasonably be expected to stay in that part of the country.
>
> (ii) In examining whether a part of the country of origin or country of return meets the requirements in (i) the Secretary of State, when making a decision on whether to grant asylum or humanitarian protection, will have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the person.
>
> (iii) (i) applies notwithstanding technical obstacles to return to the country of origin or country of return."

29. In relation to the cessation of refugee status, Article 1C (5) of the Convention provides:

> "This Convention shall cease to apply to any person falling under the terms of section A if:
>
> …

> (5) 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 his nationality…"

30. This is reflected in Article 11(1)(e) of the Qualification Directive which provides:

> "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."

31. Cessation is addressed in paragraph 339A of the Immigration Rules which provide:

> **"Refugee Convention ceases to apply (cessation)**
>
> 339A. This paragraph applies when the Secretary of State is satisfied that one or more of the following applies:
>
> …..
>
> (v) they can no longer, because the circumstances in connection with which they have been recognised as a refugee have ceased to exist, continue to refuse to avail themselves of the protection of the country of nationality;
>
> ….
>
> 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."

The FTT and UT decisions

32. The FTT decided that, as a matter of principle, the possibility of internal relocation should not lead to the cessation of refugee status as it only relates to part of the country. As explained at paragraphs 60-61 of the decision:

> "60. In this regard, what the Respondent is effectively saying is that in the cessation context the Appellant can attempt internal flight to Mogadishu. Changes in a refugee's country of origin affecting only part of the territory should not, in principle, lead to a cessation of refugee status: refugee status can only come to an end if the basis for persecution is removed without a pre-condition that the refugee has to return to specific safe parts of the country in order to be free from persecution; also, not being able to move or establish oneself freely in the country of origin would indicate that changes have not been fundamental. (Paragraph 17 UNHCR Guidelines on cessation)
>
> 61. Thus, I cannot be satisfied that the Respondent has shown that cessation of the Appellant's refugee status is appropriate."

33. Paragraph 17 of the UNHCR Guidelines provides:

> "17. The 1951 Convention does not preclude cessation declarations for distinct sub-groups of a general refugee population from a specific country, for instance, for refugees fleeing a particular regime but not for those fleeing after that regime was deposed. In contrast, changes in the refugee's country of origin affecting only part of the territory should not, in principle, lead to cessation of refugee status. Refugee status can only come to an end if the basis for persecution is removed without the precondition that the refugee has to return to specific safe parts of the country in order to be free from persecution. Also, not being able to move or to establish oneself freely in the country of origin would indicate that the changes have not been fundamental."

34. The UT upheld the decision and reasoning of the FTT, stating as follows:

> "54. Although it was suggested on behalf of the respondent in submissions that there was no difference in principle between the grant or the cessation of refugee status, because a person is only a refugee so long as there is no safe area of return, I do not agree. There is, in my judgement, a very significant philosophical and indeed practical difference between the grant and the cessation of refugee status, illustrated by the UNHCR Cessation Guidelines, but also reflected in the two authorities to which I have referred.
>
> 55. If the Secretary of State's position was to hold good, it would mean that a person claiming asylum would be in a more advantageous position than a person who already has refugee status and whose status the Secretary of State seeks to rescind.

> Thus, if the person whose claim for asylum depends on an assessment of an internal flight option, that individual would have that issue assessed on the basis of undue harshness and the reasonableness of internal relocation. However, in the case of a person whose refugee status is to be taken away, once it is decided that there is a part of the country in which the change of circumstances is of such a significant and non-temporary nature that the person's fear is no longer regarded as well-founded (in that area), that individual may be returned without the sort of examination of the issues of undue harshness and reasonableness of return to that particular area which would occur in considering a grant of refugee status…"

35. It should be noted that the SSHD accepts that he would need to show that internal relocation would be reasonable and not unduly harsh for the individual concerned if it is to be relied upon in relation to cessation.

