Upper Tribunal
(Immigration and Asylum Chamber)

MSM (journalists; political opinion; risk) Somalia [2015] UKUT 00413 (IAC)

THE IMMIGRATION ACTS

Heard at Field House, London	**Determination Promulgated**
On 24 March and 28 April 2015	
Further submissions: 04 June 2015	.....

Before

The President, The Hon. Mr Justice McCloskey
Upper Tribunal Judge Dawson

Between

MSM

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

Appellant: Mr S Chelvan and Ms V Hutton (both of Counsel), instructed by Duncan Lewis and Company Solicitors

Respondent: Ms DJ Rhee (of Counsel), instructed by the Treasury Solicitor

UNCHR (intervening): Ms M Demetriou QC, acting pro bono, instructed by Baker and McKenzie LLP

[1] The enforced return of the Appellant, a journalist, from the United Kingdom to his country of origin, Somalia, would expose him to a real risk of persecution on the ground of actual or imputed political opinion and/or a breach of his rights under Articles 2 and 3 ECHR.

[2] It is probable that, in the event of returning to Somalia, the Appellant will seek and find employment in the media sector.

[3] The Appellant is not to be denied refugee status on the ground that it would be open to him to seek to engage in employment other than in the media sector.

[4] Documents such as Home Office Country Information Guidance and Country of Information publications and kindred reports should not be forensically construed by the kind of exercise more appropriate to a contract, deed or other legal instrument. Reports of this kind are written by laymen, in laymen's language, to be read and understood by laymen. Thus courts and tribunals should beware an overly formal or legalistic approach in construing them. Furthermore, reports of this type should be evaluated and construed in their full context,

[5] In cases where the Secretary of State seeks to withdraw a concession, or admission, the Tribunal should adopt a broad approach, taking into account in particular its inquisitorial jurisdiction, the public law overlay, the imperative of considering all relevant evidence and fairness to the litigant.

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ANONYMITY

We maintain the anonymity order made previously under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Unless the Upper Tribunal or a Court orders otherwise, no report of any proceedings or any form of publication thereof shall directly or indirectly identify the Appellant. This prohibition applies to, amongst others, all parties and their representatives.

DECISION [No 2]

Introduction

1. This decision determines two main questions. The first is whether, given the prevailing conditions in Mogadishu, Somalia, the Appellant, a journalist, is at risk of persecution and/or breach of Articles 2 and 3 ECHR in the form of attacks inflicting serious injury or death in the event of his enforced return there. The second is the interesting question of law of whether the Appellant can be denied refugee status in the United Kingdom on the

ground that it is reasonable to expect him upon return to engage in employment other than his chosen occupation of journalism. These questions are determined in a context where the Upper Tribunal has recently promulgated updated guidance on conditions prevailing in Mogadishu: see MOJ and others (Returns to Mogadishu) Somalia CG [2014] UKUT 00442 (IAC)

2. The contours of this appeal emerge from the following passages in the decision of the First-tier Tribunal ("*FtT*"):

> "*It is conceded by the Respondent that in general journalists may be at risk in Mogadishu. It is an established principle of refugee law that protection is to be refused if it is shown that the person seeking asylum can reasonably be expected to take measures to avoid the threat of persecution upon his return to his country of origin. This principle finds expression, for example, in the requirement for an applicant to demonstrate that it would not be reasonable, or that it would be unduly harsh, to expect him to relocate to an area where he would not face the real risk of persecution .....*
>
> *It is common ground that this Appellant is a qualified teacher and that he practised as such prior to training as a journalist. It would not, in my view, be unreasonable to expect him to change his profession and to return to teaching, in order to avoid any risk he may face merely on account of being a journalist practising in Mogadishu ...*
>
> *I am further satisfied that even if the Appellant could show that the only reason that would compel him to change profession would be a fear of persecution he would not be entitled to international protection under the Refugee Convention .....*
>
> *The Appellant's change of profession by returning to teaching would not involve a violation of or a denial of a right enshrined in the Convention.* ***The right to practice ones profession does not enjoy protected status under the Convention*** *.....*
>
> *In the circumstances I find that to the extent that this Appellant would be at risk merely on account of his continuing to practice as a journalist in Mogadishu, it would be reasonable to expect him to revert to teaching as a means of earning and income and, hence, avoid any risk that would befall him as a journalist at the hands of the Al-Shabaab.*"
>
> [Emphasis added.]

Al-Shabaab ("AS") is a radical Islamist group, a terrorist organisation.

The Proceedings To Date

3. The Appellant, who benefits from the protection of anonymity, is a national of Somalia, aged 29 years. This appeal has its origins in a decision made on behalf of the Secretary of State for the Home Department (the "*Secretary of State*"), dated 02 January 2014, whereby the Appellant's application for asylum was refused. The Appellant appealed to the First-tier Tribunal (the "*FtT*") which, by its determination promulgated on 18 March 2014, affirmed the decision of the Secretary of State. The ensuing grounds of appeal raised the three issues of the asserted risk to the Appellant as a member of a group, namely journalists in Somalia; the Appellant's likely conduct on return to Somalia and, in particular, whether he would, or would be obliged to, transfer to a different profession; and the historical factual issue of whether the Appellant had been specifically targeted by AS. Permission to appeal was duly granted.

4. The error of law hearing before the Upper Tribunal was held on 29 May 2014. Upper Tribunal Judge Dawson held that the decision of the FtT was vitiated by error of law (see Appendix 1). The Judge, having recorded a limited concession by the Secretary of State's representative, ruled, in substance, that the FtT had not properly directed itself in law in relation to the matters raised in the first two grounds of appeal: see especially [13] – [14] of the decision. We draw particular attention to the following passages:

> "*[17] What is missing from the determination is a finding whether the Appellant would continue as a journalist …*
>
> *There will need to be further evidence on this aspect ….*
>
> *[18] If it is found that the Appellant will resume his occupation as a journalist on return, the issue will be whether it would be reasonable to expect him to change his career and to resume his earlier* [teaching occupation] *or another occupation.*"

These passages shape the essential framework of the exercise of remaking the decision of the FtT which now falls to this Tribunal.

Preserved Findings

5. Upper Tribunal Judge Dawson expressly preserved a series of findings of fact contained in the determination of the FtT, namely:

(i) The Appellant worked as a journalist for Radio "X" in Somalia.

(ii) He did not at any stage come to the adverse attention of AS: his evidence to the contrary was a total fabrication.

(iii) He did not receive any threats on his mobile phone from AS.

(iv) None of his colleagues at the radio station was targeted or harmed before the Appellant left Mogadishu.

(v) The Appellant's wife had not relocated to a place of safety.

(vi) The Appellant's sister was aware of his intention to travel to the United Kingdom, confounding his claim to the contrary.

(vii) Little weight could be attributed to the documentary evidence on which the Appellant relied in support of his assertion that AS had threatened him.

(viii) Increased income was his initial motivation in training to become a journalist.

The preservation of these findings obviously has a bearing on the remaking exercise.

Further Finding

6. By reason of the manner in which the appeal hearing unfolded, it became necessary for the Tribunal to adjourn for the purpose of providing a preliminary ruling relating to the admission of fresh evidence (see Appendix 2). When making this ruling we found it convenient to promulgate our findings in relation to the Appellant's likely future employment in the event of returning to Mogadishu. At this juncture, we draw attention to the following passage in the Tribunal's error of law determination:

> "*What is missing from the determination* [of the FtT] *is a finding whether the Appellant would continue as a journalist and it is unclear that the Judge concluded the Appellant would practice as such on return. There will need to be further evidence on this aspect .....*
>
> *If it is found that the Appellant will resume his occupation as a journalist on return, the issue will be whether it would be reasonable to expect him to change his career and to resume his earlier or another occupation.*"

See Appendix 1, [17] – [18]. Sequentially, the next decision of the Tribunal followed an uncompleted remaking hearing. This contains our finding on the issue of future employment.

We refer particularly to [24] – [27] of Appendix 2 and, in particular, our conclusion at [27]:

> "*In summary, therefore, we find as a matter of probability that the Appellant will, if returned, continue to pursue his interest in a career*

in broadcasting and media related activity. This would include a creative role in terms of research and writing for broadcasts. To this extent there will be a journalistic element. We consider further that he is likely to secure employment in this field."

The hearing of the appeal was duly completed, on a later date, against this backdrop.

The Evidence Considered

7. What follows is a digest of the relevant documentary evidence, which we have considered in full, with some analysis and commentary. We confine ourselves to highlighting its salient features. We would add that as a result of our initial finding – see [6] above – the focus at this stage is mainly on the so-called "country evidence" relating to the risk to journalists practising their profession in Mogadishu and beyond.

8. We begin with certain aspects of the Appellant's evidence which were not challenged. He is aged 29 years and a national of Somalia. Prior to his arrival in the United Kingdom, in October 2013, he worked as a teacher and, latterly, as a journalist. In the latter capacity he was employed by a radio entity presenting news reports and sports and childrens' programmes. He claims to have been informed by fellow journalists that in Somalia –

"*…. they have to live in hiding and they have to keep changing their mobile numbers in order to stay safe and take many precautions in order to stay alive.*"

Adverting to the reported murder of a journalist by AS in June 2014, he avers:

"*I was very angry about what had happened and if I was in Somalia right now I would have broadcast this news myself on the local radio. From my point of view I would have wanted to inform the people of the truth behind these innocent people being killed … the journalist who was killed on 21 June 2014 was a friend of mine …..*

His death has motivated me even more to continue pursuing my life as a journalist as I want to highlight the brutalities inflicted on innocent people."

Continuing, the Appellant makes the case that journalists are under threat not only from the terrorist organisation AS but the "*Government authorities*" also. In support of this, he instances one specific case of a radio entity being closed by the security forces for a matter of some days, associated with the detention of the director and other journalists, evidently short lived. While the Appellant follows this with claims about

other comparable incidents, he provides no particulars. He formulates his case based on risk of return in the following general terms:

> "*…. If I am returned to Somalia I would face ill treatment by the Government in Mogadishu and other Government controlled areas and* [AS] *in their areas ….*
>
> *I cannot relocate to any other part of Somalia and live a relatively normal life without being ill treated, for being a journalist.*"

9. In its Country of Origin ("*COI*") report on Somalia of August 2013, the Home Office noted the continuing threat posed by AS. In this context, we refer to the recent review of the evidence by the Upper Tribunal in MOJ and Others. The COI report quotes from a US State Department ("*USSD*") 2012 report containing the following passage:

> "*Journalists were subjected to violence, harassment, arrest and detention in all regions. The National Union of Somali journalists (NUSOJ) reported 18 journalists were killed across the country in 2012 and 14 were wounded in Mogadishu. According to the Somaliland Journalists Association (SOLJA), more than 79 journalists were arrested in Somaliland during the year.*"

In the same year the NUSOJ reported:

> "*Media freedom, a cornerstone for democracy and good governance, has constantly been curtailed to unacceptable degrees …..*
>
> *Killing of journalists in Somalia is a common and normal practice. Mogadishu continues to record the highest levels of attacks against journalists and news media organisations in the country.*"

In this context we refer also to a BBC report of July 2012 and a Freedom House report of September 2012. The latter notes that Radio Mogadishu has the support of the transitional Government. The COI report further notes the killing of a journalist in Mogadishu on 18 January 2013. It also draws on the report of the Danish Norwegian fact finding mission (May 2013):

> "[AS] *has taken responsibility for the killings of* ***only*** *journalists from the state run Radio Mogadishu. Who is behind the rest of the killings of journalists is not clear ….*
>
> *It was added that most journalists will not report negatively about* [AS]".

