Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: RP/00153/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 November 2022	**On the 07 December 2022**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MOHAMED ABDULKADIR MOHAMED
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms H. Gilmour, Senior Home Office Presenting Officer
For the Respondent: Mr R. Toal, Counsel instructed by Kesar and Co. Solicitors

DECISION AND REASONS

1. In this decision, I record a concession by the Secretary of State that the appellant's appeal should be allowed under Article 3 of the European Convention on Human Rights ("the ECHR"), and deal with a number of consequential matters arising.

2. By a decision promulgated on 19 January 2021, I allowed an appeal brought by the Secretary of State against a decision of First-tier Tribunal Judge Loke ("the judge") dated 22 November 2019, which had allowed an appeal against a decision of the Secretary of State to revoke the respondent's refugee status on Article 3 ECHR grounds. There was no

challenge to the judge's findings of fact, which I preserved. I directed that the appeal be reheard in this tribunal, in light of the preserved findings, acting under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

3. A copy of my Error of Law decision may be found in the **Annex** to this decision. This is my decision following the resumed hearing at which the appeal was reheard. Regrettably, the proceedings have taken some time to be relisted, in light of delays caused by the Covid-19 pandemic, and adjournments granted at the request of the appellant. It was originally listed on 26 May 2022, but was adjourned until 19 September 2022, and then again until 16 November 2022, when the resumed hearing was finally effective.

4. Formally, these proceedings remain an appeal brought originally by the Secretary of State, since this decision will merge with the Error of Law decision, to form a single, composite decision. However, I refer to the appellant before the First-tier Tribunal as "the appellant" for ease of reference.

Factual background

5. The full factual background may be found in my Error of Law decision.

REMAKING THE DECISION OF THE FIRST-TIER TRIBUNAL

6. In advance of the resumed hearing before me, the appellant relied on a number of additional materials, with my permission under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the UT Rules"). These included details of the regular reviews the appellant has with Dr Joanna Moncrief, a consultant psychiatrist with the NHS, as part of the appellant's care plan. He also relied on a report from a Dr Praveen Gandamaneni, a consultant psychiatrist, dated 30 August 2022, which addresses the prospective impact on the appellant of his current treatment plan coming to an end upon his return to Somalia, the impact of the appellant having to take the medication available in Somalia rather than his current anti-psychotic prescription, the removal of the medical supervision he enjoys in the UK, the impact of his medical conditions on his ability to secure work in Somalia, and related matters. The report concluded at paragraph 11.22 that in the event of the appellant's current treatment and care being withdrawn, there would be a high likelihood of a relapse of psychotic illness, which could result in risks to himself and to others. He would be unlikely to take medication or engage with psychiatric professionals, the report concludes, and would have limited insight into the need to do so, without the safeguards of the 1983 Act, which would not apply in Somalia.

The Secretary of State's concession

7. Shortly before the hearing on 16 November 2022, Ms Gilmour, a Senior Presenting Officer, emailed the tribunal and the appellant in the following terms:

> "The SSHD [Secretary of State for the Home Department] will cease deportation action due to the real risk of serious decline in the Appellant's health if he were to return to Somalia owing to the lack of appropriate care to treat his condition. At present, this case is considered to meet the threshold in AM (Zimbabwe). The SSHD will therefore grant the Appellant 30 months' discretionary leave to remain."

The reference to "AM (Zimbabwe)" is to *AM (Zimbabwe) v Secretary of State for the Home Department* [2020] UKSC 17.

8. At the hearing on 16 November 2022, Ms Gilmour said that the Secretary of State both conceded the appeal under Article 3 of the European Convention on Human Rights ("the ECHR") *and* applied to withdraw the Secretary of State's case under rule 17 of the UT Rules.

Mr Toal's submissions

9. In relation to the ground of appeal contained in section 84(3)(a), Mr Toal submitted that the country guidance, in particular *MOJ & Ors (Return to Mogadishu) Somalia CG* [2014] UKUT 00442 (IAC), did not merit a conclusion that the circumstances in connection with which the appellant was recognised as a refugee had ceased to exist. The appellant continued to face a well-founded fear of being persecuted in Somalia.

