IN THE UPPER TRIBUNAL **Case No: UI-2022-02411**
IMMIGRATION AND ASYLUM CHAMBER **First-tier Tribunal No: RP/00062/2020**

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 11th May 2023

Before

UPPER TRIBUNAL JUDGE OWENS

Between

OMA
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms McCarthy, Counsel, instructed by Turpin Miller Solicitors
For the Respondent: Mr Clarke, Senior Presenting Officer

Heard at Field House on 25 January 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant and any member of his family 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 and any other member of his family. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Chohan promulgated on 12 May 2022 allowing the appellant's appeal against the decision to refuse his protection and human rights claim. Permission to appeal was granted by First-tier Tribunal Judge Kebede on 31 October 2022.

Background

2. OMA is a national of Somalia, who arrived in the UK on 7 October 2000 as an unaccompanied minor. On 15 May 2001, he was granted asylum and indefinite leave to remain on the basis that he is from the minority Shanshiya clan, in turn a subclan of the minority Benadiri clan, who were accepted by the Secretary of State at that time to be persecuted by majority clans.

3. Between 2006 to 2018 OMA accumulated 19 convictions for 34 offences. Following a conviction for the offence of robbery on 6 July 2018, for which he received a prison sentence of 30 months, the Secretary of State made a decision to deport OMA. On 20 March 2019, a decision was taken to revoke OMA's refugee status and on 15 August 2018 a decision was taken to refuse his protection and human rights claim. This was served on OMA on 15 September 2018 along with a Deportation Order and reasons for deportation.

The decision of the First-tier Tribunal

4. OMA gave oral evidence and was supported by an intermediary as a result of his vulnerability and poor cognitive skills. His ex-partner also gave oral evidence and both representatives made submissions.

5. The judge found that s72 Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") does not apply to OMA because he had rebutted the presumption that he constitutes a danger to the community to the UK.

6. The judge then considered the issue of cessation. The judge took into account evidence which post-dated MOJ & Ors (Return to Mogadishu) Somalia CG [2014] UKUT 00442, including evidence from the UNHCR as to the treatment of minority clans in Somalia. The judge then departed from the Country Guidance in MOJ finding that that the Secretary of State had not proved that changes in Somalia were non-temporary or durable. The judge found at [15] that OMA is at risk in Somalia because of his membership of a minority clan. The judge also made some findings as to the situation that OMA would find himself in Somalia relying on the expert country and medical evidence before him.

7. The judge went onto consider Article 8 ECHR. The judge found that both Exceptions at s117C of the 2002 Act applied to OMA. In particular, the judge noted at [19] that the Secretary of State's representative made a concession that it would be "unduly harsh" for OMA's children to remain in the UK without their father.

8. Finally, the judge found that it would be a breach of Article 3 ECHR on medical grounds for the appellant to be returned to Somalia.

9. The judge allowed the appeal on all grounds.

Preliminary matters

"Unduly harsh" concession

10. At the outset of the hearing, there was a discussion between the

representatives about the "unduly harsh" concession referred to by the judge at [15]. Prior to the hearing, I had directed both parties to provide their notes of proceedings before the First-tier Tribunal. Both parties provided their notes. Mr Clarke for the Secretary of State submitted that no such concession had been made. He drew my attention to the note from the Presenting Officer where it was recorded that in closing submissions she argued that it would not be "unduly harsh" for OMA to be deported and for the children to remain. There was no note of a concession. Ms McCarthy also provided her detailed note of the proceedings in which she had represented the appellant. In her record there was no explicit note that the Secretary of State had made a concession that it would be "unduly harsh" for the children to remain in the UK without their father. Ms McCarthy stated that her recollection was that the Presenting Officer had been sympathetic to the situation of the second child whose behaviour had deteriorated whilst OMA was in prison, nevertheless she indicated that she would not submit that a concession had been made when a Presenting Officer had indicated that one had not been made.

11. From a consideration of both parties' notes of the proceedings and from both parties' notes of the submissions which addressed the issue of "unduly harsh", I am satisfied that no such concession was made. Importantly, neither representative recorded clearly on their note of the hearing that a concession had been made and I find it highly unlikely that this would not have been recorded if this were not the case. Ms McCarthy indicated that she would alternatively argue that the Article 8 ECHR findings were adequately reasoned.

Rule 15 application to adduce an up-to-date PNC report.

12. Mr Clarke sought permission to adduce a document which comprised of an updated PNC report which was not before the Tribunal at the date of the hearing. This demonstrated that prior to the date of the hearing and less than 6 months after his release from prison on 13 June 2021, OMA had committed a further offence of burglary and theft on a non-dwelling for which he was sentenced on 18 November 2021 at Buckingham Magistrates Court to a community order and drug rehabilitation requirement. He was also ordered to pay compensation of £100 and a victim surcharge of £95.00. This sentence was subsequently varied shortly after the hearing on 6 April 2022 to 12 weeks imprisonment for breach. On 18 November 2021, also prior to the hearing, he was also sentenced to a £40 fine for failing to surrender to custody on 30 September 2021.

13. During the hearing I indicated that I would admit this evidence, however having given this matter further consideration and having reviewed the relevant authorities, I have ultimately decided not to admit this evidence in support of the error of law hearing for the reasons set out below.

14. Mr Clarke referred me to the principles in Ladd v Marshall [1954] EWCA Civ 1. His submission was that the document was not provided because of the proximity of the offence and conviction to the date of the hearing. He argued that the evidence was probative because it would have had an impact on the judge's view of whether OMA constituted a danger to the community and various other aspects of his appeal. He further submitted that the parties have a duty to the court to be candid and

OMA should have been expected to reveal to the Tribunal that he had another conviction.