Whether there was any error of law

36. Mr John-Paul Waite for the SSHD submitted that the approach of the FTT and the UT is wrong in principle and contrary to recent Court of Appeal authority.

37. It is wrong in principle because the absence of a suitable place of internal relocation is an integral part of the test for establishing refugee status and logically the availability of such a place should equally be a basis upon which refugee status can be ceased.

38. It is contrary to authority because in the recent case of *SSHD v MA (Somalia)* [2019] 1 WLR 241, this Court held at [2] (Arden LJ) that:

> "…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…."

39. As Arden LJ further stated at [47]:

> "….there is no necessary reason why refugee status should be continued beyond the time when the refugee is subject to the persecution which entitled him to refugee status or any other persecution which would result in him being a refugee, or why he should be entitled to further protection. There should simply be a requirement of symmetry between the grant and cessation of refugee status".

40. The Court also held that such a requirement of symmetry was consistent with the CJEU decision on the Qualification Directive in *Abdulla v Bundesrepublik*

Deutschland (Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08) [2011] QB 46. As the CJEU observed in that case at [89]:

> "At both of those stages of the examination, the assessment relates to the same question of whether or not the established circumstances constitute such a threat that the person concerned may reasonably fear, in the light of his individual situation, that he will in fact be subjected to acts of persecution."

41. Although *MA (Somalia)* was not concerned with internal relocation, it was submitted that the mirror image approach applies where, as in this case, the lack of a place of internal relocation was an integral ground of the decision to recognise refugee status. The SSHD contended that that circumstance has ceased to apply on a durable basis and the cessation decision was accordingly lawfully made.

42. The status of the UT decision in the present case in the light of *MA (Somalia)* was considered by UT Judge Plimmer in *SSHD v AMA* [2019] UKUT 00011, an internal relocation case. As reflected in the headnote, she held that: "Changes in a refugee's country of origin affecting only part of the country may, in principle, lead to cessation of refugee status, albeit it is difficult to see how in practice protection could be said to be sufficiently fundamental and durable in such circumstances".

43. In relation to the issue of principle, UT Judge Plimmer stated:

> "45. All the ingredients in article 1A(2) of the Refugee Convention must therefore be met at both stages of the examination: when determining status and whether to cease that status. This commonly requires the following: (i) a well-founded fear of persecution; (ii) for reasons relating to a Convention Reason; (iii) making the person unable or unwilling to avail himself of the protection of the country. The final ingredient is based upon the principle of surrogacy and necessarily includes an enquiry as to whether the person can be expected to seek protection in another part of his country of origin. The widely accepted test is whether the person can be reasonably expected to internally relocate – see Januzi v SSHD [2006] UKHL 5 at [7-8] and [48-49].
>
> 46. The wording of article 1C(5) also supports this symmetrical approach. It clearly refers not just to "*the circumstances in connection with which he has been recognised as a refugee*" having "*ceased to exist*" but also to the person not being able to avail himself "*of the protection of the country of his nationality*". The principle of surrogacy is therefore found in both article 1C(5) and article 1A(2) of the Refugee Convention. There is therefore a prima facie argument that if a person is able to avail himself of protection in one part of the country then (unless that protection lacks the positive qualities required of it, including being effective / durable / fundamental / significant / non-temporary), they do not meet the refugee definition, and if they are being considered for cessation they

> are no longer a refugee. In other words, if effective protection is available then a person does not meet the definition of a refugee."