10. Mr Toal submitted that the appellant's unsuccessful appeal against the revocation of his protection status would not result in the automatic revocation of his indefinite leave to remain. That being so, he submitted that I should postpone the promulgation of this decision until the Secretary of State had revoked the deportation order, in order to avoid the arbitrary revocation of the appellant's indefinite leave to remain, on account of an extant deportation order that cannot presently be enforced. The logic of those submissions was as follows:

a. The appellant's refugee status under paragraph 334 of the Immigration Rules is not "leave to remain", he submitted; there is no reference in that paragraph to "leave to remain". Paragraphs 335 and 339B of the rules underline the distinction between a grant of leave to remain, on the one hand, and a grant of refugee status, on the other. The revocation of protection status does not, of itself, have any impact on a person's leave.

b. A further decision of the Secretary of State would be required to revoke the appellant's indefinite leave to remain, in addition to a separate decision to revoke the deportation against the appellant.

c. The appellant is at risk of the arbitrary revocation of his indefinite leave to remain if my decision in these proceedings is promulgated *before* the Secretary of State has revoked the deportation order. That is because while these proceedings remain pending, the automatic revocation of the appellant's indefinite leave to remain that would otherwise take place by virtue of section 5(1) of the Immigration Act 1971, is placed on hold: see section 79(4) of the UK Borders Act 2007 ("the 2007 Act"), read with section 78 of the 2002 Act.

d. Once this appeal is allowed, the protection the applicant currently enjoys against the automatic revocation of his indefinite leave to remain will come to an abrupt end, simply by virtue of the fact there may be 'lag' between the proceedings being finally determined, and the Secretary of State's later decision to revoke the deportation order.

e. Postponing promulgation of this decision would be consistent with the overriding objective of the UT Rules. It would avoid placing the appellant in jeopardy of having his indefinite leave to remain arbitrarily revoked.

11. Ms Gilmour invited the tribunal to reject Mr Toal's submissions. The criteria for revocation were met. The tribunal's jurisdiction was limited to the matters in the 2002 Act and did not extend to the Secretary of State's post-decision implementation of an appeal. She was not prepared to commit to a timetable on behalf of the Secretary of State as to when the deportation order would be revoked.

DISCUSSION

12. It is necessary to consider:

a. The ground of appeal under section 84(3)(a) of the 2002 Act;

b. The impact of the Secretary of State's concession concerning Article 3 ECHR;

c. Mr Toal's submissions about the Secretary of State's implementation of this allowed appeal.

The ground of appeal under section 84(3)(a): revocation of protections status

13. The appellant has not applied to withdraw his concession before the First-tier Tribunal that he is unable to rebut the presumption contained in section 72 of the 2002 Act. It follows that the appeal must be dismissed on Refugee Convention grounds, pursuant to section 72(10).

14. As held in *Essa (Revocation of protection status appeals)* [2018] UKUT 00244 (IAC), under section 86(2)(a) of the 2002 Act, the tribunal must determine any matter raised as a ground of appeal, notwithstanding the impact of section 72(10). Section 82(1)(c) of the 2002 Act creates a statutory right of appeal to the First-tier Tribunal when the Secretary of

State has decided to revoke a person's protection status. The corresponding ground of appeal may be found in section 84(3)(a) of the 2002 Act:

> "(3) An appeal under section 82(1)(c) (revocation of protection status) must be brought on one or more of the following grounds—
>
> (a) that the decision to revoke the appellant's protection status breaches the United Kingdom's obligations under the Refugee Convention…"

15. Article 1C(5) of the Refugee Convention 1951 states that the Convention shall cease to apply to any person if:

> "He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality…"

16. As it was put in *OA (Somalia) Somalia CG* [2022] UKUT 00033 (IAC) at [37]:

> "There is a 'requirement for symmetry between the grant and cessation of refugee status', and a cessation decision is the 'mirror image' of a decision determining refugee status (*MA (Somalia)* [2018] EWCA Civ 994, per Arden LJ at [47] and [51]). 'The relevant question', held Arden LJ at paragraph 2, is:
>
> > '… whether there has been a significant and non-temporary change in circumstances so that the circumstances which caused the person to be a refugee have ceased to apply and there is no other basis on which he would be held to be a refugee.'
>
> It is for the Secretary of State to demonstrate that the above criteria are met."