10. There is a more recent Home Office Report, entitled "Country Information and Guidance" ("CIG"), dated December 2014. This incorporates certain passages from an equally up to date report produced

by the United Nations High Commissioner for Refugees ("UNHCR"). Under the rubric "*Potential Risk Profiles*" UNHCR identifies a total of twelve categories. One of these is defined in the following terms:

> "*Individuals in certain professions such as journalists .....*"

This is prefaced by these words:

> "*UNHCR considers that persons with any of the profiles below, or a combination thereof, may be in need of international protection in the sense of the* [Refugee Convention] ....."

Notably, the Home Office CIG report adopts this without question or qualification. Advice to decision makers is couched in the following terms:

> "*With regard to persons who come within these heightened risk categories, decision makers must make a careful assessment of a person's overall circumstances.*"

Risk to journalists was not one of the issues considered in MOJ and Others.

11. An overview of the subject of risk to journalists can be undertaken by reference to other pieces of evidence provided. These include in particular the reports of the Somalia journalist organisations noted in the COI 2013 report and the USSD report quoted therein. The evidence records that between 1992 and the end of 2014 56 journalists were killed in Somalia. The majority of the killings were in Mogadishu. It is of some note that the journalist murdered in January 2013 (*supra*) was working for a particular privately owned radio organisation which has evidently been the focus of a disproportionate number of attacks. It is described as the "*most vulnerable outlet to assassinations targeting Somalia journalists*". There are various strands of evidence relating to the killings of individual journalists. We find it difficult to distil from these any clear and consistent pattern. Considering the evidence as a whole, most of these killings would appear to have been planned and targeted attacks. According to the NUSOJ report, in 2014 there were five murders of "*media workers*" and attacks injuring seven "*journalists*: these figures apply to the entirety of the country.

12. The NUSOJ report makes a distinction between areas controlled by the federal government and those under the control of AS. The ability of journalists to work more freely in the former areas is acknowledged. This would include Mogadishu. However, there is criticism of state agencies:

> "*.... The authorities restrict their ability to work freely through the police and judiciary system, including the harassment of media that criticise them.* [AS] *has been able to threaten and eliminate journalists in government controlled neighbourhoods.*"

The report claims that "*crimes*" against journalists have been committed with impunity. It makes the further claim that in 2014, 47 journalists were arrested, five media buildings were attacked and repressive legislation was enacted. While NUSOJ, unsurprisingly, is critical of this conduct on the part of state agencies, there is no suggestion that journalists have been attacked, ill-treated or murdered by any such agency.

13. At this juncture we consider the discrete issue of how the risk to journalists in Somalia has evolved in recent years. The year 2012 was described in the Home Office CIG Report (2013) as "*the deadliest year on record for the country's journalists*". The "*Committee to Protect Journalists*", which is based in Somalia, has prepared a table documenting that 12 journalists were killed in Somalia in 2012. Of these, seven of the killings took place in Mogadishu; three of the victims worked for a particular media network perceived to be anti-AS; one worked for the pro-government Radio Mogadishu; one worked for Somalia National TV; and the others worked for other media outlets. In the year 2013, four journalists were killed: three of the killings were perpetrated in Mogadishu; one of the victims worked for the aforementioned anti-AS media organisation; and another worked for Radio Mogadishu. In the year 2014, there were four deaths. One of these occurred in Mogadishu and the other three elsewhere. Notably, the annual report of NUSOJ describes these victims as "*media workers*": we shall revisit the significance of this terminology. There is no evidence of any deaths in 2015 to date.

The Secretary of State's Decision

14. At this juncture it is appropriate to consider the impugned decision of the Secretary of State. The following passages are particularly significant:

> "*[46] The above information indicates that journalists and those who work in the media are generally at risk in Somalia, with those working for state-owned media companies at the greatest risk. It is noted that [Radio X] is an independent radio station however and is not linked in any way to the Somali Government ....*
>
> *[47] It is also noted that you worked as a reporter for [Radio X] from May 2011 until September 2013 ....*
>
> *Before this you worked as a teacher for three years, teaching mathematics and Somali language .....*
>
> *[48] It is therefore concluded that although working as a reporter may place you at risk in Somalia, it is not a necessary risk, as you have transferable skills as a teacher which would allow you to live and work peacefully in your home country. When this was put to you in interview the only reason you cited for not pursuing*

a career as a teacher was that the salary is less than that of a reporter."

The "*above information*" is an excerpt from the 2013 Home Office publication entitled "*Country Information and Guidance: Somalia*" *("CIG").* Drawing on identified sources, this report contains the following salient passages:

> "*Despite the violence, dozens of radio stations aligned with particular factions continued to broadcast in Mogadishu and in other parts of the country. The TFG* [Transitional Government] *continued to support Radio Mogadishu ……*
>
> *This includes journalists from popular stations …. who have found it challenging to operate under* [AS] *……*
>
> *Journalists were subjected to violence, harassment, arrest and detention in all regions. The National Union of Somali Journalists reported 18 journalists were killed across the country in 2012 and 14 were wounded in Mogadishu … This was the deadliest year on record for the country's journalists …..*
>
> *Concerning the big number of assassinated journalists, it is not justified to say that* [AS] *is targeting this group specifically, according to the international NGO(B) Mogadishu.* [AS] *has taken responsibility for* ***the killings of only journalists from the state run Radio Mogadishu****. Who is behind the rest of the killings of journalists is not clear. In this connection it should be mentioned that Shabelle Media has had a conflict for a long time with the Government. It was added that most journalists will not report negatively about* [AS]."
>
> [Emphasis added.]

In its determination, the FtT stated, at [15]:

> "*It is conceded by the Respondent that in general journalists may be at risk in Mogadishu.*"

We consider it clear that the Judge was not here referring to a concession made by the Respondent's representative at the hearing. He was, rather, adverting to those parts of the decision letter reproduced above.

15. The framework for the Tribunal's determination of the first question identified in [1] above is conveniently delineated in the following passage in the Appellant's skeleton argument:

> "*The Appellant invites the Upper Tribunal to find that, on the basis of the ……. documents and evidence, it is overwhelmingly clear that journalists (and those who work in the media) are at risk in Somalia, whether from state or non-state actors.*"

On behalf of the Appellant, it is further submitted that his claim has been "*conceded*" by the Secretary of State in the decision letter.

16. The submission of Ms Rhee on behalf of the Secretary of State, in our opinion, accurately encapsulates the key question to be addressed by the Tribunal in determining the first issue. Ms Rhee submitted that the evidence does not support a finding that a person employed as a researcher, writer or presenter in the broadcasting sector without more and with no history of working as an investigative journalist for a state run media organisation is likely to have imputed to him any political opinion exposing him to the risk of a targeted attack. Furthermore, we concur with Ms Rhee that one of the essential exercises for the Tribunal must is to consider and determine whether, from the perspective of risk, a distinction is to be made between journalists working for a pro-government media organisation and those who do not. We further consider that we must examine, and decide, the question of whether only certain types of workers in the media sector are at risk. In addition, we must consider whether any distinction is to be made between Mogadishu and the rest of Somalia. These issues require of the Tribunal a careful analysis of all the evidence bearing on the question of risk, simultaneously giving effect to the lower standard of proof which applies in asylum cases.

The Risk Issue

17. Having found that the Appellant is likely to engage in journalistic activities, for the purpose of earning a living, in the event of returning to Mogadishu – see [6] above – we pose the question required by Article 1A(2) of the Refugee Convention: does he have a well founded fear of being persecuted in Mogadishu for reasons of political opinion? We make clear at this juncture that the Appellant's case has been advanced exclusively on the ground of political opinion: no other ground or status protected by the Refugee Convention is in play. The onus rests on the Appellant and he must establish a real risk, a reasonable degree of likelihood, of persecution to a standard somewhat lower than the balance of probabilities.

18. The Refugee Convention reason invoked by the Appellant is that of political opinion. His case is that the pursuit of his chosen career in journalism will involve the expression of political opinions and is it at least partly driven by political conviction related to conditions prevailing in Somalia. Having considered with care his several accounts and having had the advantage of assessing his demeanour, we accept this and find accordingly.

19. Next we take into account the undisputed evidence relating to media broadcasting in Somalia. It is clear that there are media organisations which are, or are perceived to be, pro-AS, anti-AS, pro-government and

anti-government. It seems to us uncontroversial that journalists involved in the activities of researching, interviewing, reporting and presenting engage in the expression of views and opinions which are, or are perceived to be, of one or more of these orientations. We are satisfied that these are plainly opinions of a political *genre*. This analysis probably applies to all parts of the globe. We find further that the Appellant has established, to the requisite degree that he will foreseeably engage in journalism of this kind following his return to Mogadishu. He will not refrain from doing so, whether voluntarily or involuntarily. In addition, we find that pro-government or anti-AS opinions, both of which are probably in substance indistinguishable, are attributed to all those who work for media organisations, irrespective of their specific role or activities. Such opinions are inherently political in nature. We consider that this broad assessment applies to all media organisations in all areas of Somalia. Accordingly, the Appellant's case overcomes the threshold of falling within the ambit of the Refugee Convention.

20. We turn now to the question of real risk of persecution. This requires of the Tribunal an evaluative assessment of all the evidence, together with a predictive evaluative judgment in relation to future events. The Tribunal must also give effect to the specific finding noted in [6] above. We observe that if the Appellant's case is accepted, no journalist who will foreseeably engage in the expression of political opinion, or to whom such opinion may be imputed, in his or her occupation could be safely removed to Mogadishu or, logically, to any part of the country. The main question is: what further findings and conclusions are impelled by the evidence?

21. We conclude that the evidence supports the following findings, some of which are specific and others general in nature:

(a) Radio Mogadishu is perceived by AS to be pro-government, state run.

(b) Journalists working for Radio Mogadishu are at real risk of being targeted by AS and killed or seriously injured in consequence.

(c) AS is the only identified group, or faction, which engages in such attacks and killings.

(d) AS has perpetrated some, but not all, of the reported killings of journalists and other workers in the media sector.

(e) The perpetrators of the killings of other journalists are not known.

(f) Those who work for media organisations other than Radio Mogadishu which publish anti-AS material or have an imputed anti–AS stance or inclination are also at risk of being targeted by AS and killed or seriously injured in consequence.

(g) All of the attacks upon and murders of both journalists and "*media workers*" (the language employed in one of the NUSOJ reports) documented in the reports digested above have been motivated by the occupation of the victims. The expression of political opinions is an intrinsic feature of the daily lot of most of those who work in the media sector. Furthermore, we find that the aggressors impute political opinions to all such workers in any event. We consider that there is a direct nexus between the espousal and/or expression of political opinions, actual or imputed, by the victims and their death or injury. There is no other identifiable motive or ground and none was suggested on behalf of the Secretary of State.

