C-255/19 - A

IAC-FH-LW-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: RP/00137/2016

THE IMMIGRATION ACTS

Heard at Field House
On 21 December 2018

Sent to parties (and intervener)

...22nd March 2019...

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR O A
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr L Tarlow, Home Office Presenting Officer
For the Respondent/Claimant: Mr S Harding, Counsel, instructed by Sentinel Solicitors

FINDINGS AND ORDER FOR PRELIMINARY REFERENCE TO THE CJEU

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

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

1. The respondent (hereafter "the claimant") is a national of Somalia, aged 54. He came to the UK in 2003 on a multi-entry visa as the spouse of his then (first) wife. He was granted indefinite leave to enter and subsequently refugee status in line with his wife (she had been granted refugee status in October 2001). However, in February 2012 he was convicted at Harrow Crown Court of burglary and blackmail and received custodial sentences of two years on each count to run concurrently. In light of his criminal offending the appellant (hereafter "the Secretary of State for the Home Department" or "SSHD") notified the claimant on 8 July 2014 of her intention to cease his refugee status and on 27 April 2016 made a deportation order against him under s. 32(5) of the UK Borders Act 2007. On 27 September 2016, the SSHD certified his case under s. 72(2) of the Nationality, Immigration and Asylum Act 2002. The SSHD also revoked his refugee status under Article 1C(5) of the Refugee Convention and excluded him from humanitarian protection under paragraph 339D of the Immigration Rules. The SSHD further decided that his return to Somalia would not breach the UK's obligations under Article 3 ECHR.

Procedural history

2. The claimant appealed against these decisions. There have since been several sets of appeal proceedings.

3. His appeal was first heard and dismissed by Judge Cameron of the First-tier Tribunal (FtT) on 20 July 2017. Judge Cameron found that the claimant had rebutted the presumption that the crimes he was convicted of in February 2012 were particularly serious and that his continued presence in the UK would constitute a danger to the community and that accordingly certification under s. 72 could not be upheld. The Judge went on to dismiss the appeal on all grounds.

4. The claimant was successful in obtaining permission to appeal against this decision and subsequently Upper Tribunal Judge (UTJ) Canavan set aside Judge Cameron's decision for material error of law and remitted it to the FtT.

5. The claimant's appeal was then heard by Judge Frankish of the FtT. In a decision sent on 30 January 2018 he was satisfied both that the claimant had rebutted the presumption of s. 72 certification and that the claimant had shown that return to Somalia would violate Article 3 ECHR (he did not, however, allow the appeal on asylum grounds).

6. The SSHD was granted permission to appeal this decision. In a decision sent on 13 November 2018, UTJ McWilliam set aside Judge Frankish's decision. Her reasons for doing so were essentially that Judge Frankish had erroneously proceeded on the basis that UTJ Canavan had preserved certain findings of fact made by Judge Cameron. Observing that UTJ Canavan had stated at paragraph 16 that the matter would be heard afresh in the Upper Tribunal, UTJ McWilliam stipulated that the Tribunal on the next occasion was indeed to hear matters afresh and added that "[t]he issues which need to be determined are cessation under Article 1C(5) of the Refugee Convention and Articles 3 and 8 of the ECHR".

The hearing before me

7. At the outset of the hearing Mr Tarlow confirmed that the SSHD no longer sought to rely on the s. 72 certificate. Mr Harding then called the claimant to give evidence. A summary of his oral evidence is given below. Also given below is a summary of the submissions I heard from Mr Tarlow and Mr Harding.

8. In re-making the decision on the appellant's appeal, I have two tasks. The first is establishment of the facts. The second is legal evaluation of the facts. In relation to the first task, I have decided I am in a position to make findings. In relation to the second task, I formed the provisional view that there was an issue of law that needed to be decided which was not clear (see **PART B** for more detail). On 28 January 2019 I sought the observations of both parties on this matter. Having subsequently received written submissions from the parties on the matter, I have decided to make a preliminary reference to the Court of Justice of the European Union (CJEU) under Article 267 TFEU. My reasons for so deciding are set out in **PART C** below. I also decided to join UNHCR as an intervenor at this stage: see **PART D**.