17. As the Secretary of State's decision dated 28 October 2016 states at pages 2 and 5, the appellant was granted indefinite leave to remain as a family member of his aunt, who herself had been granted indefinite leave to remain as a refugee on account of being a member of a sub clan of the Benadiri minority clan. The appellant's aunt had claimed in her asylum interview that her brother was the appellant's father, and that she had adopted the appellant following his father's death. The Secretary of State's decision dated 11 November 2015, and her decision dated 28 October 2016, both proceed on the basis that the appellant is a member of the same clan as his aunt. I agree with the Secretary of State's reasoning and find that the appellant is a member of the same sub-clan of the Benadiri as his aunt, and that his refugee status is anchored to the reasons for his aunt being granted refugee status.

18. The question, therefore, is whether the Secretary of State has proved that the circumstances in connection with which the appellant (and his aunt) were recognised as refugees had changed.

19. The risk now faced by minority clans in Mogadishu summarised in these terms by *MOJ*, at paragraph (viii) of the Headnote:

> "There are no clan militias in Mogadishu, no clan violence, and no clan based discriminatory treatment, even for minority clan members."

20. Pursuant to *OA (Somalia)*, headnote paragraph 2, the guidance given in *MOJ* remains applicable. I therefore find that the appellant does not suffer a well-founded fear of being persecuted on account of his membership of a sub-clan of the Benadiri. The changes summarised in *MOJ*, and confirmed by *OA*, are significant and non-temporary. There is no other basis upon which the applicant seeks recognition as a refugee. I find that the appellant's aunt, and therefore the appellant, no longer have a well-founded fear of being persecuted on account of the discrimination and persecution experienced by members of minority clans in Mogadishu.

21. I determine the ground of appeal contained in section 84(3)(a) of the 2002 Act by finding that the decision of the Secretary of State to revoke the appellant's protection status does not place the United Kingdom in breach of its obligations under the Refugee Convention. The operative reason for dismissing the appeal under this ground remains section 72 of the 2002 Act but, having determined this issue as a ground of appeal, the appeal would be dismissed on revocation grounds in any event.

The impact of the Secretary of State's concession

22. In light of the Secretary of State's concession, which I accept because I agree it was properly made and open to the Secretary of State on the updated medical evidence concerning the appellant, this appeal must be allowed on Article 3 grounds.

23. I also consent to the Secretary of State withdrawing her case that the applicant's removal to Somalia would not place the United Kingdom in breach of its obligations under Article 3 ECHR, pursuant to rule 17(2) of the UT Rules.

Whether to postpone promulgating a final decision

24. I reject Mr Toal's submission that I should defer the promulgation of this decision until the Secretary of State has revoked the appellant's deportation order for the following reasons.

25. First, it is inappropriate for this tribunal to become involved in the Secretary of State's implementation of its decisions, or otherwise blur the constitutional separation of powers between the executive and judiciary. The Upper Tribunal does not have an enforcement or supervisory role.

Implementation of the tribunal's decisions is a matter for the Secretary of State. A person who is unhappy with a decision of the Secretary of State consequential upon an allowed appeal may have other avenues of redress, if so advised (for example, judicial review), but no part of any such consequential process should form part of the tribunal's determination of appeals under the 2002 Act.

26. Secondly, pursuant to the Secretary of State's concession, she agreed to grant 30 months' discretionary leave to remain to the appellant. Plainly, the Secretary of State's understanding of the applicant's immigration status is that he no longer holds, or will no longer hold, indefinite leave to remain. There is no right of appeal against a decision to confer a lesser form of leave, since a "human rights claim" is defined by reference to an individual's prospective removal from the UK: see section 113(1) of the 2002 Act. It would be inappropriate for this tribunal to attempt exceed its statutory jurisdiction in an attempt to impact the Secretary of State's decision to revoke the applicant's indefinite leave to remain.