(h) We find no sustainable basis for making any distinction between journalists and "*media workers*" (and we were not invited to do so). We define this term as all those who work in the media sector. Thus the members of the endangered group are not strictly confined to journalists in the conventional sense. Thus the analysis in [20] above extends to this wider group.

(i) We find that there is nothing selective about the attacks on the members of the endangered group. In particular, we find no sustainable basis for confining those at risk to persons who work for media organisations perceived to be either pro-government or anti – AS (insofar there is any distinction between the two). In this sense, the attacks which have been perpetrated and which, predictably, will continue are indiscriminate. We reject the Secretary of State's argument to the contrary.

(j) Thus the risk is generated by membership of the endangered group without more.

(k) We find no basis for any sustainable distinction between Mogadishu and other areas of Somalia.

We have made these findings on the basis of all the evidence presented. While the evidence was undisputed *per se*, it has required analysis, interpretation and evaluation. The Tribunal has performed this task. While we have noted some differences and inconsistencies in the reports, we consider these to be minor and inconsequential. The reports are, broadly, united and consistent in their exposition of the factual issues associated with our findings tabulated above.

The Concession Issue

22. One discrete strand of the Appellant's case is that the Secretary of State's letter concedes that he will be at risk of persecution for a Convention reason, *qua* journalist, in the event of returning to Mogadishu: see the relevant excerpts reproduced in [14] above. We consider it trite that the construction of the relevant passages is a question of law for the Tribunal and, further, they must be considered in their full context. This

includes in particular the underlying and surrounding evidence. The letter is expressly and inextricably linked with the evidence to which it refers, which we have outlined in [13] above.

23. We consider that documents such as the CIG, the COI and kindred reports should not be forensically construed by the kind of exercise more appropriate a contract, deed or other legal instrument. Reports of this kind are written by laymen, in layman's language, to be read and understood by laymen. Thus courts and tribunals must beware an overly formal or legalistic approach in construing them. Furthermore, reports of this type must be evaluated and construed in their full context, which – as in this case – includes previous and related reports upon which the text in question draws. Thus, in construing the relevant passages of this particular report, we must consider also the COI report published more or less simultaneously, the USSD report reproduced in part in the COI report and the other information sources identified in [9] – [13] above. These are all strands of the same web. We also take into account that reports of this kind, dealing as they do with matters of life and death and rights under Articles 2 and 3 ECHR, are generally prepared with care and couched in carefully selected terms. Approached in this way, we construe the Secretary of State's decision letter as acknowledging that journalists as a group in Somalia <u>are</u>, at present, at risk of persecution and/or treatment infringing Articles 2 and 3 ECHR.

24. As we noted in our first judgment in this appeal, the Secretary of State is desirous of withdrawing this concession: see the reported version, [2015] UKUT 00228 (IAC). Given our findings in [20] and our analysis in [22], this issue has been rendered moot. However, we consider it appropriate to express our view that the task for the Tribunal is not necessarily the narrow one of ruling on whether the concession can legitimately be withdrawn. This is in truth something of a peripheral battle, merely distracting attention from the central task of the Tribunal, which is to consider the evidence in its totality, including evidence postdating the Secretary of State's decision and to make its independent assessment of risk accordingly. This we have done in the exercise yielding the findings rehearsed above. To this we would add that the Tribunal exercises an inquisitorial jurisdiction, with a significant public law overlay, to be contrasted with the *lis inter-partes* approach which characterises private law litigation. The topic of withdrawal of supposed concessions, or admissions, seems to belong more readily to the latter sphere. It may be that previous judicial examination of this subject has rather neglected these considerations. We would add that the imperative of considering all relevant evidence and fairness to the litigant will always be obligatory considerations when this issue arises.

<u>Risk From State Actors</u>

25. At this juncture we turn to consider the discrete question of the risk that the Appellant will be persecuted by <u>state actors</u> for a Convention

reason. While we acknowledge that this formed part of the Appellant's case, we consider that it was canvassed somewhat faintly and we find the explanation for this diffidence in the supporting evidence invoked.

26. We note in particular the criticisms in the NUSOJ publications of state interference in the broadcasting sector in 2014. This evidence, however, suffers from certain intrinsic limitations. At its height, it suggests the detention by state agencies of a small number of journalists for unspecified reasons and for short periods, followed by release; one completed prosecution and conviction, followed by an almost immediate presidential pardon of the two journalists concerned; a rather vague objection to the enactment of a new law in one particular province or region; a handful of cases of outstanding charges against journalists; and the revocation of four broadcasting licences in the entire country, followed by the restoration thereof in at least one case.

27. Based on this evidence, the Appellant makes the further case that if returned to Mogadishu, he will be exposed to a real risk of persecution by state agents based on his political opinion. We reject this claim. In our estimation, the supporting evidence falls measurably short, both quantitatively and qualitatively, of discharging the Appellant's burden in this respect. The evidence is sparse, unilateral, probably driven by a particular viewpoint and lightly particularised. At its zenith, it merely establishes some isolated instances of state action against some journalists and media entities which has invited criticism from the journalistic profession. We consider that it does not partake of the quality or depth necessary to warrant a finding of persecution of journalists by state actors..

The Risk Issue: Conclusion

28. On the grounds and for the reasons elaborated above, we conclude that the Appellant has discharged the burden of establishing that in the event of returning to Mogadishu, Somalia, there is a real risk that by virtue of his predicted employment in the media sector he will be persecuted for the Refugee Convention reason of political opinion and/or that a breach of his rights under Articles 2 and 3 ECHR will occur.

Political Opinion and the Modification of Conduct Issue

29. The Appellant's case (in our words) was that if the Secretary of State were to refuse his asylum application on the basis that it would be reasonable to expect him, upon returning to Mogadishu, to avoid risk by not engaging in his chosen career of journalism, this would be unlawful. This issue is triggered by the assessment in the Secretary of State's decision that it would not be "*necessary*" for the Appellant to expose himself to risk in light of his "*transferable skills as a teacher*". This

assessment was duly endorsed by the FtT. The question is whether it is sustainable in law

30. On behalf of the Appellant, it was submitted by Mr Chelvan (in terms) that involuntary modification of conduct is an inadmissible consideration and (we would add) in effect a misdirection in law. This argument preys in aid, mainly, the decision of the Supreme Court in HJ (Iran) v SSHD [2011] 1 AC 596 and the decision of the Australian High Court in Minister for Immigration and Border Migration v SZSCA [2013] FCAFC 155. Reliance was also placed on C-71/11 and C-99/11 Germany v Y and Z [2013] 1 CMLR 5. Article 10 of the Qualification Directive was also invoked. The Appellant's case on this issue was supported by UNHCR, intervening. The core submission of Ms Demetriou QC was that it is unlawful to deny an asylum applicant refugee status on the basis that they could be expected to conceal, or exercise discretion or restraint in relation to, one of the core protections provided by the Refugee Convention namely race, religion, nationality, membership of a particular social group or political opinion, in order to avoid persecution. It was argued that asylum cannot be refused on a basis which expects or requires the applicant to disavow a right, or status, protected by the Convention. This argument recognises that the practice of a particular profession is not protected by the Convention. However, it is emphasised that political opinion is a protected ground and, further, that the Appellant's chosen profession of journalism is indissociable from his actual or imputed political opinion. As a result, to expect or require him to relinquish his profession contravenes the Convention as it directly undermines one of the protections which it affords.

31. On behalf of the Secretary of State, Ms Rhee accepted that asylum applicants cannot be required to relinquish their religion, racial or sexual identity or their political opinions in order to avoid persecution in their country of origin. It was acknowledged that, following the decision of the Supreme Court in HJ (Iran), to expect discretion of asylum seekers whose conduct was driven by a Convention – protected reason would be to deny them their fundamental right to be who they are. Notwithstanding, Ms Rhee submitted that the correct interpretation of HJ (Iran) is that a compulsion to alter one's conduct in order to avoid persecution does not *per se* amount to persecution. Rather, drawing on the opinion of Lord Dyson at [110] – [118], it was argued that in order to do so it must involve the forfeiture of a fundamental human right. This submission, we observe, conveniently highlights the main interface between the parties, having regard to the wider principle which the Appellant and UNCHR seek to draw from HJ (Iran).

32. **The Qualification Directive.** We take as our starting point Council Directive 2004/83/EC, the *soi-disant* Qualification Directive. This prescribes the minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons otherwise in need of international protection, together with the content of the

protection granted. The Directive gives expression to the EU's common policy on asylum, including the Common European Asylum System. It seeks to achieve the approximation of rules on the recognition of refugees and the content of refugee status. It recognises that the Refugee Convention and Protocol provide "*the cornerstone of the international legal regime for the protection of refugees*". By prescribing minimum standards for the definition and content of refugee status, it seeks to "*guide*" Member States in the application of the Convention.

33. For present purposes, Articles 9 and 10 are the most important provisions. Before turning to consider them, we would highlight that the definition of "*refugee*" in the Directive mirrors that contained in the Refugee Convention. The Directive, in contrast to the Convention, defines the concept of an act of persecution, in Article 9(1):

> "*Acts of persecution within the meaning of Article 1A of the Geneva Convention must:*
>
> *(a) Be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the* [ECHR]*, or*
>
> *(b) Be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).*"

In Article 9(2) there is a non-exhaustive list of acts which may fall within the aforementioned definition. Article 9(3) provides that there must be a connection between the reasons for persecution (see Article 10) and the acts of persecution. Article 10 stipulates that Member States shall take specified factors into account when assessing the reasons for prosecution. As regards political opinion, Article 10(1)(e) provides:

> "*The concept of political opinion shall in particular include the holding of an opinion, thought or belief on a matter related to the potential actors of persecution mentioned in Article 6 and to their policies or methods, whether or not that opinion, thought or belief has been acted upon by the applicant.*"

These words embrace the twin concepts of actual and imputed political opinion. Both are protected.

34. This last mentioned protection is a reflection of the long established norm that freedom of expression is a core value of democratic societies, recognised in a series of international instruments. Furthermore, we consider that it is clear that the Refugee Convention ground of political opinion is of the same pedigree. Bearing in mind the context of the

present appeal, it is also appropriate to acknowledge that the question of whether an opinion has the adjectival quality of political must take into account the conditions prevailing in the individual's country of origin. In Somalia, journalists and kindred workers in the media industry have become embroiled in the continuing conflict. They have been sucked into it by reason of their occupations. Their occupation is the stimulus for the imputation to them of political opinions. As appears from our findings above, we consider that each is tarred with the same brush. Furthermore, in the words of the Canadian Supreme Court in Canada (Attorney General) v Ward [1993] 2 R.C.S. 689, at [746]:

> *"The persecution stems from the desire to put down any dissent viewed as a threat to the persecutors... a claimant may be seen as a threat by a group unrelated, and perhaps even opposed, to the government because of his or her political viewpoint, perceived or real."*

35. **SSHD v** Ahmed [1999] EWCA Civ 3003. In this case the Immigration Appeal Tribunal ruled that a Pakistani Ahmadi did not qualify for protection, reasoning that it would not be unreasonable for him, upon returning to Pakistan, to make some allowances for the situation there, including the sensitivities of others and to exercise a measure of discretion in his conduct and in the profession of his faith. The Special Adjudicator had found that he would be vocal in the proclamation of his Ahmadi beliefs and would follow the command of his spiritual leaders irrespective of his place of residence in Pakistan. On appeal, the Court of Appeal placed emphasis on the central, single question, namely –

> "*..... Is there a serious risk that on return the applicant would be persecuted for a Convention reason?*"

The Court supplied the following answer:

> "*If there is, then he is entitled to asylum.* ***It matters not whether the risk arises from his own conduct in the country, however unreasonable.*** *It does not even matter whether he has cynically sought to enhance his prospects of asylum by creating the very risk on which he then relies. .....*"
>
> [Emphasis added.]

