Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: RP/00137/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13th December 2022	**On the 4th January 2023**

Before

UPPER TRIBUNAL JUDGE LINDSLEY
UPPER TRIBUNAL JUDGE KEITH

Between

OA
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Khan, of Counsel, instructed by Sentinel Solicitors
For the Respondent: Ms H Gilmour, Senior Home Office Presenting Officer

Interpretation: Mr Nuri in the Somali language

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Somalia born in 1965. He arrived in the UK in 2003 with entry clearance as a spouse of his then wife. He was granted refugee status and indefinite leave to remain in line with his wife. On 9th February 2012 he was convicted at Harrow Crown Court of

burglary and blackmail, and received a custodial sentence of two years. He was served with a notice of liability to automatic deportation on 29th February 2012, and on 20th April 2016 a decision was made to make a deportation order.

2. On 27th September 2016 the respondent certified the appellant's claim under s.72(2) of the Nationality, Immigration and Asylum Act 2002. The respondent revoked his refugee status under Article 1C(5) of the Refugee Convention and excluded him from humanitarian protection under paragraph 339D of the Immigration Rules. The respondent also decided that it would not be a breach of Article 3 ECHR to return the appellant to Somalia.

3. The appeal against this decision was dismissed by First-tier Tribunal Judge Cameron in a determination promulgated on the 20th July 2017. Judge Cameron decided however that the appellant had rebutted the presumption under s.72 of the 2002 Act. Permission was granted to the appellant to appeal, and it was found by Upper Tribunal Judge Canavan that the First-tier Tribunal had erred in law, and that the decision should be set aside. The appeal was remitted to the First-tier Tribunal to be heard afresh.

4. On 30th January 2018 the appeal was reheard by Judge of the First-tier Tribunal Frankish who found that the appellant had rebutted the presumption under s.72 of the 2002 Act, and allowed the appeal in accordance with Article 3 ECHR. The respondent appealed, and was granted permission, and Upper Tribunal Judge McWilliam found, in a decision of 8th November 2018, that the First-tier Tribunal had erred in law, and set the decision aside in its entirety. The error of law decision is attached as Annex A to our decision.

5. The remaking appeal then went before Upper Tribunal Judge Storey pursuant to a transfer order. The issues before Judge Storey were to establish the facts and determine whether the appellant's refugee status had ceased under Article 1C(5) of the Refugee Convention, and whether his appeal should succeed under Articles 3 and 8 ECHR. Judge Storey made a number of findings and an order for a preliminary reference to the CJEU in a decision promulgated on 22nd March 2019. At this hearing it was conceded for the Secretary of State that there was no challenge to the decision that the appellant had rebutted the presumption under s.72 of the 2002 Act.

6. Article 1C(5) concerns the cessation of refugee status in circumstances where the circumstances in the country of origin which led to the grant of refugee status cease to exist, and the change in circumstances in that country is significant and non-temporary. The reference made by Upper Tribunal Judge Storey was to determine, in summary, whether Articles 11(1)(e) and 2(e) of the Qualification Directive required that protection of the country of nationality must be shown solely on the basis of the protective functions of state actors, or whether family or clan non-state actors could suffice. In short summary the CJEU determined in a decision

dated 20th January 2021 that social and financial support from private actors such as family or clan members falls short of what is required to constitute protection and is of no relevance to the assessment of the effectiveness or availability of protection or whether there continues to be a well-founded fear of persecution.

7. On 24th February 2022 Upper Tribunal Judge Kopieczek gave directions that 10 days prior to the substantive hearing the appellant should file and serve a fresh paginated bundle to include witness statements of anyone it was proposed to call to give oral evidence; and no later than 7 days prior to the hearing both parties should file and serve skeleton arguments. The appeal was listed for a substantive hearing on 26th September 2022 but was adjourned at a CMRH on 23rd September 2022 by Upper Tribunal Judge Keith due to late service of the appellant's bundle which in turn made it impossible for the respondent to comply with the direction to produce a skeleton argument.

8. The matter came before us to complete the remaking of the appeal. Both representatives and the appellant were given permission to appear via video link due to a train strike. The interpreter attended in person at Field House. There were some delays in commencing the hearing whilst technical matters were sorted out. The appellant gave his evidence via video link using a phone from a friend's car but both parties and the panel were satisfied that this was a private space, that the car was legally parked in a place where it was not going to be disturbed and that the appellant had his witness statement. The parties and appellant were reminded that this was a hearing of the Upper Tribunal with equal status to those held in a Tribunal hearing room. There were no significant issues of connectivity or audibility during the hearing.