27. Thirdly, the premise of Mr Toal's submissions is, in any event, misconceived. Section 82(2)(c) of the 2002 Act inextricably links "protection status" as a refugee with leave to remain held in that capacity, in the context of a statutory appeal:

> "a person has 'protection status' if the person has been granted leave to enter or remain in the United Kingdom as a refugee or as a person eligible for a grant of humanitarian protection…"

28. For the above reasons, I decline to place the promulgation of this decision on hold pending the revocation of the appellant's deportation order.

Notice of Decision

The decision of Judge Loke involved the making of an error of law and is set aside, subject to the preservation of the findings of fact specified in the 'Error of Law' decision.

I remake the appeal, dismissing it on Refugee Convention grounds, allowing it on Article 3 grounds.

No anonymity direction is made.

Signed Stephen H Smith Date 7 December 2022

Upper Tribunal Judge Stephen Smith

Annex – Error of Law Decision

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00153/2016

THE IMMIGRATION ACTS

Heard remotely at Field House	**Decision & Reasons Promulgated**
On 9 December 2020 *via Skype for Business*	.....

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MOHAMED ABDULKADIR MOHAMED
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr T. Lindsay, Senior Home Office Presenting Officer
For the Respondent: Mr K. Smyth, Solicitor, Kesar & Co. Solicitors

DECISION AND REASONS (V)

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V (video). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

The documents that I was referred to were primarily the decision of the First-tier Tribunal under consideration, the grounds of appeal, and written submissions from both parties, the contents of which I have recorded.

The order made is described at the end of these reasons.

The parties said this about the process: they were content that the proceedings had been conducted fairly in their remote form.

1. This is an appeal by the Secretary of State. For ease of reference, I will refer to the parties as they were before the First-tier Tribunal, where necessary.

2. The Secretary of State appeals against a decision of First-tier Tribunal Judge Loke promulgated on 25 November 2019 in which she allowed an appeal by the appellant against a decision of the respondent dated 28 October 2016 to revoke his protection status.

Factual background

3. The appellant is a citizen of Somalia born in 1989. He arrived in this country from Uganda in November 2004 on a family reunion settlement visa, accompanied by his uncle and brother, to join his aunt who enjoyed indefinite leave to remain. His aunt had been recognised as a refugee on the basis that she was a member of the Benadiri clan in Somalia. The appellant was granted refugee status "in line" with that of his aunt.

4. Between January 2008 and March 2013, the appellant accrued six convictions for nine offences, including the use of threatening words or behaviour, criminal damage, going equipped for theft, failing to provide a sample and failing to surrender to custody. In April 2013, he was sentenced to 21 days' imprisonment for criminal damage and using threatening words likely to cause harassment, alarm or distress.

5. On 17 December 2013, the appellant was convicted of robbery for which he was sentenced to 4 years' and eight months' imprisonment in February 2014. The offence involved the violent robbery of a mobile telephone from a woman he had approached from behind, pinning her arms to her body, punching her to the head, and poking her in the eyes with his fingers. In addition to pleading guilty to that offence, the appellant asked for seven further street robberies, two thefts and one domestic burglary to be "taken into consideration".

6. On 11 November 2015, the Secretary of State served the appellant with a notice stating that she was intending to cease his refugee status. On 2 March 2016, the National Referral Mechanism of the Competent Authority accepted that there were "reasonable grounds" to conclude that the appellant was a victim of trafficking. On 1 July 2016, a "conclusive grounds" decision was issued, concluding that the appellant had not been trafficked.

7. On 28 October 2016, the Secretary of State revoked the protection status enjoyed by the appellant, refused a human rights claim he had made in response to being informed that the she was minded to deport him, and issued a signed deportation order against him. The Secretary of State

certified that section 72 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") was engaged, on the basis he had been convicted of a particularly serious crime, and thereby constituted a danger to the community.