Thus the focus must be on the future conduct of the person concerned. In all cases, this requires a finding or, perhaps more accurately, an evaluative predictive judgment which, we consider, is to be undertaken according to the civil standard of the balance of probabilities.

36. **HJ (Iran).** In determining the forced modification of conduct issue we consider the key domestic decision to be that in HJ (Iran). This case involved two homosexual men who would suffer persecution in their respective countries of origin if they lived openly as homosexuals. The essential question was whether they could lawfully be denied refugee status on the ground of an expectation that they could conceal their homosexuality by discretion and self-restraint. The Supreme Court allowed their appeals. Lord Hope noted that the characteristic in play was an immutable one, unlike a person's religion or political opinion: see [11]. It is of particular note that Lord Hope cited with approval the passage in Ahmed quoted above.

> "*… The critical question* [is]*: if returned, would the asylum seeker in fact act in the way in which he says he would and would thereby suffer persecution? If he would, then, however unreasonable he might be thought for refusing to accept the necessary restraint on his liberties, in my judgment he would be entitled to asylum.*"

Lord Hope distilled from this passage two propositions, [18]:

> "*The first is that attention must be focused on what the applicant will actually do if he is returned to his country of nationality. The second is that the fact that he could take action to avoid persecution does not disentitle him from asylum if in fact he will not act in such a way as to avoid it. That is so even if to fail or to refuse to avoid it would be unreasonable.*"

It is appropriate to highlight at this juncture the key finding which we have made: the Appellant will, as a matter of probability, work in the media sector upon return to Mogadishu. In his case, the relevant "avoiding action" on which the spotlight is placed is that of engaging in an alternative occupation. We have found that the Appellant will not take this avoiding action. Lord Rodger, concurring with this approach, elaborated by identifying its rationale, at [76]:

> "*No one would proceed on the basis that a straight man or woman could find it reasonably tolerable to conceal his or her sexual identity indefinitely to avoid suffering persecution. Nor would anyone proceed on the basis that a man or woman could find it reasonably tolerable to conceal his or her race indefinitely to avoid suffering persecution. Such an assumption about gay men and lesbian women is equally unacceptable. Most significantly, it is unacceptable as being* ***inconsistent with the underlying purpose of the Convention since it involves the applicant denying or hiding precisely the innate characteristic which forms the basis of his claim of persecution ….***"
>
> [Emphasis added.]

The rationale of the Refugee Convention also emerges in the following passage, in [82]:

> "*To reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect – his right to live freely and openly as a gay man without fear of persecution.*"

In short, the protected right must prevail.

37. Lord Dyson formulated the guiding principle in the following way, at [109]:

> "*It is well established that in asylum cases it is necessary for the decision maker to determine what the asylum seeker will do on return .....*
>
> ***Thus, the asylum seeker who could avoid persecution on his return, but who (however unreasonably) would not do so is in principle a refugee within the meaning of the Convention.***"
>
> [Our emphasis.]

Notably, in formulating this principle, Lord Dyson (in common with Lord Hope) referred to Ahmad. Continuing, Lord Dyson stated in [110]:

> "*If the price that a person must pay in order to avoid persecution is that he must conceal his race, religion, nationality, membership of a social group or political opinion, then he is being required to surrender the very protection that the Convention is intended to secure for him.*"

Turning to the context of the appeal, he continued:

> "*The Convention would be failing in its purpose if it were to mean that a gay man does not have a well-founded fear of persecution because he would conceal the fact that he is a gay man in order to avoid persecution on return to his home country.*"

Next, Lord Dyson noted the purposive approach to the meaning of "*refugee*" adopted by the Australian High Court in SC395/2002 v Minister for Immigration and Multi-Cultural Affairs [2003] 216 CLR 473, at [41]:

> "*The object of the signatories to the Convention was to protect the holding of such beliefs, opinions, membership and origins by giving the persons concerned refuge in the signatory countries when their country of nationality would not protect them. It would undermine the object of the Convention if the signatory countries required them to*

modify their beliefs or opinions or to hide their race, nationality or membership of particular social groups before those countries would give them protection under the Convention."

Significantly, Lord Dyson continued:

"*Like Lord Rodger, I would follow this approach.*"

We are prompted to repeat our observation above: protection of the right in question must prevail. To this we would add that this is achieved by the grant of refugee status. The effect of such grant is to enable the person concerned to exercise the right freely in the country of refuge.

38. Before extending our consideration of the opinion of Lord Dyson, we pause. In our estimation, it is clear that Lords Hope, Rodger and Dyson were *ad idem*. We detect no distinction in the dominant principle espoused by each. We interpose this analysis because the submissions of Ms Rhee on behalf of the Secretary of State rather sidestep the core of their Lordships' opinions as we have exposed this above. Notably, as regards the decision in HJ (Iran), the submissions of Ms Rhee focus on the remaining section of Lord Dyson's opinion, in particular [113] – [115]. Ms Rhee invites us to distil from these passages the proposition that a compulsory adjustment of a person's behaviour in order to avoid persecution will not constitute persecution unless it entails the forfeiture of a fundamental human right. In [113], having reflected on the "*somewhat different analysis of the problem*" in New Zealand, Lord Dyson reiterated:

"*An interpretation of Article 1A(2) of the Convention which denies refugee status to gay men who can only avoid persecution in their home country by behaving discretely (and who say that on return this is what they will do) would frustrate the humanitarian objective of the Convention and deny them the enjoyment of their fundamental rights and freedoms without discrimination.*"

We consider this passage to be consonant with what we have described as the dominant principles, which the court espoused unanimously.

39. In [114] – [115], Lord Dyson noted that the New Zealand approach entails an analysis of the claimant's conduct from the perspective of whether it is "*at the core of the right or at its margins* ***and*** *whether the prohibition or restriction imposed by the state is lawful in terms of international human rights law*", quoting from [2005] INLR 68, at [120]. We consider the conjunctive in this quotation, which we have highlighted, to be significant. Furthermore, the discursive, or *obiter*, character of this part of his Lordship's opinion emerges clearly in the ensuing section, at [115]:

> *"It is open to question how far the distinction between harmful action at the core of the right and harmful action at its margin is of relevance in cases of persecution on grounds of immutable characteristics such as race and sexual orientation. But it is a valuable distinction and there may be more scope for its application in relation to cases concerning persecution for reasons of religion or political opinion."*

In addition to our *obiter* analysis of this passage, we find nothing in it detracting from or diluting the dominant principle to which Lord Dyson subscribed (*supra*). This we consider to be reinforced in what follows in [116] – [118] and, in particular, the following passage in [118]:

> *"Even if it could be imagined that Anne Frank, as an asylum seeker, would not objectively have been at risk of being discovered in the attic, she would nevertheless have had a well founded fear of serious harm, a fear not eliminated by her decision to conceal her identity as a Jew and live in the attic."*

Thus, as Lord Dyson acknowledged in [117]:

> *"In other words, the threat of serious harm and the fear of it will remain despite the avoiding behaviour."*

In short, we find no merit in the Secretary of State's "*more is needed*" argument.

RT (Zimbabwe).

40. The Supreme Court soon had the opportunity to revisit this subject in this case. The Respondents (and, in one case, the Appellant), based their asylum claim on their unwillingness or inability to positively demonstrate their loyalty to the Mugabe regime in the event of their forced repatriation to Zimbabwe. The Court of Appeal found the distinction between individuals whose political beliefs formed a core part of their lives and those for whom political beliefs were merely marginal to their existence misconceived, as the following passage illustrates:

> ***"The question is not the seriousness of the prospective maltreatment (which is not at issue) but the reason for it.*** *If the reason is political opinion, or imputed political opinion, that is enough to bring it within the Convention. In this case we are concerned with imputed political opinions of those concerned, not their actual opinions. Accordingly, the degree of their political commitment in fact, and whether political activity is of central or marginal importance to their lives, is beside the point ….*
>
> *If the Tribunal finds that he or she would be willing to lie about political beliefs, or about the absence of political beliefs, but that the*

reason for lying is to avoid persecution, that does not defeat the claim ....."

[Our emphasis]

See [2010] EWCA Civ 1285 at [36]. In espousing this approach, we consider that the Court of Appeal rejected the analysis of Elias LJ in TM (Zimbabwe) [2010] EWCA Civ 916, at [41].

41. The Supreme Court dismissed the Secretary of State's appeal. We draw attention, firstly, to the statement of Lord Dyson at [25]:

"*It is well established that there are no hierarchies of protection amongst the Convention reasons for persecution and the well founded fear of persecution test set out in the Convention does not change according to which Convention reason is engaged ....*

Thus the Convention affords no less protection to the right to express political opinion openly than it does to the right to live openly as a homosexual. *The Convention reasons reflect characteristics or statuses which either the individual cannot change or cannot be expected to change because they are so closely linked to his identity or are an expression of fundamental rights.*"

[Emphasis added.]

Lord Dyson then turned to address the argument that the HJ (Iran) principle does not apply to the Convention ground of political opinion in the case of a person to whom the relevant interference would affect –

"*... the margin, rather than the core, of the protected right and would not cause him to forfeit a fundamental human right.*"

Lord Dyson rejected this distinction. In doing so, he reasoned that the right not to hold a political opinion is a fundamental one, continuing at [42]:

"*A focus on how important the right not to hold a political or religious belief is to the applicant is wrong in principle.*"

Lord Dyson continued, at [43]:

"*As regards the point of principle, it is the badge of a truly democratic society that individuals should be free not to hold opinions. They should not be required to hold any particular religious or political beliefs. This is as important as the freedom to hold and (within certain defined limits) to express such beliefs as they do hold.*"

Lord Dyson illuminated this analysis by reference to the sinister "thought police" in George Orwell's novel 1984. Notably, the distinction was also rejected as being unworkable in practice. Lord Dyson added at [51]:

> "*What matters for present purposes is that nothing that was said .. in the HJ (Iran) case supports the idea that it is relevant to determine how important the right is to the individual. There is no scope for the application of the core/marginal distinction ....*"

The Supreme Court was unanimous in its decision. In the only concurring judgment, Lord Kerr formulated his rejection of the core/margins distinction in these terms, at [74]:

> "*The level of entitlement to protection cannot be calibrated according to the inclination of the individual who claims it. The essential character of the right is inherent to the nature of the right, not to the value that an individual places on it .....*
>
> *That is why the emphasis must be not on the disposition of the individual liable to be the victim of persecution but on the mind of the persecutor.*"

Our analysis

42. The main issue in this appeal has arisen in cases beyond these shores. In Szatv v Minister for Immigration and Citizenship [2007] 233 CLR 18, the Appellant qualified as a civil engineer. Some years later, he began working as a journalist in a particular region of Ukraine, where he suffered harassment and physical maltreatment on account of his political views. He fled to Australia, where he sought asylum. The Refugee Review Tribunal rejected his claim on the ground that he could return to a different part of Ukraine where he would not be known and could work in the construction industry there. His appeal was allowed on the basis that the fallacy in the Tribunal's reasoning was that in order to avoid persecution the Appellant would have to forfeit the very right to express his political opinions without fear of persecution which the Convention is designed to protect. The same approach was applied by the High Court in Appellant S395/2002 v Minister for Immigration (216) CLR 473, at 489 especially. Notably, these decisions were cited with approval by the Supreme Court in HJ (Iran).