9. It was agreed by both parties that the findings of Judge Storey were retained, and it was conceded by the appellant that the appeal could not succeed on Article 3 ECHR grounds. The matters for us to determine were therefore whether the appellant's refugee status was shown by the respondent to be subject to the cessation clause at Article 1C(5) of the Refugee Convention; and whether the appellant was entitled to succeed in his appeal under Article 8 ECHR.

10. The appellant produced a bundle of documents for the hearing which included a statement from the appellant, a statement from Ms ZO, his contended fourth wife, an Islamic marriage certificate and country of origin documents. No reference was made by Mr Khan to any of the country of origin documents in his oral submissions. Mr Khan called the appellant to give oral evidence but not Ms ZO, who was not in attendance online either.

Evidence & Submissions - Remaking

11. The found facts, by Upper Tribunal Judge Storey following the hearing in December 2018, in this case are, in summary as follows:

    - The appellant married his first wife in 1986 or 1987.

- He is a member of the Reer Hamar clan.
- His first wife suffered violence in 1991 and 1993.
- In approximately 1994 his home was attacked by the Hawiye clan in Mogadishu and he was shot in the leg.
- In 2001 there was a further attack and his first wife was raped. The appellant left Somalia for Kenya with his first wife and sister-in-law's children in 2001 after this attack. He stayed in Nairobi in 2001, but his wife travelled to the UK paid for by his brother and was granted refugee status in the same year.
- The appellant joined his first wife in the UK in 2003. He divorced his first wife in 2005. He married a Dutch national in 2010 but that marriage ended in 2015. He marred again, to another Dutch woman, in 2016.
- The appellant has family who live in Mogadishu including his brother; a sister who lives in Dubai; and friends from the Reer Hamar clan in the UK whom he could turn to for financial support. The appellant has injuries from the gunshot wound in his leg, but is fit to do sedentary work including shop work and driving.
- The appellant's account was therefore not accepted as credible in various fundamental ways.

12. The witness statement of the appellant states that the appellant does not agree with the findings of Judge Storey. He sets out the procedural history which we won't repeat.

13. In his witness statement and oral evidence, in summary, the appellant's relevant evidence is as follows. He says that he has not worked in the UK. He received incapacity benefit until 2014 due to his leg injuries but this ceased in July 2014 when his refugee status was revoked. He has not worked in the UK, and is supported by his sister, his brother-in-law, his current wife and members of his community in London. He said in oral evidence that he had no problem getting financial support from his community. He says however that he will be alone and will not be helped by members of the Reer Hamar if he is returned to Somalia. The help he gets from the community in the UK is conditional on his being here with them. He is afraid of Al-Shabaab gunmen in Mogadishu, and fears they might target him as an outsider. He does not think he will get work as a disabled person in Somalia.

14. The appellant says that he has not reoffended since his conviction in 2011, and wishes to be able to remain in the UK with his new British wife whom he has known since 2015 and married in an Islamic ceremony on 1st September 2022. He says that they intend to have a legal registry office wedding at some point. His evidence about their cohabitation was unclear: he said he had moved into his new wife's house three days after the wedding, so on 4th September 2022, but that

he had not changed his address because he had no income except gifts from friends, family including his wife and the community. He could not explain why this meant he could not give his address as that of his wife if they were in fact cohabiting. He could not explain why his wife had said that they were planning to move in together in her witness statement of 21st September 2022 rather than living together as he claimed they were doing at that date. He said his wife had not attended the hearing because he was not advised that she should do so.

15. Ms Gilmour relied upon the reasons for refusal letter of 27th September 2016, her skeleton argument and oral submissions.

16. In Ms Gilmour's skeleton argument it is argued that as a member of the Reer Hamar clan the appellant would be safe in Mogadishu, for the reasons set out in number 4 of the headnote in OA (Somalia) Somalia CG [2022] UKUT 00033. Reer Hamar are at the top of the minority clan structure; they have obtained positions in the regional Benadir administration and local government; they have their own districts and the appellant could obtain accommodation in such a district and would not therefore have to go to an IDP camp; and in addition the appellant would have support from friends in the UK. The appellant would not therefore be destitute in Somalia. It is not accepted that the appellant would be at risk from Al-Shabaab because OA (Somalia) upheld the findings in MOJ & Ors (Return to Mogadishu) Somalia [2014] UKUT 00442 that Al-Shabaab were only attacking "carefully selected targets", and had completely withdrawn from Mogadishu and had no real prospect of re-establishing a presence there. It is argued that the appellant can reasonably avoid places which are likely to be Al-Shabaab targets. His return would not therefore put him at real risk of serious harm contrary to Article 3 ECHR. This position is accepted by those representing the appellant.