44. In relation to the evidential difficulty of establishing cessation on the basis of internal relocation, UT Judge Plimmer stated:

> "47. However, the reality of the situation is that the expectation that a person can avail himself of the protection of another part of his country of nationality, i.e. through internal relocation, only arises for consideration where it is accepted that there is a well-founded fear of persecution for a Convention Reason in the home area of that country. It is difficult to envisage how and in what circumstances a well-founded fear of persecution can be said to be "non-temporary", "significant" or "permanently eradicated" in a country for a particular person, wherein it is accepted that it continues in the person's home area of that same country and / or the person cannot safely move around the country. The necessary requirement for the changes to be fundamental and durable is most likely to be absent. It follows that the availability of internal relocation is generally unlikely to be a material consideration when applying article 1C(5) of the Refugee Convention or article 11 of the QD.
>
> 48. Although I note the difference in approach with the first part of [17] of the UNHCR Cessation Guidelines, in principle there remains a requirement to apply the same refugee definition for both the grant of status and cessation, and this includes a consideration of internal relocation. However, given the nature of the demanding test required to be met for cessation, it is difficult to see how in practice 'an internal relocation case' can meet the required threshold. To that extent, there is force in the last sentence of [17] of the Guidelines that where safety is limited to a specific part of the country, that would indicate that the changes have not been fundamental. At [57] of MA Arden LJ was prepared to treat the Guidelines as an important text for the purposes of interpreting the QD replicating the Refugee Convention, but considered [17] of the Guidelines to merely address internal relocation, which is separately dealt with in the QD – see [39] and [57] of MA. The Court of Appeal therefore did not provide any clear view on the correctness of [17] of the Guidelines.
>
> 49. Changes in the refugee's country of origin affecting only part of the country may, in principle, lead to cessation of refugee status provided that the protection available is sufficiently fundamental and durable notwithstanding the absence of this in other parts of the country. It is difficult to see how in practice protection could be said to be fundamental and durable in these circumstances, but it is not necessarily

> impossible (particularly in a very large country). In so far as MS states that as a matter of principle, refugee status cannot cease solely on the basis of a change of circumstances in one part of the country of origin, I disagree. Whilst in principle internal relocation is relevant to whether a refugee can continue to refuse to avail himself of the protection of his country of nationality, generally speaking or as a matter of practice, it is likely to be very difficult to cease refugee status in an 'internal relocation case'. This is because by necessary implication there will be a part of the country where a well-founded fear of persecution continues (or else internal relocation would not arise) and in such circumstances the requirement that the change in circumstances be fundamental and durable or "significant and non-temporary" is unlikely to be met."

45. At the hearing of the appeal Mr Stephen Vokes for MS accepted that the approach of the UT in *AMA* was correct. He accordingly conceded that it was wrong to hold that internal relocation could not in principle lead to cessation. However, he emphasised and relied upon the practical difficulties of showing that there had been a sufficiently fundamental and durable change in circumstances where the change only affects a part of the country, as explained by the UT in *AMA.* In this connection he also relied upon Article 7 of the Qualification Directive and the requirement there set out for actors of protection to control "the State or a substantial part of the State".

46. Mr Vokes also relied upon the need for a "strict" and "restrictive" approach to cessation clauses for the reasons set out by the House of Lords in *Hoxha & Anr v Secretary of State for the Home Department* [2005] UKHL 19, and, in particular, in the judgment of Lord Brown at [63]-[65]:

> "63. This provision [Article 1C(5)], it shall be borne in mind, is one calculated, if invoked, to redound to the refugee's disadvantage, not his benefit. Small wonder, therefore, that all the emphasis in paras 112 and 135 of the Handbook is upon the importance of ensuring that his recognised refugee status will not be taken from him save upon a fundamental change of circumstances in his home country. As the Lisbon Conference put it in para 27 of their conclusions: "… the asylum authorities should bear the burden of proof that such changes are indeed fundamental and durable".
>
> 64. Many other UNHCR publications are to similar effect. A single further instance will suffice, taken from the April 1999 Guidelines on the application of the cessation clauses:
>
> > "2. The cessation clauses set out the only situations in which refugee status properly and legitimately granted comes to an end. This means that once an individual is determined to be a refugee, his/her status is maintained until he/she falls within the terms of one of the cessation clauses. This strict approach is important since refugees should not be subjected to constant review of their refugee