The decision of the First-tier Tribunal

8. The hearing before the judge proceeded on the basis of submissions only. Mr Smyth, who also appeared before me, conceded that the appellant could not rebut the presumption under section 72 of the 2002 Act. The judge found that the appellant would have been granted refugee status under a 2003 family reunion policy without any consideration of whether he met the test to be a "refugee" under Article 1A of the 1951 Refugee Convention. At [26], the judge noted that the appellant was granted refugee status so he could be cared for by his aunt under the 2003 policy, rather than under paragraph 334 of the Immigration Rules, which reflects the substantive test for refugee status contained in the 1951 Convention. She found that the "circumstances in Somalia have nothing to do with the original basis upon which the appellant was granted refugee status." Accordingly, it was not open to the Secretary of State to cease the appellant's refugee status under Article 1C (5) and paragraph 339A(v) of the Immigration Rules. She found, therefore, that the appellant should be regarded as a refugee. However, given the engagement of section 72 of the 2002 Act, the appellant was a "deportable refugee", with the effect that his preserved status as a refugee was not a barrier to his removal under Article 33(2) of the Convention.

9. At [31], the judge accepted the submissions advanced on behalf of the appellant that he has no contact with anyone in Somalia. Nor did he have any contact with any of his family in this country. She found that the prospect of the appellant engaging with family members in Somalia was not realistic. The appellant would be returning to Somalia as a single male without any family support. The appellant had claimed to have been sexually abused as a child by his father and paternal uncle. At [32), the judge said there is no reason for her to doubt that claim, noting that the respondent had not contested it.

10. There was a medical report before the judge. It outlines the appellant's extensive mental health conditions. At [33], the judge found that the mental health conditions experienced by the appellant were "inextricably linked to his continued drug and alcohol abuse." She added that has a history of "non-compliance". He also had a history of low to moderate self-harm, but was assessed as presenting a moderate to high risk of harm to others. He had been evicted from all accommodation he had lived in due to his violent behaviour. It was difficult to diagnose the appellant with any particular disorder on account of his alcohol and drug misuse. He was unemployed, homeless, with no contact with his family or any form of social support network. She found he was vulnerable and at risk from others.

11. The judge noted that the appellant had failed to engage with any mental health services available to him in this country. As such, the provision of mental health services in Somalia would have "little bearing" in his case, as it was not reasonably likely he would seek to access any. She noted that, in isolation, the appellant's mental health conditions were not of such severity to engage Article 3, but found as a matter of fact that his conditions rendered him vulnerable.

12. Addressing the appellant's likely circumstances of return in Somalia, the judge applied MOJ & Ors (Return to Mogadishu) Somalia CG [2014] UKUT 00442 (IAC). At [34], the judge addressed the country guidance criteria at [ix]. She observed that the appellant had been absent from Somalia for 21 years, and would be returning without family or clan associations in Mogadishu. She found it would be "very difficult" for him to access any help from any clan or family in Mogadishu. He had no access to financial resources, and very little prospect of securing a livelihood. His education was limited. It will be difficult for him to access employment. He would not receive remittances from abroad, given his lack of family or social network in this country. Given his unemployed and homeless status in this country, it was highly likely that he would return to similar circumstances.

13. At [35], the judge found that it was reasonably likely that the appellant would have to live in an "internally displaced persons" ("IDP") camp in Somalia. She noted the view of the UNHCR internally displaced persons are at a serious risk of harm if returned. She considered the applicable country policy and information note published by the Secretary of State, concluding that the "humanitarian conditions" in IDP camps continue to be extremely poor.

14. At [36], the judge applied the following guidance given at [408] of MOJ:

> "408. It will, therefore, only be those with no clan or family support who will not be in receipt of remittances from abroad and who have no real prospect of securing access to a livelihood and return who will face the prospect of living in circumstances falling below that which is acceptable in humanitarian protection terms."