43. In the specific context of the Qualification Directive, there are two relevant decisions of the CJEU. One concerns religious belief and practice, while the other relates to membership of a particular social group, namely homosexual males. In the first, Joined cases C-71/11 and C-99/11 Y and Z, the main question examined by the CJEU was whether Article 2(c) of the Qualification Directive is to be interpreted as meaning that an applicant's fear of being persecuted is well founded in circumstances where he could

avoid exposure to persecution in his country of origin by abstaining from certain religious practices. The Court ruled in favour of the applicant, concluding at [79]:

> "*It follows that where it is established that, upon his return to his country of origin, the person concerned will follow a religious practice which will expose him to a real risk of persecution, he should be granted refugee status, in accordance with Article 13 of the Directive. The fact that he could avoid that risk by abstaining from certain religious practices is, in principle, irrelevant.*"

Pausing at this juncture, this decision seems to us entirely consonant with those in Ahmed and HJ (Iran).

44. Some of the steps in the Court's reasoning and analysis in Y and Z repay careful analysis. First, the Court characterised freedom of religion a basic human right. Second, having regard to the wording of Article 9(1) of the Directive, it emphasised the threshold of "*severe violation*" of the right or freedom engaged. This was followed by a distinction between limitations on the exercise of the basic right (on the one hand) and the violation thereof (on the other), by reference to Article 10(1) and Article 52(1) of the Charter of Fundamental Rights. Continuing, the Court observed, at [62]:

> "*For the purpose of determining, specifically, which acts may be regarded as constituting persecution within the meaning of Article 9(1)(a) of the Directive, it is unnecessary to distinguish acts that interfere with the 'core areas' ('forum internum') of the basic right to freedom of religion, which do not include religious activities in public ('forum externum'), from acts which do not affect those purported 'core areas' .....*
>
> *[63] Such a distinction is incompatible with the broad definition of 'religion' given by Article 10(1)(b) of the Directive .....*"

In [65] the Court formulated the test of "*the nature of the repression inflicted on the individual and its consequences*". In [66], it rephrased this, albeit to like effect, as "*the severity of the measures and sanctions adopted or liable to be adopted against the person concerned*".

The Court's consideration of the exercise of assessing risk to the individual is striking, at [70]:

> "*In assessing such a risk, the competent authorities must take account of a number of factors, both objective and subjective. The subjective circumstance that the observance of a certain religious practice in public, which is subject to the restrictions at issue, is of*

particular importance to the person concerned in order to preserve his religious identity is a relevant factor to be taken into account in determining the level of risk to which the applicant will be exposed in his country of origin on account of his religion, even if the observance of such a religious practice does not constitute a core element of faith for the religious community concerned."

In [72], the Court reiterated the necessary of evaluating "*the personal circumstances of the person concerned*". Finally, as noted above, the Court rejected the "abstention" argument, namely the contention that a person does not have a well founded fear of persecution where he can abstain from religious practices.

45. To like effect is the Court's conclusion in Joined cases C-199-201/12 X, Y and Z, at [75]:

"*It follows that the person must be granted refugee status, in accordance with Article 13 of the Directive, where it is established that on return to his country of origin his homosexuality would expose him to a genuine risk of persecution within the meaning of Article 9(1) thereof. The fact that he could avoid that risk by exercising greater restraint than a heterosexual in expressing his sexual orientation is not to be taken into account in that respect.*"

In short, the possibility of conduct entailing the avoidance of modification of certain types of behaviour related directly to the right engaged is irrelevant. Thus this possibility must be disregarded.

46. In our judgement, the only issue on which there is a possible element of dissonance between the decisions of the Supreme Court and those of the CJEU is whether it is permissible to take into account the avoidance or modification of conduct on the part of the person concerned which is voluntary. This emerges particularly from the analytical exercise contained in [82] of the opinion of Lord Rodger in HJ (Iran). It may be said that the approach espoused by Lord Hope in [35] is in substance the same. Lord Walker, at [98], concurred with [82] of Lord Rodger's judgment. So too did Lord Collins, at [100] and Lord Dyson, at [132] while, simultaneously, observing in [123] that, in reality, there will be "no real choice".

47. Pausing at this juncture, we consider that the decisions of the United Kingdom Supreme Court, the High Court of Australia and the Court of Justice of the European Union are in alignment with each other. They are united by their common espousal of the dominant principle that the stature of the right and the unbridled freedom to exercise it (subject only to limitations which do not arise in this appeal) rise above and eclipse other considerations.

48. To the extent that there is any disharmony between the approaches of the Supreme Court and the CJEU, we are, by virtue of the principle of supremacy of EU Law, obliged to follow the latter. However, for the reasons which we will explain, this issue is moot in the present case as we are satisfied that the Appellant succeeds on both approaches.

49. At this juncture, we remind ourselves of the relatively narrow distance which separates the parties on this issue. It is identifiable in Ms Rhee's submission that HJ (Iran) is authority for the proposition that the compulsory modification of a person's conduct in order to avoid being persecuted will not amount to persecution unless tantamount to forfeiture of a fundamental human right. This, it is argued, is the narrow *ratio decidendi* of HJ (Iran). Thus, it is submitted, it is not sufficient that the ground or status in question simply falls within the scope of the protection afforded by the Refugee Convention. It is further submitted that, properly analysed, the right espoused by the Appellant is a right to practice one's chosen profession, which is not protected by the Convention.

50. We acknowledge at this point the Secretary of State's argument that the Refugee Convention does not protect a right to pursue a profession of one's choice. This is a case of risk arising out of imputed political opinion. We consider that the fact that the imputation of the political opinion arises in the context of the Appellant's chosen profession is immaterial and incidental. Thus we consider this argument to have no merit.

51. The second main element of the Secretary of State's case is that the modification of behaviour under scrutiny will not involve the forfeiture of a fundamental human right. We have analysed in some detail the passages in HJ (Iran) invoked in support of this contention. We would add the following. As our assessment above indicates, the espousal or expression of political opinion, or the imputation thereof, engages freedom of expression, which is a fundamental right. Insofar as Ms Rhee's submission involves the suggestion that there are different degrees in the exercise of the right to espouse and express political opinions, her argument invites a quantitative assessment which, in our opinion, is not merely impracticable but is not harmonious with the nature of the right in question. We consider that interference with this particular right is not to be measured by reference to the extent to which the exercise of one right is adversely affected by the conduct, threatened or actual, of the persecutor. This approach, in our view, neglects the intrinsic nature of the right, which permits and protects the unconstrained expression of a political opinion at any time, at the choice of the individual, as frequently or infrequently as may be desired, subject only to limitations which do not arise in this appeal. This is the quintessence of the underlying right, namely freedom of expression. Moreover, to accede to this argument would be tantamount to reinstating the discredited concept of marginal versus core. Finally, it suffers from the further infirmity that its operation would be utterly impracticable in cases of imputed political opinion.

52. Finally, having subjected the judgment of Lord Dyson in HJ (Iran) to appropriate scrutiny, we are unpersuaded that [110] – [118] thereof support the Secretary of State's case, for the reasons we have given.

53. We consider that the Secretary of State's "outright forfeiture" argument must be rejected as the further basis of its impermissible shift of focus from the persecutors to the victim.

Omnibus Conclusion

54. We conclude:

(i) The enforced return of the Appellant to Mogadishu, Somalia, will expose him to a real risk of persecution for the Refugee Convention reason of his political opinion, imputed, and/or a breach of his rights under Articles 2 and 3 ECHR.

(ii) The Appellant is not to be denied refugee status on the ground that it would be open to him to seek to engage in employment other than in the journalistic or media sector.

(iii) Giving effect to these conclusions, we remake the decision by allowing the Appellant's appeal.

Signed

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE
UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 05 June 2015

Appendix 1

Upper Tribunal
(Immigration and Asylum Chamber)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 29 May 2014	.....

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

MSM
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Chelvan instructed by Duncan Lewis & Co Solicitors
For the Respondent: Mr S Walker, Senior Presenting Officer

DECISION AND DIRECTIONS

1. The appellant is a national of Somalia where he was born in October 1985. He has been granted permission to appeal the decision of First-tier Tribunal Judge Devittie who for reasons given in a determination following a hear-

ing on 17 February 2014 dismissed the appeal against a notice of refusal of leave to enter dated 2 January 2014. The appellant had arrived in the United Kingdom on 4 October 2013 when he claimed asylum.

2. The appellant's claim was based on a fear of harm from Al-Shabaab due to his activities as a reporter/journalist. This was an occupation that he had taken up after previously working as a teacher. In May 2011 he worked as a reporter for an independent radio station "Sinba Radio". Before coming to the United Kingdom the appellant had received threats from the Al-Shabaab via text messages which continued despite a change of number on his mobile phone. No action was taken by the authorities despite his employer having complained. The threats from the Al-Shabaab were received at the end of 2012 which pressurised him into quitting his job.

3. The respondent did not believe that the appellant had received such threats giving her reasons for doing so in a letter dated 2 January 2014. She accepted the appellant had worked as a reporter for Sinba Radio since 2011. She referred in the refusal letter to country evidence indicating that journalists and those who worked in the media were generally at risk in Somalia with the greatest risk for those working for state-owned media companies. She noted that Sinba Radio was an independent radio station and was not linked in any way to the Somali government. She concluded that although working as a reporter may place the appellant at risk, it was not a necessary risk as he had transferrable skills as a teacher which would allow him to live and work peacefully in his home country. It was deemed therefore he was not at risk of persecution and did not qualify for asylum.

4. The judge also disbelieved the appellant's claim of the threats from Al-Shabaab and turned his mind to whether the appellant would be at risk in Mogadishu on account of the fact that he had previously practised as a journalist there. He concluded that Al-Shabaab would certainly take an adverse interest if they had not done so before. He then turned to whether there was a reasonable degree of likelihood of future risk if the appellant on return resumed his profession as a journalist. He went on to observe at [15] of his determination,

> "It is an established principle of Refugee Law that protection is to be refused if it is shown that the person seeking asylum can reasonably be expected to take measures to avoid the threat of persecution upon his return to his country of origin. This principle finds expression, for example, in the requirement for an applicant to demonstrate that it would not be reasonable, or that it would be unduly harsh to expect him to relocate to an area where he would not face the real likelihood of persecution."

5. The judge observed on the evidence before him that the appellant's dedication to his profession was such that he would have no option but to continue to practice as a journalist. He did not accept this as truthful observing that he had indicated at interview that he chose to become a

journalist in order to increase his income. The judge found that: “it has not been a part of his evidence that his decision to train as a journalist was motivated by a conviction he held and that this was his vocation”.