> status. In addition, since the application of the cessation clauses in effect operates as a formal loss of refugee status, a restrictive and well-balanced approach should be adopted in their interpretation."
>
> 65. The reason for applying a "strict" and "restrictive" approach to the cessation clauses in general and 1C (5) in particular is surely plain. Once an asylum application has been formally determined and refugee status officially granted, with all the benefits both under the Convention and under national law which that carries with it, the refugee has the assurance of a secure future in the host country and a legitimate expectation that he will not henceforth be stripped of this save for demonstrably good and sufficient reason. That assurance and expectation simply does not arise in the earlier period whilst the refugee's claim for asylum is under consideration and before it is granted. Logically, therefore, the approach to the grant of refugee status under 1A (2) does not precisely mirror the approach to its prospective subsequent withdrawal under 1C (5)."

47. In my judgment, this Court should follow the mirror image approach endorsed in *MA (Somalia)*, if and in so far as it is not bound so to do. It should do so for the reasons set out in *MA (Somalia)* and, in particular, because it reflects the language of Article 1C(5) of the Convention and Article 11 of the Qualification Directive, which link cessation with the continued existence of the circumstances which led to the recognition of refugee status. It is also consistent with the approach of the CJEU in *Abdulla.*

48. As the House of Lords made clear in *Hoxha*, the mirror image approach is subject to the qualification that the requisite "strict" and "restrictive" approach to cessation clauses means that it must be shown that the change in circumstances is fundamental and durable - in the equivalent wording of the Qualification Directive, "significant" and "non-temporary". In addition, the burden of proof on all issues will be on the SSHD.

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

50. The size of the area of relocation will be relevant to the reasonableness of being expected to relocate there and also to whether the change in circumstances is significant and non-temporary. I do not, however, accept that there is any requirement that it be a substantial part of the country. Article 7, which is relied upon by Mr Vokes, is concerned with the different issue of the circumstances in which non-State parties or organisations may be regarded as actors of protection. In that context

it is understandable that they should be required to be in control of a substantial part of the State.

51. I also have reservations about the generalised statements made by UT Judge Plimmer in *AMA* that it will be difficult in practice for a change in circumstances in a place of relocation to be sufficiently fundamental and durable or "significant and non-temporary" for there to be cessation. That may be so in some cases, but it will all depend on the evidence in any particular case and one should not generalise.

52. I recognise that this involves differing from the approach set out in paragraph 17 of the UNCHR Guidelines in so far as that states that "changes in the refugee's country of origin affecting only part of the territory should not, in principle, lead to cessation of refugee status". I accept, however, as the Guidelines state, that "not being able to move or establish oneself freely in the country" is relevant to whether the change in circumstances is fundamental, or "significant" and "non-temporary".

53. It follows that the FTT and the UT erred in law in holding that the availability of internal relocation cannot in principle lead to a cessation of refugee status and the case will have to be remitted to consider whether or not it does so on the facts in this case.

(2) Ground 2 - Failure to apply s.72 of the 2002 Act.

The legal framework

54. Article 33 of the Convention provides:

> "1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."

55. Section 72 of the 2002 Act provides:

> **"72 Serious criminal**
> (1) This section applies for the purpose of the construction and application of Article 33(2) of the Refugee Convention (exclusion from protection).
>
> (2) A person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if he is—
>
> (a) convicted in the United Kingdom of an offence, and

(b) sentenced to a period of imprisonment of at least two years.

….

(3) A person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if—

(a) he is convicted outside the United Kingdom of an offence,

(b) he is sentenced to a period of imprisonment of at least two years, and

(c) he could have been sentenced to a period of imprisonment of at least two years had his conviction been a conviction in the United Kingdom of a similar offence.

(4) A person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if—

(a) he is convicted of an offence specified by order of the Secretary of State, or

(b) he is convicted outside the United Kingdom of an offence and the Secretary of State certifies that in his opinion the offence is similar to an offence specified by order under paragraph (a). ….

(6) A presumption under subsection (2), (3) or (4) that a person constitutes a danger to the community is rebuttable by that person.