17. It was argued orally by Ms Gilmour that she placed reliance on PS (cessation principles) Zimbabwe 2021 [UKUT] 00283 in concluding that the appellant's refugee status had properly ceased, particularly at (2) of the headnote which provides guidance that the country situation and the appellant's personal circumstances must be considered. She argues that the situation in Somalia and the appellant's personal circumstances have changed since the grant of his refugee status, as set out above and in the reasons for refusal letter, and so his refugee status can lawfully be ceased by the respondent. In essence there is no longer a real risk to the appellant of clan violence because this has drastically declined, such that there has been a sustained, durable and permanent change so that minority clan membership is no longer a persecutory risk factor, and further as the appellant would have social and financial support from his own Reer Hamar clan, which would assist him integrating on return along with support from his community in the UK, his sister, brother-in-law and claimed new wife. She also argued that the opinion of the CJEU set out in the judgment given after the reference by Judge Storey was not of the same weight now the UK had left the EU,

and that the law should be applied as set out in Qualifications Regulations and the Immigration Rules.

18. Ms Gilmour argued that the appellant's return would, in addition, not constitute a disproportionate interference with his right to respect for family and private life as protected by Article 8 ECHR. Applying the scheme at s.117C of the Nationality, Immigration and Asylum Act 2002 it is argued that the appellant cannot meet the first exception to deportation based on private life because he would not have very significant obstacles to integration in Somalia because he left Somalia as an adult, he speaks Somali, he is familiar with the culture, and he has been able to survive in the UK without an income and shown an ability to access the support structures within the Somali community here and so could do likewise on his return to Somalia. In addition, the appellant cannot show he has been lawfully resident for half of his life, and it is not accepted that he is socially and culturally integrated in the UK due to lack of evidence of work, education or voluntary work, and in light of the appellant's criminal conviction.

19. It is argued that the appellant cannot met the second exception to deportation based on family life because it is not accepted that the appellant is properly married to Ms ZO or in a genuine and subsisting relationship with her. He has produced an Islamic Nikah certificate dated 1st September 2022 but the certificate says Ms ZO was previously married, and so was the appellant, and the divorce certificates have not been produced. Further from the statements of Ms ZO and the appellant show that they currently lived at separate addresses, and the oral evidence on this point was inconsistent. It would not in any case be unduly harsh even if Ms ZO and the appellant are in a relationship for them both to live in Mogadishu or for the appellant to leave and for Ms ZO to remain in the UK given the marriage is so recent and was entered into it with the understanding that the appellant is subject to deportation proceedings.

20. It is not accepted that there are any compelling and compassionate factors over and above the exceptions to deportation which would enable the appellant to succeed on Article 8 ECHR grounds. It is not accepted that his medical issues, namely his leg injury, amount to such a circumstances as his medical records indicate that he could work in a job where he can sit, and there is no evidence he is receiving treatment or medication for it in the UK. So, whilst it is accepted that the appellant has made ties with friends in the UK during his period of residence, and there were delays in commencing the deportation proceedings, ultimately his deportation remains proportionate given the public interest in his deportation due to his two year sentence for the crimes of burglary and blackmail sentence given the lack of risk on return for this appellant in Somalia.

21. For the appellant it is argued by Mr Khan, in his skeleton argument and in oral submissions, in summary as follows. It is accepted that the findings made by Judge Storey stand. It is accepted that the appellant

cannot succeed in this appeal on the basis of Article 3 ECHR. The issues which remains are argued to be: whether the revocation of the appellant's refugee status is lawful in light of the judgment of the CJEU in SSHD v OA (Directive 2004/83/EC) Case C-255/19 given as a result of the reference by Judge Storey, and whether the deportation of the appellant breaches his rights as protected by Article 8 ECHR.

22. It is argued that the CJEU found that Article 11(1)(e) of the Qualification Directive means that a refugee ceases to maintain their status where the conditions leading to the grant of asylum cease to exist. In this respect the CJEU found that the state's ability to provide adequate protection is a crucial factor, and that the actors of protection (state or third party actors) must provide an effective legal system for the "detection, prosecution, and punishment of acts constituting persecution" and the third country national must have access to that protection. This protection cannot be provided by the provision of financial and social support given by third party actors as this does not meet the requirements of a minimum level of protection. The crucial question therefore in relation to the cessation of the appellant's refugee status is whether Somalia has established an effective and accessible legal system which prevents and detects persecution, and prosecutes and punishes acts of persecution.