15. The judge found the appellant's situation to be factually similar to that with which the Court of Appeal was concerned in Secretary of State for the Home Department v FY (Somalia) [2017] EWCA Civ 1853.

16. At 37, she added:

> "In this case I further consider that the appellant's mental health issues, he is particularly ill equipped to deal with the situation he is likely to face in Somalia.
>
> Stepping back and considering all the circumstance [sic], I find there is a real possibility that the appellant will face the prospect of living in circumstances falling below that which is acceptable in humanitarian terms. This prospect is exacerbated by the appellant's mental health difficulties. There is a real risk that he will have to reside in makeshift accommodation,

> e.g. an IDP camp and a real risk that he will live in circumstances which would amount to a breach of Article 3."

Grounds of appeal

17. The Secretary of State advances two grounds of appeal.

18. First, relying on Secretary of State for the Home Department v Said [2016] EWCA Civ 442 at [26], Mr Lindsay contends that the judge erred in her application of MOJ at [408]. At [26] of Said, Burnett LJ, as he then was, said the following of paragraph [408].

> "The conclusion at the end of paragraph 408 raises the possibility of a person's circumstances felling below what "is acceptable in humanitarian protection terms." It is, with respect, unclear whether that is a reference back to the definition of "humanitarian protection" arising from article 15 of the Qualification Directive. These factors do not go to inform any question under article 15(c). Nor does it chime with article 15(b), which draws on the language of article 3 of the Convention, because the fact that a person might be returned to very deprived living conditions, could not (save in extreme cases) lead to a conclusion that removal would violate article 3."

His Lordship added at [28]:

> "I am unable to accept that if a Somali national were able to bring himself within the rubric of para 408, he would have established that his removal to Somalia would breach article 3 of the Convention. Such an approach would be inconsistent with the domestic and Convention jurisprudence…"

19. Mr Lindsay also relies on SB (refugee revocation; IDP camps) Somalia [2019] UKUT 358 (IAC), which provides at paragraph (2) of the Headnote:

> "The conclusion of the Court of Appeal in Secretary of State for the Home Department v Said [2016] EWCA Civ 442 was that the country guidance in MOJ & Ors (Return to Mogadishu) Somalia CG [2014] UKUT 442 (IAC) did not include any finding that a person who finds themselves in an IDP camp is thereby likely to face Article 3 ECHR harm (having regard to the high threshold established by D v United Kingdom (1997) 24 EHRR 43 and N v United Kingdom (2008) 47 EHRR 39). Although that conclusion may have been obiter, it was confirmed by Hamblen LJ in MS (Somalia). There is nothing in the country guidance in AA and Others (conflict; humanitarian crisis; returnees; FGM) Somalia [2011] UKUT 445 (IAC) that requires a different view to be taken of the position of such a person. It will be an error of law for a judge to refuse to follow the Court of Appeal's conclusion on this issue."

20. Secondly, the Secretary of State criticises the judge's analysis of the cessation issue. Mr Lindsay submits that the approach of the judge was at odds with that required by JS (Uganda) v Secretary of State for the Home Department [2019] EWCA Civ 1670. There, the Court of Appeal held that the status of refugee under Article 1A of the 1951 Convention could only be accorded to a person who themselves had a well-founded fear of being

persecuted, not one derived from or dependent on another person: see [71].

21. Permission to appeal was granted by First-tier Tribunal Judge Holmes.

Submissions

22. Mr Lindsay submitted a skeleton argument dated 12 February 2020 in support of the grounds of appeal.

23. On 14 February 2020, Mr Smyth submitted a rule 24 response, and on 7 May 2020 made written submissions, in response to directions given by the Upper Tribunal on 23 April 2020, addressing the impact of the Supreme Court's judgment in AM (Zimbabwe) v Secretary of State for the Home Department [2020] UKSC 17.

24. On 4 August 2020, Mr E Tufan, Senior Home Office Presenting Officer made further written submissions on behalf of the Secretary of State.