….

(9) Subsection (10) applies where—

(a) a person appeals under [section 82] of this Act or under section 2 of the Special Immigration Appeals Commission Act 1997 (c. 68) wholly or partly on the ground [mentioned in section 84(1)(a) or (3)(a) of this Act (breach of the United Kingdom's obligations under the Refugee Convention), and]

(b) the Secretary of State issues a certificate that presumptions under subsection (2), (3) or (4) apply to the person (subject to rebuttal).

(10) The [...] Tribunal or Commission hearing the appeal—

(a) must begin substantive deliberation on the appeal by considering the certificate, and

> (b) if in agreement that presumptions under subsection (2), (3) or (4) apply (having given the appellant an opportunity for rebuttal) must dismiss the appeal in so far as it relies on the ground specified in subsection (9)(a)."

The FTT and UT decisions

56. The FTT clearly regarded MS's criminality as being material.

57. In paragraph 29 of its determination the FTT stated:

> "I am conscious of the number of convictions this Appellant has, as is shown in the PNC report that I have before me. It is apparent that the Appellant has no respect for the criminal laws of the United Kingdom or that he has any respect for authority…."

58. Referring to the absence of a certificate, in paragraph 29 the FTT stated:

> "I would add that I may well have come to a different conclusion had the second decision letter also referred to certification."

59. In paragraph 36 the FTT concluded:

> "I have no doubt that if he is permitted to remain in the United Kingdom he will go on to commit further crimes. He does not learn by his previous convictions and I am not satisfied that there is anything in what he says in his statement that will be a protective factor to prevent him offending in the future."

60. The FTT Judge did not, however, consider that she was entitled to place reliance on MS's convictions unless there was a s.72 certificate which the SSHD could rely upon. The only certificate issued was one which related to convictions before asylum was granted. The FTT considered that this certificate could not be relied upon as the grant of refugee status meant that as at that time the SSHD cannot have regarded the convictions to be of a particularly serious crime or that he was a danger to the public. Although the facts relating to MS's 2016 conviction and sentence of over 2 years were before the FTT, it would appear that the FTT did not consider that this could be relied upon without a certificate relating to it.

61. This aspect of the FTT decision was not appealed to the UT and it was noted at paragraph 62 of the UT determination that:

> "Mr Wilding confirmed that there was no challenge to the FtJ's conclusions in terms of the s.72 certificate"

Whether there was any error of law

62. The first issue to be addressed is whether it is open to the SSHD to raise this ground of appeal in circumstances where this was not an issue appealed to the UT, nor does the ground reflect the way the matter was put before the FTT. Mr Waite contended

that the nature of the issue raised means that the SSHD should be allowed to pursue this ground. He submitted that the FTT and the UT were obliged by s.72 of the 2002 Act to apply the presumption regardless of whether a certificate had been issued and of the position of the SSHD.

63. Section 72 relates to Article 33(2) of the Convention under which the benefit of the prohibition of expulsion or return under Article 33(1) "may not, however, be claimed by a refugee" who, having been convicted of "a particularly serious crime, constitutes a danger to the community of that country". Although there is no specific reference to Article 33 in the FTT decision, by claiming that he remained a refugee and challenging the SSHD's decision to deport him MS was necessarily relying on Article 33(1) and the SSHD was seeking to rely on MS's convictions in support of the deportation decision, and, specifically before the FTT, on the certificate which had been issued.

64. Under s.72 a person sentenced to imprisonment for at least 2 years is to be presumed to have been convicted of "a particularly serious crime and to constitute a danger to the community" of the UK. That statutory presumption is of general application and it applies regardless of whether a s.72 certificate has been issued.