23. Mr Khan argues for the appellant that the respondent relies upon MOJ to argue that Al Shabaab have been permanently removed from Mogadishu and has no realistic prospect of re-establishing itself there, and that clan violence has not permanently disappeared, and that this is a significant and permanent change. The respondent also relies upon OA with respect to the status of Reer Hamar, and support through family and social links both in the UK and Somalia. It is submitted that the case the respondent puts is that the appellant can be supported by family and his clan, and despite his injuries is fit for some work. It is argued that these findings are not relevant to the question of revocation of the appellant's refugee status, and further that the focus of the country guidance cases has been on factors which lead to the reintegration of returnees to Somalia and security provided through the clan system. Social and financial support through the clan system is however found by the CJEU to be of no relevance when considering if a refugee ceases to have protection. There is no discussion in either MOJ or OA of protection provided through an effective and accessible legal criminal justice system and thus of sufficiency of protection. Further the country of origin materials, for instance the 2021 US State Department Report on Somalia, does not support there being a function system, in fact it refers to the civilian judicial system as being "dysfunctional" and susceptible to clan politics, and to the use of torture and inhuman and degrading treatment of detainees. This is echoed in the CPIN "Security and Humanitarian Situation in Mogadishu" published in May 2022, which finds that the Somali police struggle to provide basic law enforcement services, and that Somalia has no effective national laws or policing to counter organised criminal activity. Therefore, it is argued the

appellant's refugee status cannot be revoked. The panel questioned Mr Khan at the hearing as to whether it was really possible to argue that the lack of evidence of risk (accepted by him in his concession on Article 3 ECHR) was not relevant to ceasing the appellant's refugee status, particularly as the judgment of the CJEU referred to the "parallelism" between the grant and cessation process, and in the process of granting refugee status it would not be necessary to show a lack of sufficiency of protection in a country if there was not well founded fear of persecution.

24. Mr Khan also argued that the appellant is entitled to succeed in his appeal under Article 8 ECHR, by application of the second exception to deportation based on the appellant having a genuine and subsisting relationship with a qualifying partner and the effect of his deportation to that partner being unduly harsh. It is argued that the appellant's partner, Ms ZO is a British citizen, and therefore a qualifying partner. She has lived in the UK for over twenty years, and has children and grandchildren in this country. She is the carer for her elderly father, and lives with three of her adult children. It would be unduly harsh to expect Ms ZO, as a British citizen, to go and live in Mogadishu, where there are still regular terrorist attacks and indiscriminate violence, and in the context of her ties to the UK. Further if the appellant were deported, and Ms ZO remained in the UK, it would lead to the end of their relationship and this would equally be unduly harsh.

25. In the alternative Mr Khan argued that even if it would not reach the level of severity required to meet the unduly harsh test in relation to the appellant's partner for him to be deported that there are compelling compassionate factors over and above the exceptions to deportation. These, it is argued, are as follows: his offence was committed over ten years ago; the appellant does not pose a threat to the public; he received a two year sentence and was found by the judge to have been the least involved with the offence of the co-defendants; he has lived in the UK for almost twenty years having been granted refugee status and then indefinite leave to remain; he has strong social and family ties with the UK; he has been a volunteer with the Jazari Community Centre since 2011; he has not visited Somalia since his arrival in the UK as he did not judge it safe to do so; his lengthy absence from Somalia will create very significant obstacles to integrating in that country.

Conclusions – Remaking

26. At 2 of the headnote in PS (cessation principles) Zimbabwe the Upper Tribunal sets out the following summary of the guidance on cessation of refugee status: "It is therefore for the SSHD to demonstrate that the circumstances which justified the grant of refugee status have ceased to exist and that there are no other circumstances which would now give rise to a well-founded fear of persecution for reasons covered by the Refugee Convention. The focus of the assessment must be on: (i) the personal circumstances and relevant country background evidence including the country guidance ('CG') case-law appertaining at the time that refugee status was granted and; (ii) the current personal

circumstances together with the current country background evidence including the applicable CG."

27. We also note that at 1(i) of the head note the following is said: There is a requirement of symmetry between the grant and cessation of refugee status because the cessation decision is the mirror image of a decision determining refugee status i.e. the grounds for cessation do not go beyond verifying whether the grounds for recognition of refugee status continue to exist – see Abdulla v Bundesrepublik Deutschland (Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08) [2011] QB 46 at [89] and SSHD v MA (Somalia) [2019] EWCA Civ 994, [2018] Imm AR 1273 at [2] and [46].