9. What follows is divided into four parts: **A: ESTABLISHMENT OF THE FACTS; B: RELEVANT LEGAL ISSUES; C: QUESTIONS TO THE CJEU; and D: DIRECTION JOINING UNHCR AS INTERVENOR.**

PART A: ESTABLISHMENT OF THE FACTS

The claimant's evidence

10. In his asylum interview which took place in January 2014 the claimant said he had married his first wife in 1986 or 1987. In 1995 the Hawiye had attacked his home in Mogadishu, killing his brother and shooting him in the leg. He had then left Somalia for Kenya with his first wife and sister-in-law's children shortly after. He stayed in Nairobi until 2001 and his wife was supported financially by his brother who paid for her to go to the UK. He had previously lived in the Hamar Weyne district of Mogadishu and

subsequently moved to Hamar-Jadid (also a district of Mogadishu) before moving to Kenya. He said he had lived in Kenya from 1994-2001. He had a sister in the UK as well as his father's cousins.

11. On 4 July 2016 the claimant provided a witness statement reiterating that he had left Somalia in 1994 and resided in Kenya from 1994-2001. He said he had married his first wife in 1994. They separated in 2005. He had various friends in the UK, including fellow members of the Reer Hamar. He no longer had immediate family members in the UK; his sister having moved to Nairobi. His only other sibling, a brother, was killed in Somalia in 1994 at the same time the claimant was shot and injured. He had previously been in receipt of disability benefit due to his leg injury, but he was not now in receipt of benefits and was supported by his community.

12. In the refusal decision of 27 September 2016 the SSHD accepted that the claimant is a national of Somalia; that he is a member of the Rer Hamar or Reer Hamar sub-clan; that he was born in Mogadishu; and that his first wife had been mistreated by members of the majority Hawiye clan who formed part of the United Somali Congress (USC). The claimant's first wife's claim was that she too had been born in Mogadishu and was from the Reer Hamar clan, her family home being in the Hamarweyne district of Mogadishu. She had married the claimant in 1987 and he helped her father with the family business (selling crockery). In 1991 their home was attacked by Hawiye gunmen and in 1993 the USC attacked the house, killing her sister's husband and shooting the claimant in the left leg and left arm. She was raped. In May 2001 the place where they were staying was attacked again by the Hawiye. She was raped. In July 2001 "we" fled Somalia and went to Kenya.

13. In the same refusal letter the SSHD stated that the claimant's claim to be at risk of persecution from the Hawiye was not accepted because it was considered that the position in Mogadishu for minority clans such as his had improved significantly and durably. Nor did the SSHD accept that the claimant would face adverse interest from Al-Shabaab. The SSHD stated that it was considered that his first wife had been consistent in her various accounts and had been granted refugee status on the basis of those accounts. By contrast, the SSHD considered that the claimant's account lacked consistency in regard to his time and family ties in Somalia. He had claimed at his asylum interview to have married his first wife in 1986 or 1987 but claimed in his witness statement of 4 July 2016 to have married her in 1994. In the same witness statement he had also said his only other sibling apart from his sister had been his brother (who he said was killed in Somalia in 1995, having been shot in the same incident as he), whereas in his asylum interview he had stated (as had his first wife) that only her sister and her sister's husband were killed in this incident and no mention had been made of his

brother being killed. The refusal letter also noted that his first wife repeatedly stated that it was his brother who funded her passage to the UK in 2001, some six years after the claimant said that he had died. The letter concluded that:

> "It would not have benefitted her case for her to fabricate this element of her claim and it is considered that you have fabricated your brother's death in order to mislead the Home Office into believing you have no family members still living in Somalia."