65. This is made clear in the decision of this Court in *SSHD v TB (Jamaica)* [2008] EWCA Civ 977, [2009] INLR 221. At [28] of his judgment Stanley Burnton LJ, with whom the other members of the Court agreed, stated as follows:

> "Given the general wording of subsection (1), I accept that the presumptions are to be applied generally, both by the Secretary of State when making a decision on an application for asylum and by the Tribunal on the hearing of an appeal. (For present purposes, it is unnecessary to consider proceedings before the Special Immigration Appeals Tribunal separately.) In my judgment, once the facts giving rise to the statutory presumptions have been established, it would be an error of law for an Immigration Judge to fail to apply a presumption required by the section, irrespective of whether or not the Secretary of State had issued a certificate under subsection (9)(b). Indeed, Mr Jay accepted that there has been no statutory certificate in this case. The only effect of a certificate is to require the Tribunal to address the certificate and any issue as to the rebuttal of the presumption of dangerousness at the beginning of the hearing of the appeal. I assume that the certificate is of greater value where the conviction relied upon is outside the United Kingdom. An appellant may seek to displace the certificate by showing that he has not in fact been convicted of a relevant offence or to rebut the presumption of dangerousness by establishing that he does not in fact constitute a danger to the community."

66. That passage was cited with approval and followed by this Court in *AQ (Somalia) v SSHD* [2011] EWCA Civ 695, [2011] Imm A.R. 779 in which Sullivan LJ, with whom the other judges agreed, stated as follows:

> "27 Whether or not the proposition in paragraph 29 of TB (Jamaica) that the Section 72 presumption applies whether or not the Secretary of State has issued a certificate under Section 72(9) was obiter, it was, in my judgment, plainly correct. Subsections (1), (2) and (6) in Section 72 set out clearly the presumption that is to be applied generally; there is no suggestion that the application of that presumption is to be subject to the certification process in subsections (9) and (10). Subsections (9) and (10) merely provide a self-contained procedural code which, as the tribunal observed in the case of IH , reverses the normal course of an appeal in those cases where a certificate is issued, but the Secretary of State is certainly not under any obligation to issue a certificate in order to bring the presumption into play.
>
> 28 As Stanley Burnton LJ said, a certificate has the limited procedural effect of requiring the tribunal to first address the certificate and any issue as to the rebuttal of the presumption which is of general application, but it is to be noted that the appellant may rebut not merely the presumption of dangerousness but also the presumption of serious criminality (see the decision of the Court of Appeal in EN (Serbia)).
>
> 29 It seems to me that this conclusion follows inexorably from the plain wording of Section 72, and the provisions of Rule 364 are, with respect to Mr Mello's submissions, of no relevance whatsoever to that question of interpretation. On any basis, what is said in a rule could not displace the clear meaning of primary legislation and the meaning of Section 72 is plain."

67. These authorities make it clear that, once the facts giving rise to the statutory presumption have been established, it would be an error of law for the relevant decision maker to fail to apply the presumption, irrespective of whether a certificate had been issued.

68. This was recognised by the UT in its decision in *SSHD v Mugwagwa* [2011] UKUT 00338 (IAC) in which it was stated that:

> "23. Section 72(2) creates statutory presumptions that the requirements of Art 33(2) are met and, as a consequence, the prohibition against *refoulement* will not apply. Section 72 is in mandatory terms: "[a] person shall be presumed …". In our judgment, where s.72(2) or any of the other statutory provisions creating presumptions in s.72 applies, the Tribunal is under a duty to apply s.72 to the individual in the appeal. Given the evidential base provided by these presumptions, subject to rebuttal, Art 33(2) will apply in such circumstances so that that a refugee's removal will not be a breach of the Refugee Convention…
>
> ….

> 32. In our judgment, the First-tier Tribunal is required in principle to apply s.72 of its own motion in an appropriate case where the factual underpinning for the application of a s.72 is present. Equally, the Secretary of State is entitled to take the point before the Upper Tribunal in the event of an appeal."

69. In the present case the fact of MS's sentence of at least 2 years was before the FTT and the UT and they were accordingly obliged by s.72 of the 2002 Act to apply the presumption when considering the lawfulness of the decision to deport MS notwithstanding his status as a refugee.