28. We understand, as stated above, that the test for cessation is therefore a mirror image test to that of recognition. The respondent must show that the circumstances that led to the grant of status have ceased to exist. As with a grant of refugee status the first question is therefore whether there is a risk of serious harm; and if there is such a risk then the question of sufficiency of protection arises. This is the position also taken by the CJEU in the decision on the reference in the appellant's case (SSHD v OA (Directive 2004/83/EC) Case C-255/19) at paragraph 37 where it talks of the "parallelism established by Directive 2004/83 between the granting and cessation of refugee status". We find that the guidance given in the decision is with respect to the issue of protection, as is reflected in the questions put to the CJEU by Upper Tribunal Judge Storey, which are set out at paragraph 29 of the judgment. We find that this guidance is therefore only of relevance if there were to remain a risk of serious harm, but the respondent seeks to argue that there is significant and permanent change in Somalia, which means that there is ultimately no well-founded fear of persecution. If this is correct then, we find, that the lack of existence of a protection system against harm, through the operation of a sufficient criminal justice system, is of no relevance.

29. We are satisfied, and it was not argued otherwise by Mr Khan, that the appellant was granted refugee status in 2003 because he and his first wife were accepted as having been subjected to persecution as members of the minority Reer Hamar clan at the hands of the Hawiye majority clan, and it was accepted that had a well- founded fear of future persecution on the same basis.

30. We find that the situation as reflected in the current country guidance on Somalia with respect to clan violence is now very different; such that the circumstances which led to the appellant being recognised as a refugee have ceased to exist in accordance with paragraph 339A of the Immigration Rules, which reflects Article 1C(5) of the Refugee Convention. As set out in the headnote of MOJ & Ors (Return to Mogadishu) Somalia at (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." In OA (Somalia) the Upper Tribunal held at 2 of the headnote: "*The country guidance given in paragraph 407 of MOJ (replicated at paragraphs (ii) to (x) of the headnote to MOJ) remains applicable"*

31. Further it is accepted by Mr Khan for the appellant that there is no Article 3 ECHR risk on return for this appellant. As such we do not need to proceed to consider the issue of sufficiency of protection as there is no risk of serious harm. So whilst we accept what is said in the decision of the CJEU following the reference in this case, namely that "social and financial support provided by private actors, such as the family or clan of a third country national" does not suffice to constitute protection when considering whether there is a well-founded fear of persecution in this instance we do not need to consider sufficiency of protection at all because there is no risk of serious harm (clan based or other) to the appellant if he is returned to Somalia.

32. We find therefore that in light of the acceptance by Mr Khan for the appellant that there is no real risk of serious harm to the appellant if he returns to Somalia that the respondent has shown that the circumstances which led to the appellant being recognised as a refugee have ceased to exist, and so the appellant can no longer refuse to avail himself of the protection of Somalia, and that the respondent is thus entitled to revoked or cease his refugee status. The appeal cannot therefore succeed on this basis.

33. This leaves the issue of whether the appellant's deportation to Somalia would be a disproportionate breach of his right to respect for private and family life as protected by Article 8 ECHR. The appellant was convicted of two offences, burglary and blackmail at Harrow Crown Court on 9th February 2012. The offence involved breaking into the flat of the victim and destroying and taking the belongings of that person with threats of violence with the aim of intimidating him into leaving the flat. It was found that the appellant was principally the driver, and the least involved, but that he did enter the flat and take items belonging to the victim. It is conceded by the respondent that he has refuted the presumption that he is a danger to the community under s.72 of the Nationality, Immigration 2002 Act. We find that the appellant is not a risk of reoffending, the offence having taken place almost eleven years ago and no other offences having been committed since that time, however the public interest in the deportation of offenders consists also of deterring other foreign nationals from offending and in maintaining public confidence in the immigration system. As a result, we find, that the public interest still requires the appellant's deportation unless he can show that he can meet one of the provisions at s.117C of the Nationality, Immigration and Asylum Act 2002. Mr Khan did not argue that the appellant could meet the first, private life exception to deportation at s.117C(4) of the 2002 Act. We find that the appellant cannot show that he has been lawfully resident in the UK for most of his

life. We will consider the other components of this exception to deportation when we look at whether the appellant can show very compelling circumstances over and above the exceptions.