15. Ms McCarthy's submission was firstly that the evidence could have been obtained with reasonable diligence because there had been several case management hearings prior to the court hearing and secondly that the new conviction was not probative. The judge had found that OMA was not a danger to the community on the basis of more serious offending and the new offence resulted in a community order and drug order only. Further, because of OMA's vulnerability and lack of cognitive skills his failure to reveal this conviction did not taint the remainder of his evidence. She acknowledged that her note of proceedings demonstrated that OMA was asked in cross examination whether he had been stopped or arrested at all since he had been released from prison and he had responded by stating that he had been stopped but not arrested.

16. When considering whether to admit this evidence, I firstly had regard to the Ladd and Marshall test in accordance with the principles in Akter (appellate jurisdiction; E and R challenges) [2021] UKUT 272 (IAC) which confirms that it is (in limited circumstances) possible to admit evidence which was not placed before the First-tier Tribunal before reaching its decision to demonstrate that there has been an error of law in that there has been a mistake of fact or that the Tribunal failed to take into account a material factor. This power will be exercised rarely because of the principal of finality.

17. I find firstly that neither party adduced evidence that OMA had carried out further offences and been convicted and sentenced in respect of them prior to the hearing of the First-tier Tribunal. The evidence was not before the judge. In terms of Ladd and Marshall the new evidence is credible and incontrovertible because it consists of information provided from the Police National Computer system detailing OMA's criminal convictions. There was no suggestion from OMA's representative that this evidence is otherwise than the true position.

18. Secondly, I find that the evidence would probably have had an important influence on the outcome of the judge's assessment of whether OMA was a danger to the community. I do not agree with Ms McCarthy that knowledge of this further offending would have had no bearing on the judge's assessment of whether OMA was a danger to the community because the further offences were less serious. The primary reason given by the judge for finding that OMA was not a danger to the community at [9] was that he had not reoffended since being released from prison in January 2021. At [10], the judge's reasoning in respect of this issue is predicated on the basis that OMA "has remained out of trouble since his release from prison"; that "he has been undergoing rehabilitation" and "there is nothing to suggest that he poses a risk of reoffending". These are manifestly errors of fact because OMA had not remained out of trouble and had reoffended. The judge's overall finding that OMA had rebutted the presumption that he is a danger to the community was based on an incorrect basis of fact.

19. I turn to the third element of the Ladd and Marshal test and consider whether the evidence would have been available to the court had the parties acted with due diligence. Mr Clarke's explanation is that the

conviction and sentencing took place a few months prior to the hearing which may explain the Secretary of States's failure to adduce the evidence. I am not persuaded by this argument. The sentencing was in November 2021 and the appeal hearing took place on 1 April 2022. In between these dates there were at least two case management hearings at which the Secretary of State was present. Although the focus of the case management hearings was on the reasonable adjustments required for OMA to give his best evidence, it would have been open to a reasonably diligent Secretary of State to check OMA's current convictions particularly given that the decision to deport was taken in 2018, four years prior to the hearing. Indeed, during the hearing the Secretary of State's representative appears to have confirmed that there are no further convictions. There is no real explanation as to why the Secretary of State did not, in the context of a deportation appeal, check the current situation and adduce this evidence. I find that this evidence could have been placed before the Tribunal had the Secretary of State acted with due diligence. I therefore find that the third limb of the Ladd and Marshall test is not met.

20. I give the fact that the Ladd and Marshal test is not met great weight when assessing whether this is one of those rare occasions when new evidence should be admitted to demonstrate an error of fact in accordance with Akter. I take into account that this evidence was easily obtainable by the Secretary of State who has great resources at her disposal. I also take into account the timing of the production of the evidence. The evidence was produced at the very last moment on the morning of the error of law hearing. The appeal was dismissed in May 2022. The grounds were dated 13 June 2022. There was no reference to this evidence in the grounds, nor was this issue raised as a ground of appeal. Further the document in question does not relate to the grounds as originally pleaded. There was a further six months in which the Secretary of State could have produced this evidence with a Rule 15(2A) notice and an application to amend the grounds. The Secretary of State did not serve any written Rule 15(2A) notice, thereby failing to comply with the Procedure Rules. Further the Secretary of State did not apply to amend the grounds either formally by way of a written notice or orally at the hearing. I also comment that contrary to submission made by Mr Clarke the "duty of candour" relates to judicial review proceeding and not statutory appeals. There is no suggestion that OMA's representatives behaved improperly in characterising OMA as rehabilitated, and OMA has low cognitive abilities.

21. Overall, I do not find that this is one of the rare situations where the overriding interests of justice justify a departure from the general principles, and I have decided to refuse the application to admit the new evidence to be adduced in respect of the error of law hearing.

The Grounds of Challenge

Ground 1 – Material misdirection of law in respect of s72 of the Nationality Immigration and Asylum Act 2002

22. The judge has erred in transferring the burden of proof to the Secretary of State. The judge gave inadequate reasons for finding that the appellant does not constitute a danger to the community when his offending had lasted for a period of 12 years and was escalating in seriousness. The judge also failed to consider the seriousness of the consequences of

reoffending in line with Kamki [2017] EWCA Civ 1715.

Ground 2 - Failure to give adequate reasons for findings on asylum decision

23. The judge failed to follow the country guidance in MOJ that there is no longer any clan-based violence in Mogadishu. The judge gave inadequate reasons for departing from the country guidance and for finding that there has been no durable change.