70. Given the obligation on the FTT and the UT to apply the statutory presumption, and the public interest in deportation of serious criminals who are to be regarded as a danger to the community of the UK, I am satisfied that this is a ground of appeal which the SSHD should be allowed to raise, even though it has not previously been raised in these terms and was not an issue appealed to the UT.

71. By failing to apply the statutory presumption the FTT and the UT erred in law. The only basis for concluding otherwise was the suggestion that the failure to certify and to pursue this ground in itself shows that the SSHD did not consider MS to be a serious criminal or a danger to the community. That is not supported by the evidence and, in any event, the statutory presumption applies regardless.

72. It remains open to MS to seek to rebut the statutory presumptions and on this issue also the case will accordingly have to be remitted.

(3) Ground 3 - Article 3 ECHR.

73. In determining this issue the FTT followed the guidance set out at headnote (xii) of the decision in the *MOJ* case in which the UT gave country guidance in respect of Somalia at paragraphs 407-408. Headnote (xii) sets out paragraph 408 of that decision, which provides:

> "408. 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."

74. Paragraph 408 refers back to matters set out in paragraph 407h. as follows:

> "h. 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:
>
> (i) circumstances in Mogadishu before departure;
>
> (ii) length of absence from Mogadishu;

> (iii) family or clan associations to call upon in Mogadishu;
>
> (iv) access to financial resources;
>
> (v) prospects of securing a livelihood, whether that be employment or self-employment;
>
> (vi) availability of remittances from abroad;
>
> (vii) means of support during the time spent in the United Kingdom;
>
> (viii) why his ability to fund the journey to the West no longer enables an appellant to secure financial support on return.
>
> Put another way, it will be for the person facing return to Mogadishu 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."

75. In *Said v SSHD* this Court disapproved of paragraph 408 of the above guidance in so far as it purported to establish the circumstances in which removal to Somalia would infringe Article 3. Burnett LJ, with whom the other judges agreed, stated as follows:

> "26 Paragraph 407(a) to (e) are directed to the issue that arises under article 15(c) of the Qualification Directive. Sub-paragraphs (f) and (g) establish the role of clan membership in today's Mogadishu, and the current absence of risk from belonging to a minority clan. Sub-paragraph (h) and paragraph 408 are concerned, in broad terms, with the ability of a returning Somali national to support himself. The conclusion at the end of paragraph 408 raises the possibility of a person's circumstances falling below what "is acceptable in humanitarian protection terms." It is, with respect, unclear whether that is a reference back to the definition of "humanitarian protection" arising from article 15 of the Qualification Directive . These factors do not go to inform any question under article 15(c) . Nor does it chime with article 15(b) , which draws on the language of article 3 of the Convention, because the fact that a person might be returned to very deprived living conditions, could not (save in extreme cases) lead to a conclusion that removal would violate article 3 .
>
> 27 The Luxembourg Court considered article 15 of the Qualification Directive in Elgafaji v Staatssecretaris van Justitie [2009] 1 WLR 2100 and in particular whether article 15(c) provided protection beyond that afforded by article 3 of the Convention. The answer was yes, but in passing it

confirmed that article 15(b) was a restatement of article 3 . At para [28] it said:

> "In that regard, while the fundamental right guaranteed under Article 3 of the ECHR forms part of the general principles of Community law, observance of which is ensured by the Court, and while the case-law of the European Court of Human Rights is taken into consideration in interpreting the scope of that right in the Community legal order, it is, however, Article 15(b) of the Directive which corresponds, in essence, to Article 3 of the ECHR . By contrast, Article 15(c) of the Directive is a provision, the content of which is different from that of Article 3 of the ECHR, and the interpretation of which must, therefore, be carried out independently, although with due regard for fundamental rights, as they are guaranteed under the ECHR ."