34. Mr Khan argued that the appellant can meet the requirements of the second exception to deportation at s.117C(5) of the 2002 Act, namely the family life exception, on the basis that it would be unduly harsh to the appellant's wife, Ms ZO, for him to be deported. We have firstly to consider whether the appellant is in a genuine and subsisting relationship with a qualifying partner. We accept that there is an Islamic marriage certificate for the appellant and Ms ZO, and she is a British citizen. Ms ZO did not attend the Upper Tribunal to give evidence in support of her written statement that she is in a genuine marriage with the appellant. The appellant was found not to be a credible witness by Upper Tribunal Judge Storey in relation to quite extensive parts of his history, and in findings which it is accepted by his representative are properly preserved for this hearing. We do not accept that the appellant has provided a sufficient explanation for his contended partner's non-attendance: he is represented by solicitors who have instructed counsel and it is not credible that they would not have told him that she should attend, or credible that she would not have wanted to attend to support him if she were in a genuine relationship as his partner. The appellant gave no reasons why she was otherwise unable to attend the hearing. The appellant could not adequately explain why he and his wife do not give the same address on the statements they make three weeks after their marriage when his evidence is that they moved in together around 4th September 2022. It does not follow that simply because he is reliant on the charity of others for financial support that he has to give his address as that of his sister and brother-in-law rather than his wife if he truly lives with her. The witness statements give very little detail about the relationship between the appellant and his contended partner. We find that the appellant has not shown on the balance of probabilities that he is in a genuine and subsisting relationship with Ms ZO.

35. Even if we had been convinced that she is a genuine and subsisting partner we had would not have concluded that it was unduly harsh for the appellant to be deported and Ms ZO to remain in the UK. She clearly has a lot of other family (father, children and grandchildren) in this country to provide her with support, and indeed whom she supports, and the period of claimed cohabitation is very short and has taken place in the known context of the appellant facing deportation proceedings. There is no evidence that Ms ZO, a British citizen, would not be able to visit the appellant for periods of time in Somalia or a third country such as Kenya if she did not wish to go to Somalia, and maintain contact with him through social media.

36. The final question that must be answered is, notwithstanding the fact that we have found that the appellant cannot meet the two exceptions to deportation, whether there are very compelling circumstances over and above the exceptions to deportation which meant that his

deportation is not in the public interest in accordance with s.117C(6) of the 2002 Act. This is a balancing exercise.

37. When conducting this balancing exercise we weigh the following in the appellant's favour: his 19 year period of residence in which we find that he has developed private life ties with friends and family; the fact that the respondent delayed in commencing these deportation proceedings until 2016, some four years after his conviction, which potentially has led to the deepening of the appellant's ties with the UK; the fact that he has been a volunteer with the Jazari Community Centre; the fact that the appellant has been a victim of persecution historically and as a result has a disability due to a gunshot wound, even if this is not one which precludes work such as driving and shop work; the fact that his sentence of imprisonment (2 years) is in the middle of the range of under 4 year sentence and his crime was not one in which he personally committed acts of violence; the fact that the appellant is rehabilitated and does not pose a risk of re-offending; the fact that the appellant has not travelled to Somalia whilst he has been in the UK; and the fact that Somalia remains a country with very poor governance and where approximately 70% of the population live in poverty.

38. Against the appellant we weigh the following: that the public interest requires his deportation in the interests of maintaining the credibility of the immigration system through the deportation of foreign offenders and to deter other foreign offenders; the appellant has not provided a detailed picture of his private life in the UK so we are unable to conclude that it extends beyond friendships with people in his community, some voluntary work with his community centre and spending time with family members; the offences for which the appellant was convicted did involve threats of violence to the victim even if the appellant himself did not carry these out; the appellant has some family in Somalia and would be able to seek support both social and practical (accommodation, finding work and money) from Reer Hamar clan members if he were deported; we find that the appellant has shown no plausible reason why his friends and family in the UK would cut off their financial support to him if he were in Somalia rather than in this country so we find that he would have financial assistance from the UK if deported; the appellant left Somalia as an adult, can speak Somali and understands the religion and culture and for these reasons along with the practical support he could access, we find, would have no significant obstacles to integration on return; we find that the appellant would have the potential to find work in areas such as driving and shop work in Mogadishu; and we find that he has no family life ties with the UK.

39. Ultimately we conclude that the lack of UK family life ties, the potential to re-integrate into Somali society, speaking Somali and understanding the society, through the financial assistance of UK family and friends and the practical and other support of Reer Hamar clan members in Somalia in the context of the appellant's criminal conviction and the weight that must be given to the public interest in the deportation of

foreign criminals means that the appellant's deportation is a proportionate interference with his Article 8 ECHR rights.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. The decision of the First-tier Tribunal was set aside.
3. We remake the appeal by dismissing it on the basis that his refugee status is properly revoked and he cannot succeed on human rights grounds.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) we make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Signed: Fiona Lindsley Date: 16th December 2022
Upper Tribunal Judge Lindsley

Annex A: Error of Law Decision:

DECISION AND REASONS

1. I shall refer to the Respondent as the Appellant as he was before the First-tier Tribunal. He is a citizen of Somalia and his date of birth is 1 January 1965.

2. The Appellant came to the UK in 2003 on a multi entry visa as the spouse of his then wife. He was granted indefinite leave to enter and subsequently granted refugee status in line with that of his wife.