Ground 3 – Failure to give adequate reasons for findings on a material matter – Article 3 ECHR

24. The judge allowed the appeal under Article 3 ECHR for the same reasons as he allowed the appeal on asylum grounds, and this infected his decision in respect of the Article 3 ECHR living conditions claim. The judge failed to take into account that OMA would have support from members of his clan in Mogadishu and did not find that he would be unable to support himself by undertaking unskilled work. The judge failed to give adequate reasons for allowing the appeal on Article 3 ECHR non-medical grounds.

Ground 4 – Failure to give adequate reasons for findings on a material matter- Article 8 private life

25. The judge has erred in the burden of proof. There is little basis for the finding that OMA is socially and culturally integrated into the UK. Length of residence alone and ability to speak English do not on their own amount to social and cultural integration. There was no evidence of a positive contribution and social and cultural integration has been broken by the OMA's history of offending.

26. The judge erred in finding that there exist very significant obstacles to OMA's integration into life in Somalia.

Ground 5 – failing to give adequate reasons for findings on a material matter - Article 8 family life

27. The judge did not consider why OMA's children could not remain living with their mother. The judge failed to take into account the threshold for "unduly harsh" as set out in MK (Sierra Leone) v SSHD [2015] UKUT 223.

Ground 6 Failing to give adequate reasons for findings- Article 3 ECHR medical

28. The judge failed to have regard AM(Zimbabwe) v SSHD [2020] UKSC 17 which sets out the test and approach for determining Article 3 ECHR medical claims. The judge has failed to give adequate reasons for finding that OMA would suffer intense suffering and harm. The judge has failed to have regard to the availability of health care provision in Mogadishu and there is no finding that OMA would be unable to access medical treatment.

The Rule 24 Response

29. OMA produced a rule 24 response. I will address the various submissions made in the rule 24 response in respect of each of the grounds below.

Cross appeal

30. Ms McCarthy also submitted that she wanted to cross appeal on the basis that the judge had failed to give consideration to her submissions that OMA would be at risk of persecution on an alternative basis namely of belonging to a particular social group as a result to his mental health disability in line with DH (Particular Social Group: Mental Health) Afghanistan [2020] UKUT 00223 (IAC). She submitted that it was not incumbent on her to raise this cross appeal in her rule 24 response because the appellant had won on asylum grounds before the First-tier Tribunal.

Discussion and Decision

Ground 1 – s 72 NIA 2002

31. It was agreed by both representatives that the judge applied the correct burden of proof in respect of s72 NIA 2002. Having considered the decision as a whole, I am also in agreement. I am satisfied that the judge was manifestly aware of the correct test. At [7] the judge sets out the relevant part of the statute and records that there is a presumption that the appellant is a danger to the community of the UK because he has been sentenced to a period of imprisonment of at least two years and that the presumption is rebuttable. This asserted error is not made out.

32. I am satisfied that the judge was well aware of the nature of the offence and that OMA's offending had escalated. At [8] the judge records the representative's submission that the offence of robbery was serious and that there had been an escalation. The judge considers this in the round with the lack of offending since the OMA was released from prison in January 2021 and his attempts to address the reasons for his offending.

33. It is submitted that the judge misdirected himself by failing to consider the seriousness of the harm were OMA to reoffend. This ground was not specifically addressed in the reply to the error of law grounds. I am in agreement that this is an important element in assessing whether an individual has rebutted the presumption that he is a danger to the community. This assessment will necessarily entail not only an evaluation of the likelihood or risk of reoffending but of the type and seriousness of the harm should reoffending take place. I am satisfied that in the judge's reasoning between [7] to [10] there was a failure to evaluate the level of harm that any repeat offending would cause. The offence was one of robbery leading to a custodial sentence of 30 months and the offence had a negative effect on the victim. I am satisfied that the judge has erred by failing to take into account this material consideration. The finding that the s72 presumption has been rebutted is flawed for this reason alone. The judge may not have reached the same conclusion had the judge taken into consideration this factor.

34. For this reason, I am satisfied that the judge's finding that the appellant has rebutted to the presumption that he is a danger to the community to the UK is flawed and this part of the decision is set aside and will need to be revisited in the light of any up-to-date evidence of further offending

and rehabilitation.

Ground 2 – cessation

35. OMA was granted refugee status because he was from a minority clan and therefore at risk from majority clans. It is now accepted by the Secretary of State that OMA was granted refugee status in his own right and not on a derivative basis and I disregard any reference to him being granted refugee status on a derivative basis in the grounds.

36. The judge considered whether the appellant was still at risk in Mogadishu on the basis of his clan membership from [11] to [15].

37. The judge took into account the view of UNHCR dated 21 January 2019 that the situation in Somalia has not fundamentally and durably changed and the organisation's comments in respect of OMA's personal circumstances.

38. At [12] the judge states:

> "In the refusal decision the respondent suggests that the country conditions in Somalia have changed and that the appellant could return to Mogadishu. However as pointed out by the UNHCR above, the respondent has failed to submit any independent evidence to suggest that there have been fundamental and non-temporary changes in Somalia which would not put the appellant at risk on return. The respondent relies on the country guidance case of MOJ & Other (Return to Mogadishu Somalia CG [2014] UKUT 00442 (IAC). Headnote (ix) of that case reads as follows: ……"

39. I agree with Mr Clarke that headnote (ix) relates to general conditions in relation to living circumstances and that this headnote does not relate to the risk to minority clan members.