> 28 In view of the reference in the paragraph immediately preceding para 407 to the UNHCR evidence, the factors in paras 407(h) and 408 are likely to have been introduced in connection with internal flight or internal relocation arguments, which was a factor identified in para 1 setting out the scope of the issues before UTIAC. Whilst they may have some relevance in a search for whether a removal to Somalia would give rise to a violation of article 3 of the Convention, they cannot be understood as a surrogate for an examination of the circumstances to determine whether such a breach would occur. I am unable to accept that if a Somali national were able to bring himself within the rubric of para 408, he would have established that his removal to Somalia would breach article 3 of the Convention. Such an approach would be inconsistent with the domestic and Convention jurisprudence which at para 34 UTIAC expressly understood itself to be following."

76. By relying upon and applying paragraph 408 of the *MOJ* decision in determining whether there would be a breach of Article 3 ECHR the FTT accordingly applied the wrong legal test, as *Said v SSHD* makes clear.

77. Mr Vokes for MS realistically accepted that this may have been a legal error but suggested that its materiality was doubtful given the findings made by the FTT in relation to the humanitarian situation. I do not accept that submission. The test applied was clearly material to the decision reached.

78. It follows that this decision also involves an error of law and that on this issue also remission will be necessary.

Conclusion

79. For the reasons outlined above I would allow the appeal on all three grounds of appeal and the case will need to be remitted.

Lord Justice Newey:

80. I agree with both judgments.

Lord Justice Underhill:

81. I agree that this appeal should be allowed, and the case remitted, for the reasons given by Hamblen LJ.

82. I only wish to say anything of my own on ground 1, which raises the only issue of general application. I appreciate that our conclusion differs from that of UNHCR at para. 17 of its Guidance, quoted by Hamblen LJ at para. 33 of his judgment. That is not something that I take lightly, but I have to say that I do not find convincing either of the reasons given by UNHCR for the proposition that "changes in the refugee's country of origin affecting only part of the territory should not … lead to cessation". The first is that the risk of persecution should not be regarded as having been removed if the refugee "has to return to specific safe parts of the country"; but, with respect, that statement is itself unreasoned, and I cannot see any principled basis for it, given that the refugee would not have been granted protection in the first place if there were a part of his or her own country where they could be safe and to which it was reasonable for them to relocate. The "mirror image" approach endorsed by Hamblen LJ seems to me both fair and principled. I recognise that the fact that the refugee has left their home country and found safety in the country of refuge, perhaps years previously, must be taken into account; but, so far as the Convention issues are concerned, the way that that is done is not by changing the basic criteria for protection but by the requirement for a specially strict approach to their application, with the burden on the Secretary of State, as enjoined in *Hoxha* (see para. 48 of Hamblen LJ's judgment). It may also of course, separately, and depending on the particular facts, give the refugee grounds for arguing that his or her removal is in breach of their rights under article 8 of the ECHR. As for the UNHCR's second reason, namely that the fact that only part of the country is safe indicates that the changes have not been fundamental, I cannot see that that will axiomatically be so. Whether it is or not will depend on the particular facts.

83. At para. 50 of his judgment Hamblen LJ rejects Mr Vokes' submission (by way of alternative to his main point) that cessation will not be legitimate in an internal relocation case unless the safe area is "substantial". I agree with him, but the context must be appreciated. The Secretary of State proposes to return MS to Mogadishu. Mr Vokes' submission proceeded on the assumption that even if Mogadishu is safe that cannot justify cessation because it does not constitute a substantial part of Somalia as a whole. In terms simply of land area, that is no doubt true, but in other respects it is plainly not: on the contrary, it is the capital and the largest city in the country, and home to a substantial part of its population. I do not accept that the possibility of return/relocation to such a place is incapable of justifying cessation, though of course whether it in fact does so will depend on the assessment of the tribunal.

84. I mention for completeness that there is another appeal pending before this Court which raises an issue about the nature of the rights enjoyed by a person granted

refugee status as a family member. Mr Waite confirmed that no such issue had been raised in these proceedings.