3. On 9 February 2012 the Appellant was convicted at Harrow Crown Court of burglary and blackmail. He received custodial sentences of two years on each count to run concurrently. He was issued with a notice of liability for automatic deportation on 29 February 2012. On 20 April 2016 he was served with a decision to make a deportation order under Section 32 (5) of the UKBA 2007.

4. On 27 September 2016 the Secretary of State certified the Appellant's claim under Section 72(2) of the Nationality, Immigration and Asylum Act 2002. The Respondent revoked the Appellant's refugee status under Article 1C(5) of the Refugee Convention and excluded him from humanitarian protection under paragraph 339D of the Immigration Rules. The Secretary of State decided that return to Somalia would not breach the UK's obligations under Article 3.

5. The Appellant appealed and his appeal was dismissed by First-tier Tribunal Judge Cameron in a decision that was promulgated on 20 July 2017. The judge found that the Appellant had rebutted the presumption under s.72. He went on to dismiss the appeal on all other grounds. Permission was granted to the Appellant and the matter came before Upper Tribunal Judge Canavan to decide whether Judge Cameron had erred.

6. Judge Canavan set aside the decision of Judge Cameron and remitted the appeal to the First-tier Tribunal for a fresh hearing. The appeal came before First-tier Tribunal Judge Frankish on 30 January 2018. He found that the Appellant had rebutted the presumption with reference the certification under s.72. He allowed the appeal under Article 3. He did not determine the appeal under Article 8 having found that consideration was not necessary because return to Somalia would breach the UK's obligations under Article 3. Permission was granted to the Secretary of State by Upper Tribunal Judge Kebede on 4 September 2018.

7. The grounds assert that the judge failed to conduct an independent fact-finding assessment having used the decision of Upper Tribunal Judge Canavan as a starting point and attaching too much weight to it. The judge failed to properly engage with the issues raised by the Secretary of State in respect of the Appellant's ability to work, with reference to credibility issues that were raised in the Reasons for Refusal Letter and when

considering the evidence relating to the Appellant's brother-in-law and whether he could provide assistance to him in Somalia. There were inconsistencies in the evidence, but the judge referred to the error of law decision and concluded that in the light of it, the inconsistencies in the Appellant's evidence should be given little weight. The grounds take issue with the application of MOJ & Ors [2014] CG UKUT 00442 to the facts in this case.

8. I heard oral submissions from the representatives. I concluded that Judge Frankish materially erred because of his approach to the error of law decision and how he factored into his decision the observations that were made by Judge Canavan. There is continual reference throughout his decision to this. I will set out the following paragraphs of Judge Frankish's decision: -

> 25. The UT determination states that, "This is a finely balanced decision". It concludes that erroneous findings of fact in the first determination were sufficiently egregious as to amount to errors of law. The matter has been sent back to the First-tier to have another go. However, the UT determination has tipped the balance strongly in favour of the appellant. Without further or better evidence on which to base the findings, the conclusions of the UT rule out, as errors of law, the making of the following adverse conclusions against the appellant: that the brother, if alive, was actually living in Mogadishu in 2001 and certainly not (§10) that he is living there now; that the appellant has any remaining relatives in Mogadishu; that the appellant has two children each by two separate wives, four in all, in Somalia; that the UK brother in law is able or willing to provide financial assistance at his present low level, and certainly not more, if the appellant returns to Somalia; that fellow minority clan members in Mogadishu can provide meaningful assistance (§13); that, as an incapacity benefit recipient since arrival in 2003, the appellant can be classed as fit for work (§14).
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> 26. Not surprisingly, and is he was entitled to do, Mr Harvey continued to bang the drum of discrepancy relative to the wife's evidence and what the appellant is said to have told the probation officer who compiled his pre-sentence report.
>
> 27. Certainly, inconsistencies continue to apply including points which arose at the hearing. His witness statement dated fourth of July 2016 categorically states (§ 10) that he no longer has any relatives in the UK, is sister having gone back to live in Nairobi. If you have no relatives here, the implication was that she was accompanied by her husband and children. In all evidence the appellant said she was only Kenyon for a short holiday. He could not explain the discrepancy stop acting as the driver and participating in the violence inflicted upon Mr a Ibrahim suggests that the appellant has the capability of working, at least as a driver, as Mr Harvey suggested. However, that information was known in the UT determination which did not approve such a conclusion stop as to support from the brother-in-law, the appellant said it was minimal: a roof over his head, help with his

bus pass and the occasional £5 note. Since the first determination, two of the sisters seven children have moved out but that still leaves five. Taking account of the UT determination, it is not possible to conclude that the brother-in-law can be prevailed upon to continue his support to the appellant on the latter's return to Somalia, let alone improve on it