40. At [14] the judge says:

> "the respondent has failed to submit independent evidence to establish that there have been fundamental changes in Somalia to justify the appellant's removal to Somalia".

41. He then refers in the same paragraph to Ms Mary Harper's expert report where she refers to the difficulties the appellant would face in returning to Mogadishu because of his individual circumstances.

42. The judge appears to be conflating the appellant's risk on return as a minority clan member and the difficulties he would face in his living conditions because of his individual circumstances.

43. At [15] the judge concludes:

> "On the evidence before me, I am not satisfied that the respondent has not [sic] discharged the burden of proof to establish that there have been fundamental and non-temporary changes in Somalia [sic] justify revoking the appellant's protection

> status. In my view, based on the evidence before me, the appellant remains at risk due to his membership of a minority clan. Hence, I find the appellant being a member of a particular social group, would be at real risk of persecution and/or ill treatment contrary to Article 3 if he were to be removed to Somalia."

44. The difficulty for the judge is that the issue of risk to minority clans has comprehensively been considered in County Guidance including MOJ to which the judge refers. Extracts of the headnote state as follows;

> *(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.*
>
> *(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.*
>
> *(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.*

45. The position in MOJ has been endorsed in OA (Somalia) CG [2022] UKUT 33. Mr Clarke also submitted that the expert report did not in itself did not depart from MOJ or OA.

46. Section 12 of the Practice Directions of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal of the Senior President of Tribunals dated 10 February 2010 concerns the status of starred and Country Guidance determinations. So far as is relevant, it provides:

> "12.2 A reported determination of the Tribunal, the AIT or the IAT bearing the letters "CG" shall be treated as an authoritative finding on the country guidance issue identified in the determination based upon the evidence before the members of the Tribunal, the AIT or the IAT that determine the appeal. As a result, unless it has been expressly superseded or replaced by any later "CG" determination, or is inconsistent with other authority that is binding on the Tribunal, such a country guidance case is authoritative in any subsequent appeal, so far as that appeal:-
>
> (a) relates to the country guidance issue in question; and
>
> (b) depends upon the same or similar evidence.
>
> 12.3 A list of current CG cases will be maintained on the Tribunal's website. Any representative of a party to an appeal concerning a

> particular country will be expected to be conversant with the current "CG" determinations relating to that country.
>
> 12.4 Because of the principle that like cases should be treated in like manner, any failure to follow a clear, apparently applicable country guidance case or to show why it does not apply to the case in question is likely to be regarded as grounds for appeal on a point of law."

47. These principles are reiterated in SG (Iraq) v SSHD [2012] EWCA Civ 940 at [46] and [47] where it is said;

> "The system of Country Guidance determinations enables appropriate resources, in terms of the representations of the parties to the Country Guidance appeal, expert and factual evidence and the personnel and time of the Tribunal, to be applied to the determination of conditions in, and therefore the risks of return for persons such as the appellants in the Country Guidance appeal to, the country in question. The procedure is aimed at arriving at a reliable (in the sense of accurate) determination."
>
> "It is for these reasons, as well as the desirability of consistency, that decision makers and tribunal judges are required to take Country Guidance determinations into account, and to follow them unless very strong grounds supported by cogent evidence, are adduced justifying their not doing so."

48. MOJ gives clear guidance that the situation in Mogadishu has changed such that a Benadiri minority clan member who is an 'ordinary civilian' such as the appellant is not at risk of serious harm.

49. I am satisfied that there were no very strong grounds supported by sufficient cogent evidence for the judge to depart from the Country Guidance. On this basis I am satisfied that the judge's decision to do so and to find that the appellant remains at risk as a member of a minority clan at [15] was inadequately reasoned and an error of law. I therefore set aside this part of the decision and the findings that relate to it.

Cross appeal – Failure to consider alternative reasons for refugee status.

50. In her skeleton argument before the First-tier Tribunal, Ms McCarthy submitted that the appellant was a member of a particular social group i.e. a "person living with disability or mental ill health" and that he would be subject to serious harm on account of this. In accordance with Smith (appealable decisions; PTA requirements; anonymity) [2019] UKUT 216 (IAC) because OMA's appeal had succeeded on refugee grounds there was no requirement for OMA to apply for permission to appeal because a determination of that ground in OMA's favour would not have conferred any material benefit. Since the Secretary of State has obtained permission, OMA is entitled to rely upon 24(3)(e) of the 2008 rules in order to argue in a response that OMA should succeed on these grounds. This was included in the rule 24 response at paragraph 10.

51. I agree with Ms McCarthy submission that the judge was mandated to consider if there were any other basis on which OMA would have a well-

founded fear of persecution if returned to Somalia now. The judge gave no consideration to her submissions at all, and this was an error because he had to resolve those issues before him.

Article 3 ECHR – living circumstances

52. Mr Clarke submits that the judge's findings on Article 3 ECHR living conditions/destitution are infected by the judge's error in respect of his finding that there remains a risk to minority clans. The judge at [11] to [15] conflates the two issues.

53. At [15] the judge has allowed the appeal under the Refugee Convention and Article 3 ECHR because OMA is a member of a minority clan. His reasoning is confused. I agree that the judge has conflated his consideration of the humanitarian situation in Mogadishu with his consideration of the risk to OMA as a minority clan member. It would have been helpful if the judge had made findings in relation to the Article 3 ECHR humanitarian situation under a separate hearing because many of his findings appear to be mixed in with the consideration of the cessation issue. The decision is not easy to understand because the judge's findings (those that relate to Article 3 ECHR on the basis of living conditions) are brief and scattered throughout the decision. I am firstly satisfied that there is no clear and unambiguous overall finding by the judge that OMA would encounter living conditions in Somalia which would breach Article 3 ECHR. The judge does not refer to OA in this part of his judgement or elsewhere, despite counsel's lengthy reference to the relevant factors in her comprehensive skeleton argument. I am satisfied that the judge has not applied the correct caselaw in respect of Article 3 ECHR living conditions and that he did not make a clear overall finding on this issue. I find that this issue has not been resolved.