6. The judge went on to observe that the principles in *HJ* (Iran) [2010] UKSC 31 did not apply to the circumstances of the case and expressed the following conclusions at [19] and [20] of his determination,

> “19. The distinction in this case is this. The appellant’s change of his profession by returning to teaching would not involve a violation of or a denial of a right enshrined in the Convention. The right to practise one’s profession does not enjoy protected status under the convention.
>
> 20. In the circumstances I find that to the extent that this appellant would be at risk merely on account of his continuing to practise as a journalist in Mogadishu, it would be reasonable to expect him to revert to teaching as a means of earning an income, and hence, avoid any risk that would befall him as a journalist at the hands of the Al-Shabaab.”

7. The judge went on to conclude that the appellant would not be at risk of indiscriminate violence were he to be returned.

8. The challenge to this decision is threefold. Having conceded that the appellant was a journalist from 2011 in Mogadishu and that journalists are “generally at risk” with no evidence of effective state protection, the appellant could show that he is a refugee. The tribunal had failed to engage with the point at all even though it had been addressed in the skeleton argument and in oral submissions.

9. The second ground argues that the respondent could not force modification (by changing occupation) as this has been unlawful since the earlier cases of *Danian* and *Iftikhar Ahmed* as further affirmed in *HJ* (Iran) and *HG (Cameroon) v SSHD* [2010] UKSC 31. It is argued that if the appellant does voluntarily change his profession why would he do so. It would be in the face of a risk from an imputed political and an imputed religious opinion from Al-Shabaab. The appellant has a right not to share the views of Al-Shabaab and not to fear persecution on the basis that Al-Shabaab imposes views on him as to his conduct with reference to *RT & Others v SSHD* [2012] UKSC 38. It is argued that the judge materially directed himself as to the law in failing to identify any legal authority since *Danian* which enables forced modification to evade persecution. On this basis enforced modification is unlawful and the appeal falls to be allowed on asylum grounds.

10. The third ground relates to the judge’s finding that the appellant had not faced targeting by Al-Shabaab. The positive aspects of the appellant’s case including consistency and prompt claim to asylum are relied on. The First-tier Tribunal had failed to identify what weight was attached to the

appellant's wife's statement regarding the fate of the SIM card. In rejecting the police report, it is argued that the judge had not made a reasoned finding especially where the report had been made by the appellant's employer whose evidence as to the appellant's employment status with them had been accepted. It is argued that the approach of the First-tier Tribunal had therefore been irrational and unfair as the evidence had not been looked at in the round.

11. At the hearing Mr Chelvan supplemented this ground with argument that the judge had failed to take into account the undisputed evidence of the risks faced by journalists in Somalia in considering the threats specific to the appellant.

12. Before hearing submissions I made an order that the anonymity order made in the First-tier Tribunal should continue in the Upper Tribunal. Unless and until a Tribunal or court directs otherwise the appellant is granted anonymity. This means that no report of these proceedings shall directly or indirectly identify him or any member of his family. The direction applies to both the appellant and to the respondent and a failure to comply with this direction could lead to contempt of court proceedings.

13. In the course of his lengthy and forceful submissions, Mr Chelvan followed the format of the grounds of challenge and referred to the skeleton argument on which he had relied before the First-tier Tribunal. In particular he maintained that the principle that the appellant could be expected to modify his behaviour by changing his job to avoid persecution had no basis in law. In the case of the appellant, the concession by the Secretary of State meant that the appellant was a refugee because of the political opinion that would be imputed to him. He acknowledged that in the light of the concession he had not prepared evidence for the First-tier Tribunal dealing with the point whether persons who had previously been journalists would be at risk. This drew attention to exactly what the judge had concluded on the appellant's intentions were he to return.

14. Mr Chelvan contended that with reference to [20] of the determination quoted above, that the appellant would continue to practice as a journalist in Mogadishu. Mr Walker submitted however that this paragraph could be read in two ways and there remained a question whether the judge found the appellant would be at risk were he to continue as a journalist notwithstanding his negative findings regarding any risk in the past. He accepted that the analysis particularly in [20] lacked clarity which made the findings unsafe and in his view there would need to be a total rehearing and even though there were strong credibility findings, none could be said to be safe. There would need to be a total rehearing. Mr Chelvan did not accept that the matter needed to be reheard relying on the concession which had not been withdrawn.

15. I observed to the parties that I would decide what findings of the judge could be preserved and would decide the future conduct of the appeal in a reserved decision.

16. I begin my consideration with the quality of the fact-finding by the judge. I see no material error in the reasoning regarding the absence of threats from the Al-Shabaab before the appellant set out for the United Kingdom. The judge took into account all the evidence including the statement from the appellant's wife. The judge did not accept the explanation as satisfactory why the appellant was unable to produce the mobile phone and it was rationally open to him to reject the explanation that the threatening messages had been deleted when the phone was put in for repair by his wife. The challenge in the third ground is no more than an evidential disagreement. The judge was clearly aware of the concession which he referred to on more than one occasion in the determination and he was aware of the country information indicating the risks that journalists faced. It was open to him to reject the employer's evidence of reference of the matter to the police even though it had been accepted that the appellant had been employed as claimed. There is no question that the judge failed to take into account all the evidence in the round.

17. At [16] the judge did not accept as truthful that the appellant's dedication to his profession was such that he would have no option but to continue to practice as a journalist on return. What is missing from the determination is a finding whether the appellant would continue as a journalist and it is unclear that the judge concluded the appellant would practice as such on return. There will need to be further evidence on this aspect. I do not consider that this will require the findings on the pre-flight threats to be disturbed and these can be preserved.

18. If it is found that the appellant will resume his occupation as a journalist on return, the issue will be whether it would be reasonable to expect him to change his career and to resume his earlier or another occupation.

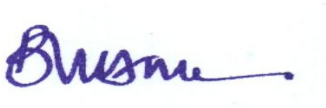
19. This is an unusual case in that the Secretary of State concedes error by the First-tier Tribunal though for reasons different from those on which it has been challenged. The points at issue are however important. Were it not for the Secretary of State's concessionary approach I would need some persuasion that there is much merit in the remaining grounds. This is however an adversarial jurisdiction and the parties have acceded to a course of action that was open to them.

20. Accordingly the decision of the First-tier Tribunal is set aside. It will be remade in the Upper Tribunal and the findings in [13] of the determination are to be preserved. The Tribunal will hear evidence on two aspects:

    (i) the appellant's intentions so far as a career is concerned on return;

    (ii) whether former journalists who are no longer pursuing their occupation would nevertheless be in need of protection having regard to the Secretary of State's concession and the current situation in Somalia.

Signed Date 16 June 2014



Upper Tribunal Judge Dawson

Appendix 2

Upper Tribunal
(Immigration and Asylum Chamber)

THE IMMIGRATION ACTS

Heard at Field House, London

On 24 March 2015

Determination Promulgated

.....

Before

The President, The Hon. Mr Justice McCloskey and
Upper Tribunal Judge Dawson

Between

MSM

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

Appellant: Mr S Chelvan and Ms V Hutton (both of Counsel), instructed by Duncan Lewis and Company Solicitors

Respondent: Ms DJ Rhee (of Counsel), instructed by the Treasury Solicitor

UNCHR (intervening): Ms M Demetriou QC, acting pro bono, instructed by Baker and McKenzie LLP

ANONYMITY

We maintain the anonymity order made previously under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Unless the Upper Tribunal or a Court orders otherwise, no report of any proceedings or any form of publication thereof shall directly or indirectly identify the Appellant. This prohibition applies to, amongst others, all parties and their representatives.

DECISION AND DIRECTIONS

Introduction

1. This decision determines the following two issues:

   (a) the applications of the Appellant and the Respondent to have further evidence admitted; and

   (b) the important factual question of the Appellant's future employment plans and intentions.

The proceedings to date

2. The Appellant, who benefits from the protection of anonymity, is a national of Somalia, aged 29 years. This appeal has its origins in a decision made on behalf of the Secretary of State for the Home Department (the "*Secretary of State*"), dated 02 January 2014, whereby the Appellant's application for asylum was refused. The Appellant appealed to the First-tier Tribunal (the "*FtT*") which, by its determination promulgated on 18 March 2014, affirmed the decision of the Secretary of State. The ensuing grounds of appeal raised the three issues of the asserted risk to the Appellant as a member of a group, namely journalists in Somalia; the Appellant's likely conduct on return to Somalia and, in particular, whether he would, or would be obliged to, transfer to a different profession; and the historical factual issue of whether the Appellant had been specifically targeted by the terrorist organisation "Al-Shabaab" ("*AS*"). Permission to appeal was duly granted.

3. The error of law hearing before the Upper Tribunal was held on 29 May 2014. Upper Tribunal Judge Dawson held that the decision of the FtT was vitiated by error of law. In a commendably focused determination, the Judge, having recorded a limited concession by the Secretary of State's representative, ruled, in substance, that the FtT had not properly directed itself in law in relation to the matters raised in the first two grounds of appeal: see especially [13] – [14] of the decision. The Judge found no merit in the third ground of appeal. We draw particular attention to the following passages:

   "*[17] What is missing from the determination is a finding whether the Appellant would continue as a journalist ...*

There will need to be further evidence on this aspect ….

[18] If it is found that the Appellant will resume his occupation as a journalist on return, the issue will be whether it would be reasonable to expect him to change his career and to resume his earlier [teaching] *or another occupation.*"

These passages shape the essential framework of the exercise of remaking the decision of the FtT which now falls to this Tribunal.

4. Upper Tribunal Judge Dawson expressly preserved a series of findings of fact contained in the determination of the FtT, namely:

(ix) The Appellant worked as a journalist for Simba Radio in Somalia.

(x) He did not at any stage come to the adverse attention of AS: his evidence to the contrary was a total fabrication.

(xi) He did not receive any threats on his mobile phone from AS.

(xii) None of his colleagues at the radio station was targeted or harmed before the Appellant left Mogadishu.

(xiii) The Appellant's wife did not relocate to a place of safety.

(xiv) The Appellant's sister was aware of his intention to travel to the United Kingdom.

(xv) Little weight could be attributed to the documentary evidence on which the Appellant relied in support of his assertion that AS had threatened him.

The preservation of these findings obviously has a bearing on the contours and outcome of the remaking exercise.

The Appellant's application to admit fresh evidence

5. The subject matter of rule 15 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (the "*2008 Rules*") is "Evidence and Submissions". Rule 15(2A) provides:

"*In an asylum case or an immigration case –*

(a) If a party wishes the Upper Tribunal to consider evidence that was not before the First-tier Tribunal, that party must send or deliver a notice to the Upper Tribunal and any other party –

(i) indicating the nature of the evidence; and

(ii) explaining why it was not submitted to the First-tier Tribunal; and

(b) *When considering whether to admit evidence that was not before the First-tier Tribunal, the Upper Tribunal must have regard to whether there has been unreasonable delay in producing that evidence.*"

This provision must be considered in conjunction with rule 15(2), whereby:

"*The Upper Tribunal may –*

(a) admit evidence whether or not –

(i) the evidence would be admissible in a civil trial in the United Kingdom; or

(ii) the evidence was available to a previous decision maker; or

(b) exclude evidence that would otherwise be admissible where –

(i) the evidence was not provided within the time allowed by a direction or a practice direction;

(ii) the evidence was otherwise provided in a manner that did not comply with a direction or a practice direction; or

(iii) it would otherwise be unfair to admit the evidence."