28. A key factor is the appellant's brother, said to have been killed in Somalia. He told the GP and the probation officer that this was in 1993. His witness statement dated 4 July 2016 has it as 1995. He told me it was 1994, the same year as the appellant himself left Somalia. There is no clear evidence as to the time and circumstances of the brother's death. The appellant's sister states (§8) that the militia attacked them in 1993 and, when they refused to hand over money, her sister was shot as was her husband followed by gang rape of the surviving sister which again occurred in 2001 when she decided to leave, with the assistance of the appellant's (still surviving) brother. The appellant conceded that the 1993 incident described by his sister had nothing to do with the murder of his brother and that, in her evidence relating to her case, his sister makes no reference to that murder at all. He asked why it was so difficult to accept the murder of his other sister and her husband but not his brother. The answer is the inconsistency with the sister's account and the omission to mention the brother's murder, along with the variation in the appellant's account (1993, 1994 and 1995) as to the date of death, notably in what he told the probation officer. However, these inconsistencies have been found, in the UT determination, to be unreliable points to be given weight. Ms Dirie relied upon the fact that the appellant's sister and brother in law were not there to be cross-examined as if that was a point in her client's favour. I find the contrary. The appellant having set out his account in writing is not, in itself, evidence of the truth of that account (see UKIAT 00072 U (Turkey)). The appellant's sister and brother in law failed to attend on his behalf. The explanation was that the latter was busy with his taxi-driving work and the former with taking her remaining five children to school. I find this extraordinary. The appellant faces deportation to his home country, a prospect the sister and brother in law could help resist by attending cross examination. The brother in law's occupation is the quintessential for flexible hours. The sister's responsibilities arise only before and after school. Every one of the discrepancies which Mr Harvey burrowed into in depth were matters she could have clarified.

29. Nonetheless, my findings as to the facts are that there are none to be made other than those in the first determination minus the points overruled in the UT determination. That is to say: there is no evidence that the brother is extant and certainly none that he is now, or was in 2001, in Mogadishu or Somalia; there is no evidence of any other family in Mogadishu or Somalia; the sister and brother in law here are unable or unwilling to provide if the appellant returns; fellow Bandhabow clan members in Mogadishu or Somalia cannot provide meaningful assistance.

9. I have underlined particular areas of concern. However, a proper reading of the decision makes it clear that the FTT elevated the error of law decision to fact- finding assessment concluding that it was bound by the conclusions of the UT (or at least they were the starting point). The UT judge concluded that Judge Cameron made findings which were open to him on the evidence; however, there were findings that were not grounded in the evidence and/or inadequately reasoned. The reasons given for setting aside the decision are not findings of fact that tie the hands of the FTT remaking the decision. They concern the UT judge's view of the evidence before Judge Cameron. The UT did not hear submissions regarding the re-making of the decision. It was open to the UT judge to do so and remake the decision, but this is not what happened. The intention of the UT was to remit the case to be re-heard. The UT judge did not seek to preserve any findings. The UT stated at [16] that the matter would be heard afresh by the FTT. The UT judge expressed strong views about the evidence that was before Judge Cameron. It may be that on rehearing the matter the FTT would reach the same conclusions; however, it was incumbent on the FTT to hear the matter afresh and reach independent conclusions on the evidence. Considering the decision of Judge Frankish, with particular focus on the above quoted paragraphs, I conclude that there was no independent assessment of the evidence which fairness demands when re-hearing a case.

10. I have taken full account of Ms Dirie's commendable efforts to support the decision of the First-tier Tribunal. However, I do not agree that the judge simply used the error of law decision as a guide to help him identify the findings that needed to be made in this case. His approach to the error of law decision was not one that was open to him.

11. The decision of the FTT contained material error and must be set aside. Having considered the **Practice Statement** of the Immigration and Asylum Chambers of the First-tier and **Upper Tribunal** on 25 **September 2012** , and the unfortunate history of this case, it is my view that the matter should be re-heard afresh by the Upper Tribunal. There is no challenge in respect of the certification decision and that stands.

12. The Tribunal on the next occasion is to hear the matter afresh. The issues which need to be determined are cessation under Article 1C (5) of the Refugee Convention, Article 3 and Article 8. However, because of the passage of time and a degree of confusion, I made the following direction which were communicated orally to the parties at the hearing: -

    1. The Appellant's solicitors are to serve and file the original grounds of appeal within 14 days.

    2. The parties are to agree if possible and inform the Upper Tribunal within 21 days of the issues in this appeal.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed *Joanna McWilliam*
Date 8 November 2018
Upper Tribunal Judge McWilliam