54. What the respondent has not challenged are those limited factual findings made by the judge at [13] in respect of the situation OMA would find himself in Somalia which are based on he and his partner's oral evidence. These include the fact that he has been absent from Somalia for over 20 years, has no family or clan associations in Somalia, has not worked in the UK for many years and in view of his mental health issues it is difficult to see how he could secure a livelihood in Somalia. The appellant's ex-partner could not support the appellant financially. He has two brothers in the UK with whom he has little or no contact and they would not support him financially.

55. The judge at [15] also refers to the fact that there is no challenge to the country expert report and its findings and that the Presenting Officer for the Secretary of State acknowledged that it would be very difficult for OMA in Somalia.

56. The problem is that the expert report is extremely long and has contains various different assertions or scenarios. The judge unfortunately has not set out which ones he accepts. In these circumstances my view is that the judge has failed to make the necessary findings in respect of the living circumstances issue. Ultimately, I am satisfied that the judge has erred by conflating the protection issues with the Article 3 ECHR living conditions issues, failing to address the relevant factors in OA despite the comprehensive skeleton, failing to make unambiguous findings of fact in

relation to the situation that OMA would find himself in Somalia as well as an overall finding that those conditions would reach the Article 3 ECHR threshold. This part of the decision is also set aside in its entirety.

Ground 6 - Article 3 medical grounds

57. At this point I take the grounds slightly out of order. The written grounds assert that the judge has failed to give adequate reasons for finding that OMA would suffer "intense suffering and harm". There is no requirement that the standard of healthcare available be of the same standard as in the UK. Furthermore, the judge failed to have regard to the fact that mental health care provision is available in Mogadishu as in the Country Background note and the judge does not make a finding that the appellant would not be able to access it.

58. In his submissions, Mr Clarke stated that although the judge correctly directed himself to AM which sets out the test and approach for determining Article 3 ECHR medical claims, he did not properly apply it to OMA. Mr Clarke reiterated that the judge's approach to Article 3 ECHR on medical grounds was flawed because the judge failed to give adequate reasons why OMA would experience "intense suffering" that would engage the high threshold of Article 3 ECHR. He repeated the test set out in AM/Zimbabwe v SSHD [2020] UKSC 17. The decline OMA's health needs to lead to a "serious, rapid and irreversible decline". He submitted that there was a heavy focus in the decision on temporary consequences. There was no explanation by the judge as to why the result would be "irreversible". Article 3 ECHR protection is not designed to alleviate disparities in the level or quality of treatment in different countries.

59. Further, the judge did not make any clear findings about the availability of treatment. Although at [28], the judge quoted from Ms Harper's report, she did not state that there was no treatment available, she stated that the mental health services were poor. It is manifest from her report and from the Secretary of State's evidence that services are available.

60. Mr Clarke submits that the judge did not engage with whether OMA would be able to access these services, how long it would take for his health to decline, whether this would be irreversible and within what time period. There was an inadequate engagement by the judge with the evidence of those health facilities available.

61. He also questioned whether the Country Background Note Version 1. December 2020 was placed before the judge.

62. Ms McCarthy submitted that the judge has at [25] directed himself to the correct test in AM (Zimbabwe). Her submission is that in the light of the agreed mental health and vulnerabilities of OMA which had been discussed at several case management hearings and had necessitated him giving evidence through a court appointed intermediary and in the light of the lack of any challenge to the expert reports of Mary Harper and Dr Anna Preston the judge was clearly entitled to find that the test in AM was met. The judge gave full reasons supported by relevant extracts from the uncontested medical reports.

63. I am firstly satisfied that the judge directed himself appropriately to the leading authorities on Article 3 ECHR health claims at [25] and [26] in some detail. Indeed, the judge set out the correct test in full.

64. The judge then at [27] relied on the psychiatric report prepared by Dr Anna Preston and quotes the concluding remarks at 8.2 to 8.5 of the report. The judge manifestly accepted the contents and conclusions of the medical report which as the judge notes were not challenged by the Secretary of State.

65. The medical expert concluded that OMA has post-traumatic stress disorder and meets the criteria for "substance dependence disorder". She was also of the opinion that his cognitive function indicates low levels of functioning across most areas when compared to his age-related peers. She also commented on his low independence and reliance on others with respect to many aspects of life. She opined that OMA is vulnerable due to untreated PTSD and distressing symptoms. Her view which was also summarised in the skeleton argument is that he needs to access substance misuse treatment and trauma focused therapy with an assessment to see if he requires psychotropic medication. She notes that he currently receives no treatment in the UK.

66. The judge set out the following extract of the expert report at [27]

> "8.5. If Mr Ali was removed from his family and support network, he would likely experience a further traumatic loss and struggle significantly on a day-to-day basis to manage tasks of daily living and self-care, and safety. Mr Ali's mental health would be likely to significantly deteriorate should he be removed to Somalia. Mr Ali is likely to face many challenges and obstacles upon any removal to Somalia, and in the context of untreated PTSD and the absence of effective coping strategies and significant protective factors, destabilisation, substances, risk of serious harm to himself and suicide is highly likely to significantly increase."