In short, the Upper Tribunal is invested by rule 15(2A) with a discretionary power to admit evidence which was not placed before the FtT. In deciding whether to exercise this power, it should take into account rule 15(2) and must have regard to the overriding objective, per rule 2(3)(a).

6. The Applicant's application for the admission of further evidence did not comply with rule 15(2A)(a). No acceptable explanation for this failure was proffered. The hearing suffered delay and disruption in consequence. We deprecate this failure to comply with the Rules. Fortunately for the Applicant, the provisions of rule 7 can be invoked in these circumstances and, with some reluctance, we do so.

7. The hearing date upon which this application unexpectedly emerged had not been allocated for this purpose and this was compounded by the lack of proper advance notice in compliance with the Rules. When one considers the meticulous case management of this appeal undertaken by Upper Tribunal Judge Dawson since the setting aside of the FtT's decision in June 2014, the eleventh hour developments in these proceedings must be condemned as inexcusable. Matters were exacerbated by the

unacceptable failure of the Appellant's legal representatives to disclose to either the Tribunal or the Respondent's representatives, throughout the case management phase, the possibility of developments of this kind. The knowledge possessed by the Appellant's representatives was not shared. This was entirely unacceptable in the circumstances of this appeal. It is universally recognised that the late and unexpected introduction of evidence in whatever form is incompatible with the principles which govern contemporary litigation: see O'Sullivan v Herdmans [1987] 3 ALL ER 129, per Lord Mackay of Clashfern at 137. The related principle of litigation cards face up is now one of some antiquity.

8. This duties on representatives imposed by these principles apply with particular force to issues relating to the acquisition of, disclosure of and reliance upon documents by any party. The non-disclosure of another, parallel process, under the Data Protection Act 1998, throughout a protracted period, upon which we shall elaborate presently, placed the hearing date in serious jeopardy, to the knowledge of the Appellant's representatives and no one else. Disarray resulted and a substantial quantity of valuable court time was wasted. This is intolerable. We shall consider at a later stage of these proceedings whether an order for wasted costs under section 29(4) of the Tribunals, Courts and Enforcement Act 2007 or Rule 10(3) of the 2008 Rules, or any other order, is appropriate.

9. The Tribunal's attempts to bring form and focus to this application during the hearing achieved limited success. The documents which the Applicant wishes to have admitted as fresh evidence are a series of materials provided to the Applicant's solicitors under cover of a letter dated 06 March 2015 from UK Visas and Immigration (hereinafter "*UKVI*"), an agency which is described as "*an operational command of the Home Office*". These documents were provided in response to a "subject access request" under the provisions of the Data Protection Act 1998 (the "*1998 Act*"). While the letter is dated 06 March 2015, the attachments were not brought to the attention of the Tribunal until 23 March 2015, the eve of hearing. Furthermore, the letter makes clear that the request was made by a letter sent as long ago as 25 November 2014. The significance of this is that during the period of almost four months preceding the hearing which elapsed thereafter and notwithstanding that case management reviews were conducted by the Tribunal, the existence of this parallel process was concealed from all. This is quite unacceptable.

10. The documents disclosed were presented to the Tribunal in two groups. The submissions of Counsel made no reference whatsoever to the larger bundle which, upon a cursory perusal, consists of materials generated by the Applicant's application for asylum and the two ensuing appeals and is largely duplication. In passing, we observe that the costs involved in preparing and reproducing this large, redundant bundle are unlikely to be recoverable, come what may. It seems to us a paradigm illustration of the blizzard mentality, regrettably so prevalent in many areas of contemporary litigation.

11. In advancing the application under Rule 15(2A), Counsel referred only to a discrete collection of documents assembled in a small booklet. The context in which the Applicant's belated application unfolded is shaped by two main elements. The first of these is a passage contained in the Respondent's decision letter dated 02 January 2014:

> "*[46] The above information indicates that journalists and those who work in the media are generally at risk in Somalia, with those working for state-owned media companies at the greatest risk. It is noted that Simba Radio is an independent radio station however and is not linked in any way to the Somali Government ....*
>
> *[47] It is also noted that you worked as a reporter for Simba Radio from May 2011 until September 2013 ....*
>
> *Before this you worked as a teacher for three years, teaching mathematics and Somali language .....*
>
> *[48] It is therefore concluded that although working as a reporter may place you at risk in Somalia, it is not a necessary risk, as you have transferable skills as a teacher which would allow you to live and work peacefully in your home country. When this was put to you in interview the only reason you cited for not pursuing a career as a teacher was that the salary is less than that of a reporter.*"

The "*above information*" is an excerpt from the Home Office publication entitled "Country Information and Guidance: Somalia" (2013). Drawing on identified sources, this report contains the following passages:

> "*Despite the violence, dozens of radio stations aligned with particular factions continued to broadcast in Mogadishu and in other parts of the country. The TFG* [Transitional Government] *continued to support Radio Mogadishu ......*
>
> *This includes journalists from popular stations .... who have found it challenging to operate under* [AS] *.....*
>
> *Journalists were subjected to violence, harassment, arrest and detention in all regions. The National Union of Somali Journalists reported 18 journalists were killed across the country in 2012 and 14 were wounded in Mogadishu ... This was the deadliest year on record for the country's journalists .....*
>
> *Concerning the big number of assassinated journalists, it is not justified to say that* [AS] *is targeting this group specifically, according to the international NGO(B) Mogadishu.* [AS] *has taken responsibility*

for ***the killings of only journalists from the state run Radio Mogadishu****. Who is behind the rest of the killings of journalists is not clear. In this connection it should be mentioned that Shabelle Media has had a conflict for a long time with the Government. It was added that most journalists will not report negatively about* [AS]."

[Emphasis added.]

In its determination, the FtT stated, at [15]:

"*It is conceded by the Respondent that in general journalists may be at risk in Mogadishu.*"

We consider it clear that the Judge was not here referring to a concession made by the Respondent's representative at the hearing. He was, rather, adverting to those parts of the decision letter reproduced above.

12. Sequentially, the next material development to which we refer is the written submission of Ms Rhee, Counsel for the Respondent, dated 12 November 2014, provided in response to the Upper Tribunal's directions. Having referred to [46] of the decision letter, the submission summarises the Respondent's position thus:

"*[10] First, the Secretary of State was not thereby purporting to accept that all practising journalists in Somalia are necessarily at risk. The Secretary of State submits that this is evidenced not only from the passages of the COIS Report .... which do not support such a wide concession, but also from the fact that she then went on to state ..... that 'working as a reporter may place* [the Appellant] *at risk'* [emphasis added]. *That is, her decision was that in any event an individualised risk assessment would need to be undertaken, albeit against general background factors. .....*

[15] Second, if and to the extent that paragraph [46] of the Secretary of State's refusal letter is considered to contain a concession that all practising journalists in Somalia are necessarily at risk, then the Secretary of State confirms that she does indeed seek to withdraw such concession. Such a concession is neither supported by the information in the COIS Report ... nor .... the information in the current CIG Report (April 2014). Whilst both reports indicate that there are known instances of journalists having been targeted, the evidential picture falls far short of establishing that all journalists are generally at risk, let alone journalists who do not work for state owed media companies (such as Simba Radio)."

Ms Rhee's written submission further contains the proposition that the question of risk will be a matter for adjudication by the Tribunal based on

all available evidence, including that postdating the decision letter, continuing:

> "*The Secretary of State's position is that it is therefore somewhat artificial to seek to isolate a concession in respect of the evidential position pertaining at a given moment in time, as in any event the position would need to be considered against the most up to date and relevant evidence.*"

Finally, the submission discloses the Respondent's wish to withdraw the "*concession*" if necessary.

13. The gist of the argument advanced to the Tribunal by Counsel for the Appellant was that to permit the Respondent to withdraw the "*concession*" would be to condone an act committed in bad faith and that withdrawal should not therefore be permitted. In the skeleton argument it is contended:

> "*The Appellant therefore submits that on the balance of probabilities he can prove that the Respondent has acted in bad faith in withdrawing the concession as she has not acted reasonably, with good faith and upon lawful and relevant grounds of public interest.*"

The Appellant's case is that bad faith on the part of the Respondent is evidenced by certain of the documents yielded by the subject access request. It was submitted, in particular, that these documents support the contention that the Respondent's instructions upon which Ms Rhee's aforementioned submission of November 2014 was evidently based were tainted by bad faith. The Tribunal was referred to an email chain preceding Ms Rhee's submission. We consider that there are two key items in this sequence, the first and the last. This sequence of communications begins with a four page document generated in October 2014. One deduces readily that the author of this document is the Senior Presenting Officer who had represented the Respondent at a case management hearing held on 15 October 2014, resulting in a direction from the Tribunal to the Respondent to provide a written submission on the issue of the "*concession*". It is abundantly clear that this document takes the form of instructions prepared by the client for the benefit of the Respondent's solicitor and Counsel and for the purpose of seeking legal advice. The ensuing email communications take their hue and colour from this starting point. Some of the electronic communications generated during this phase are routine and might not, individually, attract privilege. This, however, is to be contrasted with the lengthy opening communication (summarised above) and a further electronic communication, dated 04 November 2014, which marks the end of this discrete phase. This is clearly a request by the Treasury Solicitor for further instructions from the Respondent, triggered by Counsel's request (quoted therein) for clarification of the Respondent's instructions concerning the basis upon which withdrawal of the "*concession*" should be advanced.

The sequence of communications ends here: there is no response to the solicitor's request in the materials provided to the Tribunal.

14. The genesis of the Appellant's quest to establish that the Respondent's wish to withdraw the "*concession*" is precluded by bad faith is a passage in the decision of the Court of Appeal in NR (Jamaica) – v – SSHD [2009] EWCA Civ 856, the context whereof was a concession made before the first instance tribunal by the Respondent's representative that if the Appellant was a lesbian, she would be at real risk upon return to her country of origin. The Court of Appeal espoused the approach which it had previously taken in Davoodipanah – v – SSHD [2004] EWCA Civ 106, where Kennedy LJ stated at [22]:

> "*It is clear from the authorities that where a concession has been made before an adjudicator by either party the Tribunal can allow the concession to be withdrawn if it considers that there is good reason in all the circumstances to take that course ….*
>
> *What the Tribunal must do is to try to obtain a fair and just result. In the absence of prejudice, if a presenting officer has made a concession which appears in retrospect to be a concession which he should not have made, then justice will require that the Secretary of State be allowed to withdraw that concession before the Tribunal.*"

Pausing at this juncture, the applicability of this statement to the "*concession*" contained in the decision letter is not disputed on behalf of the Appellant. In NR (Jamaica), Goldring LJ, having quoted the above passage, continued, at [12]:

> "*…. The Tribunal may in its discretion permit a concession to be withdrawn if in its view there is good reason in all the circumstances for that course to be taken. Its discretion is wide. Its exercise will depend on the particular circumstances of the case before it. Prejudice to the appellant is a significant feature. So is its absence. Its absence does not however mean that an application to withdraw a concession will invariably be granted.* ***Bad faith will almost certainly be fatal to an application to withdraw a concession.*** *In the final analysis, what is important is that as a result of the exercise of its discretion the Tribunal is enabled to decide the real areas of dispute on their merits so as to reach a result which is just both to the Appellant and the Secretary of State.*"

We have highlighted the sentence on which the Appellant's argument rests.