25. On behalf of the appellant, Mr Smyth highlights the unchallenged findings of fact reached by the judge. In the rule 24 response, he acknowledges that the judge did not refer to Said or SB, nor consider the tests in D v United Kingdom or N v United Kingdom, but submitted in his May 2020 note that AM (Zimbabwe) v Secretary of State for the Home Department [2020] UKSC 17 has materially lowered the threshold for breaches of Article 3.

26. My Smyth also submits that the judge's analysis was not solely based on the impugned paragraph 408 of MOJ, but rather on a combination of her unchallenged findings relating to his vulnerability and likely destitution, taken with the well-documented difficulties with IDP camps in Somalia. Those findings were central to the judge allowing the appeal on Article 3 grounds, and went beyond [408] of MOJ. In granting permission to appeal, Judge Holmes observed that the judge's unchallenged findings of fact may mean that any error, or failure properly to apply the country guidance, would be immaterial.

27. To the extent that the Benadari clan is able to provide returning clan members with any assistance, such assistance would be limited to the ability and willingness of the individual concerned to engage with the community, and any help on offer, submitted Mr Smyth. As such, for this appellant, the judge's unchallenged findings concerning his social isolation, homelessness, drug problems, and mental health conditions, combined to render the prospect of clan assistance futile.

28. In relation to the cessation issue, Mr Smyth submits that it was open to the judge, on the basis of the evidence before her, to conclude that the circumstances in connection with which the appellant had been granted refugee status had not ceased to exist.

Discussion

Ground 1

29. It is clear that the judge's operative reasoning relied on [408] of MOJ which, as held in SB (Somalia), was an error of law. While I accept that her unchallenged findings of fact concerning the appellant's mental health conditions and social isolation formed part of her overall assessment, the threshold against which she measured those findings was the concept of what is "acceptable in humanitarian protection terms", at [408] of MOJ. So much is clear from what is said at [36]:

> "In my assessment, the appellant falls into *the category* envisioned by the Upper Tribunal." (emphasis added)

Plainly, "*the category*" envisioned by the Upper Tribunal in MOJ was that concerning those who would face conditions falling below what is "acceptable in humanitarian protection terms", and it was that "category" that the judge considered this appellant to fall into. This is underlined when one addresses the judge's overall, global conclusions at [38]:

> "… I find there is a real possibility that the appellant will face the prospect of living in circumstances falling below that which **is acceptable in humanitarian terms**…" (Emphasis added)

30. While it is common ground that AM (Zimbabwe) has materially lowered the threshold for Article 3, that shift in the jurisprudence is not capable of curing the judge's erroneous reliance on [408] of MOJ. This is because, as Mr Tufan submitted on behalf of the Secretary of State in his written submissions, the impact of the judgment of the European Court of Human Rights ("the ECtHR") in Paposhvili v Belgium 41738/10 [2017] Imm AR 867, was to articulate the Article 3 threshold in these terms. The ECtHR held at [183] that:

> "Article 3 should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy…"

The Supreme Court gave guidance at [31] of AM (Zimbabwe) as to what was meant by "intense suffering" and a "significant" reduction in life expectancy. While the judge is, of course, not to be criticised for not referring to a judgement that was yet to be handed down, it is clear that her analysis was not consistent with the revised test. By focussing on "what is acceptable in humanitarian terms", that is the likely destitution of the applicant in view of his social isolation and mental health conditions, the judge did not reach findings that his return would lead to a serious, rapid or irreversible decline in his or her state of health, nor that he would be exposed to intense suffering, or a significant reduction in life

expectancy. If anything, the judge found that the applicant's removal would largely be neutral from the perspective of his access to healthcare: "the provision of mental health services in Somalia would have little bearing" (see [33]).

31. It follows, therefore, that the modification of the Article 3 threshold by the Supreme Court in AM (Zimbabwe) does not render the judge's erroneous reliance on [408] of MOJ immaterial. The judge applied a materially incorrect threshold. The test she did apply was not consistent with the established Article 3 jurisprudence at the time, and nor with the clarified Article 3 threshold as the Supreme Court would later declare it to be in AM (Zimbabwe). As such, the error was material, and this aspect of the decision must be set aside.