67. The Secretary of State does not challenge any of the factual findings in relation to OMA's poor health, nor does the Secretary of State challenge the expert's conclusion that his mental health would be likely to significantly deteriorate should be removed to Somalia nor that the risk of suicide is highly likely to significantly increase.

68. The judge also considers the country expert report on the availability of medical treatment and quotes a passage about the poor availability of treatment and quality of treatment. As the judge comments at [28] he has viewed the Article 3 ECHR medical claim in the context of the difficulties OMA would face in Mogadishu. From reading the decision as a whole it is manifest that these include the fact that he does not read nor write Somali, that he has poor cognitive function, mental health problems, that he does not have any family connections there, that he has been absent for 23 years from the age of ten and is a member of a minority clan. The judge accepted his ex-partner's evidence that she is from an Ethiopian background and not a Somali one and that she could not afford to send remittances, being a single mother with three children. The judge also accepted the evidence that the appellant has no family in the UK or in Somalia who would help him financially. The

judge accepts the expert's opinion that due to his particular characteristics including his vulnerability and total lack of family or clan connections that he would be very unlikely to find assistance from his clan, not least because of his drug addiction and criminal past. The opinion of the expert is that due to the appellant's lack of Somali, his low cognitive function, his lack of any real skills and his poor health, he would struggle to find accommodation or work and noted the lack of proper drug rehabilitation services and appalling conditions in some of those centres. She also commented on the scarce mental health provision.

69. The judge also notes at [29] that OMA has struggled to access medical health treatment in the UK because of his addiction, low cognitive skills and poor self- care and street homelessness. In view of these factors, the judge comes to what seems to me an entirely sustainable view that OMA "would stand little chance in Somalia".

70. Although as submitted by Mr Clarke, the judge makes no clear unambiguous finding that OMA would not be able to access medical treatment, I am satisfied from reading the decision as a whole that this is what the judge meant by the statement above and his reasoning is tolerably clear. If OMA cannot access healthcare in the UK where he has protective and supportive factors as well as a much wider availability, he would not be able to do so in Somalia. It is my view that the judge has given adequate reasons to explain why OMA would not be able to access medical care in view of his personal circumstances and his inability to function properly in the UK.

71. I turn to the judge's finding on the level of suffering.

72. At [29] the judge forms the view that the deterioration in the appellant's mental health would cause him intense suffering and harm. He states:

> 29. Based on the independent reports of Dr Preston and Mary Harper, which remain unchallenged, it is not difficult to conclude that if the appellant were to be removed to Somalia his mental health would deteriorate significantly, which in my view, would cause him intense suffering and harm. That would be compounded by the fact that the appellant belongs to a minority clan, which is a risk in itself.

73. This is manifestly referring back to the expert evidence (which in turn was based on the evidence of OMA and his partner) that he suffers from active post- traumatic stress disorder symptoms including high anxiety and fear, hyperarousal, including a general feeling of being unsafe and under threat, a fear of being in danger and that his life is going to end, as well as intrusive symptoms related to trauma including distressing dreams and memories, flashbacks and shouting in his sleep and that these symptoms would increase in Somalia.

74. At 7.3.2 the expert stated:

> "It is also my opinion that Mr. Ali's mental health would be likely to deteriorate should he be removed to Somalia and his children, who are his main protective factor and motivator towards pro-social behaviour change. I would expect that he would struggle significantly to self-manage. Mr. Ali presents as dependent on

> others with respect to many areas of functioning, with few skills in managing his mental and emotional health, and social integration. The intensity and severity of his post- traumatic symptoms and associated level of depression would increase. In my opinion it is inevitable that this would lead to increased use of substances to manage his emotions and post-traumatic symptoms. Risk of self-harmful behaviours and/or suicide would be likely to increase significantly".

75. The real question is whether the judge has failed to adequately reason why the decline in OMA's mental health is serious enough to amount to "intense suffering" or be "exceptional" and meet the high Article 3 ECHR threshold.

76. This is finely balanced. An appeal court should be slow to interfere in findings made by a specialist Tribunal and the judge clearly had the correct test in mind. I have had regard to HA (expert evidence; mental health) Sri Lanka [2022] UKUT 00111 (IAC) as well as the decision in Savran v Denmark (application number 57467/15 as well as J v SSHD [2005] EWCA Civ 629 and Y(Sri Lanka) v SSHD [2009] EWCA Civ 362. Ultimately, I am persuaded that the judge failed to give adequate reasons for finding that a "significant deterioration in his mental health" meets the demanding Article 3 ECHR threshold. The medical evidence does not set out the extent of the deterioration nor the speed, nor explain why the deterioration would be irreversible. Although OMA's symptoms are distressing and would get worse, it is not clear to me why the judge considered that they would meet the threshold and further the judge seems to have mixed this finding in with the finding that he belongs to a minority clan which he erroneously states is a risk in itself.

77. Further, I am satisfied that the medical evidence does not come close to establishing that there was a real risk that OMA would commit suicide if returned to Somalia. At 5.4.11 of the report, he is reported not to currently have suicidal ideation. He has not attempted suicide in the past and stated "I am not that person, I never cut myself". The expert's finding is not that he would attempt suicide but that the "risk" would increase significantly. However, the starting point is from a low level of risk. Further the risk of suicide in the opinion of the expert is also mixed in with the risk of "self-harmful behaviours" which include taking alcohol and drugs which cannot be said to amount to treatment breaching Article 3 ECHR.