15. The question for the Tribunal, therefore, is whether the Respondent is acting in bad faith in seeking to withdraw the "*concession*" in the decision letter. We have consistently referred to the "*concession*" in italics and inverted commas because of the terms in which it is phrased and the

evidence upon which it is evidently based. We do not readily identify black and white in either the supporting evidence or the formulation of the "*concession*". Rather, there are several shades of grey. The Respondent's submission is that the words in question should be construed in a certain way, as set out in [11] above. We consider this a respectable argument. The meaning of the words in any document is a question of law for the court conducting a dispassionate, detached and objective exercise taking into account the full context. This we consider to be orthodox doctrine and no authority to the contrary was cited. Furthermore, we consider that the Upper Tribunal is not in any event bound by this kind of "*concession*" (if it be such) in proceedings of this nature. The Tribunal is the ultimate arbiter of all issues, including the key issue of future risk to the Appellant in certain eventualities, having acquitted its duty to consider all material evidence, including the "concession", as construed by the Tribunal in due course, in the round.

16. On the assumption that the Appellant's construction of the words under scrutiny is legally correct, we consider that this application must fail because the Appellant has not discharged the burden of establishing bad faith in the manner asserted. In contemporary public law, bad faith and improper motive are sometimes interchangeable terms, or concepts. Fundamentally, both denote the misuse of power. See, generally, De Smith's Judicial Review (7th Edition), para 5 – 087. In SCA – v – Minister of Immigration [2002] FCAFC, bad faith is defined as "*a lack of an honest or genuine attempt to undertake the task and involves a personal attack on the honesty of the decision maker*": see [19]. The authors of De Smith continue, at paragraph 5 – 089:

> "*Bad faith is a serious allegation which attracts a heavy burden of proof.*"

In practice, bad faith typically denotes conduct on the part of a public official which is dishonest. It "always involves a grave charge": per Megaw LJ in Cannock Chase District Council – v – Kelly [1978] 1 WLR 1 at 6. Furthermore, this serious allegation requires, in every case, ample advance notice and detailed particularisation: the present case is a worrying illustration of the neglect of these imperatives.

17. In one of the earlier authoritative judicial formulations, it was held that the onus entails establishing that the public authority was intent upon achieving an improper purpose "*under colour and pretence*" of a proper purpose: per Lord MacNaghten in Westminster Corporation – v – London and North Western Railway [1905] AC 426, at 430.

18. The Appellant invites the Tribunal to infer bad faith from the materials highlighted and summarised above. We conclude without hesitation that the onus of proving bad faith has not been discharged by the Appellant. We consider that the materials fall well short of being tainted in the manner asserted. In the first of the two main electronic communications,

it is evident that the presenting officer concerned was simply expressing a view about the timing of the production of certain documents. Crucially, the words used do not, expressly or inferentially, evince an intention to conceal material documents. Rather, the author of the communication was simply mooting the possibility of disclosing them at a later stage of the proceedings. Furthermore, this unfolded in a context where the author had not received legal advice and was preparing instructions which would enable such advice to be provided. At its worst, this discloses a questionable tactic. As regards the second main electronic communication, we find nothing untoward. This, in our view, reveals that the Respondent's representatives were giving conscientious and serious consideration to an issue which was, on any showing, a challenging one. Importantly, it is clear that the representatives had been equipped by the Respondent with the most recent of the relevant reports (CIG, April 2014). There can be no suggestion that the Respondent was withholding anything of relevance from its lawyers. Nor is there any evidence of any misleading, incomplete or dishonest response by any of the Respondent's officials to the lawyers' request for instructions. Accordingly, whatever the meaning to be placed on the relevant passages in the decision letter, we conclude that the Respondent was not acting in bad faith in the respects alleged.

19. The question of whether the Respondent is legally entitled to the return of some of the documents provided in response to the subject access request is, in our view, a quite separate one, notwithstanding that it was conflated with the bad faith issue in the submissions of Counsel. The test which is engaged has been articulated in a number of decided cases and is expressed with particular clarity in the judgment of Peter Gibson LJ in Breeze – v – John Stacy and Sons Limited [1999] WL 477354, at page 6 of the transcript:

> "*There is, on the authorities, a two stage test. First, was it evident to the solicitor receiving the privileged documents that a mistake had been made? If so, the solicitor is expected to return the documents. If it was no so evident would it have been obvious to the hypothetical reasonable solicitor that disclosure had occurred as a result of the mistake?*"

The wider principles expounded in Phipson on Evidence (17th Edition), paragraph 26 – 64, do not apply. Rather, the narrower Breeze principle, summarised in paragraph 26 – 65, is engaged in the present context.

20. In applying this principle to the instant case, we have considered the evidence contained in the two witness statements of the Appellant's solicitor, which were supplemented by her oral testimony to the Tribunal. One of the exhibits to these statements confirms that immediately upon discovering that certain materials were contained in the Appellant's bundles for hearing, the Respondent's solicitor communicated, in writing, a contention that this is privileged material which had been provided to the Appellant's solicitors in error and that privilege had not been waived. The

evidence of the Appellant's solicitor informs, but is not determinative of, our evaluation of the "*hypothetical reasonable solicitor*" test. Having considered this evidence with care, we do not find it persuasive. We consider that it should have been abundantly clear to the hypothetical reasonable solicitor that the two major documents examined and summarised above were privileged (which the solicitor did not dispute), had been generated in the context and for the purpose of these proceedings (also not disputed) and, taking into account particularly the high level of importance which the discrete issue of the "*concession*" had assumed, had been provided in error. The hypothetical solicitor would have been cognisant of the full background, including the appeal proceedings, the identity of the Respondent's Counsel, the content of the latter's submission of November 2014 and the evident fact that the provider of the documents, UKVI, was acting without reference to and unbeknownst to the Respondent's litigation representatives. The fact that one arm did not know what the other was doing would in our estimation have been obvious. Evaluating all the evidence objectively, we consider that the error was a glaring one. This analysis is not undermined in any way by the consideration that some of the disclosed documents were edited by masking, not least because the accompanying letter of 06 March 2015 expressly stated that this measure had been taken –

> "*…. because Home Office records sometimes include other information that we are not able to release to you under the Data Protection Act 1998 (for example, another person's data), so this is blacked out.*"

To summarise, we are satisfied that the hypothetical reasonable solicitor would have realised quickly that an unintended windfall had materialised in consequence of unmistakeable oversight, inadvertence or error.

21. Accordingly, we refuse the Appellant's application under Rule 15(2A). We shall decide the issue of future risk to the Appellant by reference to all relevant and available evidence in the round, including the Respondent's decision letter and our construction of its terms.

22. Henceforth, we consider that, as a general rule, disclosure of documents should be pursued within the ambit and framework of the legal proceedings in question, applying the governing procedural regime. Parallel processes are to be firmly discouraged since, as the present case demonstrates, they are inimical to the important values of transparency, efficiency and expedition and have the potential to give rise to ambush, disruption and delay. They may also invite the condemnation of sharp practice.

The Respondent's Fresh Evidence Application

23. This application also was not made in accordance with Rule 15(2A)(a) of the 2008 Rules. The explanation provided, based on the timing of receipt

of the documents by the Respondent's representatives, was flimsy. However, no objection to the admission of these documents was articulated on behalf of the Appellant and, in particular, no prejudice of any kind was asserted. The key consideration in determining this application is the nature of the documents. On a brief perusal, they all have a direct bearing on the issue of future risk to the Appellant and, hence, are plainly relevant. The weight to be attached to them individually is a matter upon which we do not pronounce at this stage. We accede to the Respondent's application.

The Appellant's Future Employment

24. Although we have not had submissions on the oral testimony of the Appellant and his supporting witness, in the light of the limited cross examination and his responses to our questions, we are able to make findings on one of the core issues that we are required to determine, namely: what is the Appellant's employment likely to be if he returns to Mogadishu?

25. It weighs against the Appellant that he was untruthful before the FtT about the adverse interest in him of AS. It is also a matter of concern that the evidence he gave in English before us about his past work in Somalia and his future ambitions contained substantially greater detail than that in his statement dated 04 March 2015. This may reflect, however, on the quality of statement compilation by his solicitors, which is surprising in the light of the direction that his statement should stand as his evidence in chief. We give the Appellant the benefit of the doubt on this issue.

26. The Appellant gave his answers to questions without hesitation in a lucid and confident way. He is articulate in English and is clearly well educated. We consider that the SSHD was correct to accept that he was involved in journalism before he left Mogadishu. So far as his ambitions for the future are concerned, we note the evidence about the peripheral role (giving due weight to the restrictions on employment) that the Appellant has played in the United Kingdom with Somalia associated TV broadcasters. On balance, we find it reasonably likely that the Appellant will seek to work with broadcasters or the information media on return and, further, will secure employment in this sector. Noting the absence of evidence of any published articles by the Appellant, we do not consider that he has in the past been an investigative journalist; in reality, his ambition appears to be more akin to being a researcher and presenter, the latter reflecting the role that he probably had before coming to the United Kingdom. As a probability, his journalistic employment in Somalia was of this *genre*. Following careful reflection on the factors adverse to the Appellant's veracity, we consider it unlikely that he will seek to resume his pre-journalism career as a teacher.

27. In summary, therefore, we find as a matter of probability that the Appellant will, if returned, continue to pursue his interest in a career in

broadcasting and media related activity. This will include a creative role in terms of research and writing for broadcasts. To this extent there will be a journalistic element. We consider further that he is likely to secure employment in this field. Whether he will be seen or perceived as a person who may attract adverse attention and interest amounting to persecution in contravention of the Refugee Convention is a matter to be determined.

OVERALL CONCLUSION

28. Giving effect to the analysis and discrete findings and conclusions above:

(a) The Appellant's application for the admission of fresh evidence under Rule 15(2A) of the 2008 Rules is refused.

(b) The Respondent's corresponding application is granted.

(c) We find that if he returns to Mogodishu the Appellant is likely to be actively employed as a researcher, writer or presenter in the broadcasting sector.

DIRECTIONS

29. We make the following directions:

(i) As previously intimated to the parties, this appeal will be relisted at 10.00 hours on 28 April 2015, for a half day.

(ii) All three parties will revise their written submissions, to reflect this ruling, with appropriate deletions, additions and highlighting, based on the existing documents, by 23 April 2015 at latest.

(iii) If the Appellant's representatives wish to augment their written submissions, one hour will be allocated for this purpose.

(iv) Similarly, one hour is allocated to the Respondent's representatives.

(v) Similarly, we allocate 45 minutes to the intervening party, UNCHR.

(vi) Any application for a wasted costs order will be made in writing by 20 April 2015, with any response to be made in writing by 27 April 2015.

(vi) Liberty to apply on two clear days notice to the other parties.

(vii) These directions may be modified or supplemented as the Upper Tribunal considers fit.

Signed: 

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE

UPPER TRIBUNAL

IMMIGRATION AND ASYLUM CHAMBER

Date: 31 March 2015