32. There has been no challenge to any of the judge's findings of fact, and I preserve those findings in their entirety. I also preserve the finding that the presumption under section 72 of the 2002 Act has not been rebutted.

Ground 2

33. Turning to ground 2, I find that the judge erred in her consideration of the cessation issue. The judge found that the appellant was not recognised as a refugee on account of his risk of being persecuted in Somalia, but rather because his aunt had been recognised as a refugee. As there was no change to his aunt's status, found the judge, it could not be said that the circumstances in connection with which he had been recognised as a refugee ceased to exist. The judge cited Mosira v Secretary of State for the Home Department [2017] EWCA Civ 407 as authority for that proposition.

34. Mosira was a unique case in which the appellant's mother had been recognised as a "refugee" with no consideration of whether the criteria contained in Article 1A(2) of the 1951 Convention were met. Mr Mosira had been granted refugee status "in line" with his mother: see [20] and [21]. Strikingly, when the Secretary of State sought to "revoke" his refugee status, she did not contend that he had never been a refugee in the first place: see [32]. While Sales LJ regarded that as an "arguable" point of law presenting a "potentially attractive" avenue for the resolution of the case without recourse to Article 1C(5) of the 1951 Convention, he did not permit the Secretary of State to raise that point at the last minute.

35. The facts of the Mosira contrast significantly with those of the present proceedings, as the appellant's aunt was recognised as a refugee as a result of her membership of the Benadari clan, following what appears to have been a substantive determination. As Mr Lindsay notes at [12] of his February 2020 skeleton argument:

> "It cannot be disputed that A was granted refugee status in line with his aunt. It cannot be disputed either that A shared the same basis of fear [of] persecution (i.e. Benadiri clan membership) as his aunt. In these circumstances it is submitted that, following JS (Uganda) v Secretary of

> State for the Home Department [2019] EWCA Civ 1670, A *himself* would at the date of his initial entry into the United Kingdom have had a well-founded fear of being persecuted…"

36. I accept those submissions. As the Court of Appeal held in Secretary of State for the Home Department v KN (Democratic Republic of the Congo) [2019] EWCA Civ 1665 at [35]:

> "The decision of this court in Mosira does not apply to all dependents of refugees, but rather is confined to cases where the basis for granting the refugee status to the parent and/or the child was not covered by the Refugee Convention."

37. In order to determine whether the Secretary of State was entitled to cease the appellant's refugee status, it was incumbent upon the judge to address whether the circumstances in connection with which he was recognised as a refugee had ceased to exist, which in turn required consideration of the political risk profile of his aunt, and his own personal circumstances and corresponding risk profile. On the assumption the appellant was also a member of the Benadiri clan, his status as a member of that clan, and his personal characteristics, should have fed into that analysis. Although in light of the judge's unchallenged findings relating to section 72(10)(b), this was an appeal the judge was bound to dismiss on asylum grounds in any event, it is necessary to set aside her findings on the substantive asylum issue as they involved the making of an error of law. Pursuant to Essa (Revocation of protection status appeals) [2018] UKUT 00244 (IAC), even where a section 72 notice requires an appeal to be dismissed on asylum grounds, the duty of the tribunal under section 86(2)(a) of the 2002 Act requires the tribunal to determine matters raised as a ground of appeal.

Disposal

38. In light of the preserved findings of fact, it will be appropriate for the decision to be remade in this tribunal.

Anonymity

39. The judge did not make an order for anonymity, and there was no application for an anonymity order before me. As such, at this stage, I do not make such an order.

Notice of Decision

The decision of Judge Loke involved the making of an error of law, and is set aside. The findings of fact at [31] onwards are preserved.

The decision will be remade in the Upper Tribunal.

The matter will be listed for a remote Case Management Review Hearing on the first available date.

No anonymity direction is made.

Signed *Stephen H Smith* Date 18 January 2021

Upper Tribunal Judge Stephen Smith