78. I also note by way of comment that the judge has failed to make a finding as to whether the appellant is currently a "seriously ill person" which is a requisite for the Paposhvili test to be met.

79. I am therefore satisfied that the Secretary of State has made out the grounds in respect of the Article 3 ECHR medical claim. The judge's finding that the appellant will be at real risk of treatment contrary to Article 3 ECHR as a result of a decline in his mental health is inadequately reasoned. This part of the decision is flawed and is set aside.

Article 8 ECHR

80. I turn to the grounds of appeal in respect of those asserted errors with respect to Article 8 ECHR.

81. The judge found that Exception 1 in respect of private life was made out. It is asserted in the grounds that the judge applied the incorrect burden of proof and erred in his consideration of whether OMA is socially and culturally integrated into the UK. Mr Clarke submitted that the judge misapplied the law and gave inadequate reasons for his findings that OMA was socially and culturally integrated into the UK. He submitted that there was no evidence of a positive contribution. He refers to the case Binbuga (Turkey) v SSHD [2019] EWCA Civ 551 and submits that the judge failed to consider whether the appellant's history of offending and imprisonment broke his social and cultural integration. In oral submissions he referred me to CI (Nigeria) v SSHD [2019] EWCA Civ 2027. He submitted that the judge treats OMA's length of residence, knowledge of English and family and friends as determinative without feeding in OMA's criminality into the assessment including the prolific nature of his criminal offending.

82. Ms McCarthy submitted in her response that the judge has applied the correct test and has considered the duration of his time in the UK since childhood, his social ties, his children, his education, his work and his language to conclude that notwithstanding the convictions he remains socially and culturally integrated. In her oral evidence she reiterated that the judge had had regard to the relevant factors and was entitled to come to this finding on the evidence before him.

83. The judge's reasoning is at [17] where he states:

> "The appellant has been in the United Kingdom for almost 22 years. The appellant came to the United Kingdom when he was aged 10; he is now 32 years of age. Prior to his conviction in 2018, the appellant had been in the United Kingdom lawfully in view of his refugee status. The appellant can speak the English language fluently. It is not disputed that the appellant's family and friends are in this country and not Somalia. Previously the appellant has been in employment. Taking those factors into account, I am satisfied that for the bulk of his life the appellant has been in the UK lawfully and culturally integrated into the United Kingdom. Again, it does not appear to be disputed that due to the deterioration in the appellant's mental health the appellant has not been able to work and that does account for much of his criminal offending."

84. I take into account that a judge does not need to set out every factor that has been taken into consideration and that an expert Tribunal can be assumed to have directed itself appropriately. However having had regard to the authorities of Binbuga and CI as well as AM (Somalia) v SSHD [2019] EWCA Civ 774 and KM v SSHD [2021] EWCA Civ 693, I am satisfied that the judge in this appeal misapplied the law by failing to make a holistic assessment taking into account OMA's history of criminal offending, imprisonment and current lifestyle when assessing whether he was currently socially or culturally integrated to the UK. The judge has not given consideration to whether his criminal offending and current lifestyle has broken his social and cultural integration. The evidence before the judge was that OMA had spent very little time at school and had last worked

in 2012. He was currently homeless with ongoing substance misuse problems. His ex-partner's evidence in her statement was that he had deteriorated since leaving prison. He was not currently working. He was not receiving medical treatment. He had missed appointments with the medical expert and was on occasion out of touch with his ex-partner and legal representative. The judge's statement that "there was nothing to suggest that he was not socially or culturally integrated" (although not enough to demonstrate that the judge had applied the incorrect burden of proof) indicates that the judge did not take into account these material factors when making this assessment. It cannot be said that had the judge taken all of the factors into consideration and considered whether his criminality broke his integration, the judge would have still come to the same decision, despite the length of OMA's lawful residence; the age at which he had come to the UK and his strong relationship with his ex-partner.

85. Since I have found that the judge's approach to this part of Exception 1 is flawed, I do not go onto consider the grounds in respect of "very significant obstacles". I set aside the decision allowing the appeal under Article 8 ECHR under Exception 1 on this basis and those findings contained within this section of the decision.

Exception 2

86. Mr Clarke's submission is that the judge's findings on this issue are infected by her erroneous understanding that the Secretary of State had made a concession in relation to this aspect of the appeal. Further the judge did not apply the correct threshold in relation to the "unduly harsh test". The test is a demanding one. How a child will be affected by a parent's deportation will depend for instance on the child's age, whether the child lives with them, by the degree of the child's emotional dependence on the parent, the financial consequences of deportation, the availability of emotional and financial support from a remaining parent and other family members, by the practicability of maintaining a relationship and the individual characteristics of the child in accordance with HA (Iraq) [2020] EWCA Civ 1176.The judge failed to explain why the children would not be able to remain living in the UK alone with their mother. The judge has not set out the level of the "sporadic" contact nor whether the appellant provides any care for the children.

87. Ms McCarthy submitted that notwithstanding the judge's error in relation to the concession, the judge's finding was adequately reasoned. It was accepted that the children's mother had no reason to lie about the impact of the incarceration on the child. The judge accepted the mother's evidence because of her demeanour and openness. The judge accepted that the children were adversely affected when their father went to prison and that the removal of the children would have a negative impact on their lives.

88. The judge's findings are set out at [19] to [21] as follows:

> "It is not disputed that the appellant maintains contact with his children. Ms Simbi submitted that the contact was sporadic. However, more importantly, Ms Simbi acknowledged that it would be unduly harsh on the children if the appellant were to be

> removed. That is nothing less than a concession by Ms Simbi. During his oral evidence, the appellant stated that he last saw the children in February of this year. Ms Mohamed stated that since his release from prison, the appellant has been seeing the children more often. Otherwise the appellant speaks to his children on the phone 2 to 3 times a week. It is clear from Ms Mohamed's testimony that the children were affected adversely when the appellant was sent to prison and one child in particular experienced emotional and behavioural problems at school. Ms Mohamed made it clear that she would not take the children to Somalia. However, Ms Mohamed insisted that the children needed their father and that if he were to be removed it would have a negative impact on the children's lives.
>
> I must agree with Ms McCarthy when she states in her skeleton argument that Ms Mohamed's "evidence is mature, thoughtful and insightful: her concern is entirely for the wellbeing of the children and her very firm view is that it is in their best interests to continue to have the father in their lives, as well as for the father to have the mental health treatment that he needs." I have to say that as the former partner of the appellant, Ms Mohamed did not have to attend the hearing and give oral evidence in support of the appellant's appeal. Indeed, she has done so in the best interests of her young children. I commend Ms Mohamed for attending and giving very genuine, sincere and candid evidence. The appellant owes her much.
>
> I acknowledge that there is no independent evidence, for example, in the form of an independent social worker's report, as this tribunal is used to seeing. Nevertheless, it is a matter for me to decide what weight to attach to the evidence before me and in particular the oral evidence of Ms Mohammad. Considering all the facts and evidence presented before me, I am satisfied that the appellant has a close bond with his three children and if he were to be removed it would be unduly harsh on them. I must add that my findings are somewhat academic in view of the fact that Ms Simbi accepted that the appellant has a genuine and subsisting parental relationship with his children and, importantly, the concession made by her that it would be unduly harsh on the children if the appellant were to be deported. Accordingly, I find the appellant meets the requirements of Exception 2" (Underlining my emphasis)

89. Firstly, notwithstanding the judge's statement that her findings are academic, I am satisfied that the judge's erroneous understanding that there was a concession by the respondent (which is referred to at both [19] and [21]) influenced his decision in this respect. Secondly, there is no reference in the decision to the demanding test. Although the judge was perfectly entitled to accept Ms Mohamed's evidence for the reasons he gave, it seems that the judge has equated the best interests of the children with the test of unduly harsh. The judge has accepted that OMA has a genuine and subsisting parental relationship with the children and that one child experienced emotional and behavioural problems at school when OMA went to prison and found that this on its own would

mean that the deportation of OMA was "unduly harsh".

90. The evidence before the judge about OMA's relationship with his children was primarily from Ms Mohamed. Ms Mohamed's evidence was that contact was sporadic. In her first statement dated July 2021 she confirmed that she had never lived with OMA but when the children were younger, he would take them to nursery and pick them up. Prior to Covid and prison he would take them to the park and look after them in the holidays. After 2017, his alcohol and substance misuse got worse. When OMA went to prison the children were informed that he was working abroad, and he would telephone the children. One child in particular had problems at school and was very upset that he was not seeing his father. She informed the assessor in July 2021 that she had not seen him for two months prior to that. In her written statement prepared in March 2022 she stated that OMA had not seen the children as much as he would like in the last months. He saw them twice in the previous month and they went to the park. The reasons he does not see the children is because he does not want to see them "emptyhanded" or for them to see him "looking a certain way" as well as the distance between them. She states that his intentions are good, in the past he has gone for periods without seeing the children and he is the best father he can be. He is currently homeless. The Secretary of State's refusal letter refers to social services involvement with the family last taking place in May 2020. However, there was no further evidence of this.

91. I am satisfied that the judge when considering whether the deportation of OMA is unduly harsh has failed to consider all of the relevant factors as set out in HA and failed to apply the test of "unduly harsh properly". The decision allowing the appeal pursuant to Article 8 ECHR is set aside as are the findings on the "unduly harsh" issue.

Disposal

92. It was agreed by the parties that the appeal could be retained for re-making in the Upper tribunal. This was on the basis that various factual findings could be preserved. However, in writing this decision, the full extent of the legal errors of the judge and the failure to make concrete findings has become apparent. It is unfortunate for OMA that this is the case. Nevertheless, despite the normal course of action for an appeal to be retained in the Upper Tribunal in this appeal, given the scale of the issues and the number of factual findings that need to be made, it is appropriate for the appeal to be remitted to the First-tier Tribunal for a complete re-hearing. In my view the extent of the legal errors in the decision would mean that it would be unfair for OMA not to have a second opportunity to appeal to the higher courts should his appeal not succeed.

Notice of Decision

93. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

94. The decision that OMA has rebutted the presumption that he is a danger to the community is pursuant to s72 NIA 2002 is set aside.

95. The decision that the appeal is allowed under the Refugee Convention on the basis that he has a well-founded fear of persecution for a Convention reason is set aside.

96. The decision that OMA's removal from the UK would breach Article 3 ECHR on the basis of the living conditions and destitution he would encounter in Somalia is set aside.

97. The decision that OMA's removal from the UK would breach Article 3 ECHR on medical grounds is set aside.

98. The decision that OMA's removal from the UK is a disproportionate breach of Article 8 ECHR is set aside.

99. No factual findings are preserved.

100. The appeal is remitted to the First-tier Tribunal for a de novo hearing before a judge other than First-tier Tribunal Judge Chohan.

Signed *R J Owens*

Judge of the Upper Tribunal
Immigration and Asylum
Chamber

Dated 10 May 2023