14. At paragraphs 62-65 the letter continued:

> "62. It is considered, therefore, that you left Mogadishu in 2001, having spent 36 years living there and you spent the next two years in Kenya and Ethiopia before travelling to the UK. It is also considered that you will have retained some ties to your home town and there will be individuals in Mogadishu who can provide you with some support. As stated above, it is considered that you have provided an account regarding your brother which is not consistent with your ex-wife's internally consistent accounts. It is noted that your brother paid for your ex-wife's passage to the UK and you have provided no explanation of how you were able to fund your own journey given that you were unable to pay for that of your wife and claim to have done *'nothing'* (Asylum Interview, Question 31) during your time in Kenya. It is submitted that you were provided with financial assistance from somebody, possibly, your brother in Mogadishu.
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> 63. The independent evidence indicates that your clan retains a presence in Mogadishu. Your ex-wife stated in her Asylum Statement and at Question 6 of her Self-Completion Form of 24 September 2001, that you relied on clan assistance to arrange and facilitate your travel to Kenya. It is considered that clan support remains for you in Mogadishu and the country guidance case law indicates that your safety would not be subject to the availability of majority clan support.
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> 64. You state that the traditional trade of your clan was to make clothes called 'Alendi'. In her Asylum Statement of 17 October 2001 your ex-wife stated:
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> > *'The majority of my clan have turned to self-employment and small business as a means of survival. My father was no exception. He owned a small shop selling crockery in the Hamarweyne district of Mogadishu, where we also had our home.*
> >
> > *In 1987 I married my husband, [O A]. After our marriage,[OA] moved into my family home. He helped out my father with the family business.'*
>
> 65. It is considered that you have work experience from your time in Mogadishu. It is noted that the Judge's Sentencing Remarks, of 9 February 2012, state that *'... you have been receiving incapacity benefit since 2003'*. In your statement of 4 July 2016, you stated: *'I have not been able to work in the UK. I was previously in receipt of disability benefit ... I am not now in receipt of benefits and am supported by my community.'"*

15. In a witness statement of 16 February 2017 the claimant stated, inter alia, that he had no-one to support him in Mogadishu and feared he would be at risk on return because a large number of people continue to be killed there. He said he was married in 1986 and had left Mogadishu in 1994. Regarding the year when he had left Mogadishu, he had made a mistake in his statement for which he apologised.

16. In relation to the 1995 incident, he said he had no idea why his former wife did not mention the killing of his brother. In relation to the funding of his former wife's travel to the UK, it was his cousin, not brother, who supported her in this way. He did not have any ties in Mogadishu or elsewhere in Somalia. In terms of his own journey to the UK, this was paid for with money sent by his ex- wife. He would not receive clan support in Mogadishu. Minority clan members are not in a position to support as they are being killed. "They cannot support themselves, let alone me". In terms of finding employment in Mogadishu, he would not be safe and would not be in a position to work because of that. In terms of the suggestion that the Somali community in the UK could support him were he to be returned to Mogadishu, he said he was being supported presently "because I am facing deportation. That support would not continue if I was returned. I have had to ask for support personally, face-to-face, but I would not be able to do that if in Somalia".

17. The claimant's oral evidence before Judge Cameron in July 2017 was very similar to that set out in his witness statement of the same month, except that he said his sister was now in Dubai.

18. The claimant's oral evidence before Judge Frankish in January 2018 broadly maintained the same position as set out in his July 2017 witness statement, except that he said his sister had gone to Nairobi for a short holiday only.

19. The claimant gave oral evidence before me on 21 December 2018. He said he had married his first wife in 1986 and divorced her in 2005; they had not had any children. He had undergone a religious ceremony of marriage with a Dutch national in 2010 but that ended in 2015. He married a different Dutch national in June 2016. He had left Somalia in 1994. He had always lived in Somalia with his (first) wife. He knew she had said that they left Mogadishu for Kenya in 2001, but the fact was they had left in 1994. He had a brother who had been killed by the Hawiye in the same incident when he was shot and injured. He had no family in Somalia. His sister was his only surviving sibling. He is no longer on benefits but is not allowed to work. If he went to Mogadishu he could not work there because of the lack of safety. At the time he committed his offences in the UK, he was driving a car. He would not be able to work as a driver though because he could not stand or use his injured leg for sustained periods. The Somali community

presently supporting him would only help him whilst he was in the UK. For his journey to the UK his wife had raised money from the Somali community.

Submissions as to the facts

20. Mr Tarlow for the SSHD submitted that the claimant's claim that his brother had been killed in Mogadishu in 1995 was not supported by his wife's evidence. Based on his being able to drive when he committed his offence, the Tribunal should find that the claimant had the ability to work if back in Mogadishu. The claimant had not established that he would be at real risk of persecution or serious harm on return to Mogadishu. Mr Harding asked me to find the claimant's evidence regarding the date the claimant left Somalia and the death of his brother was credible. Whether the claimant left Mogadishu in 1994/1995 or 2001 or 2003 mattered little. His first wife's different evidence had not been tested. As regards the support issue, the claimant had no family in the UK and it was unrealistic to expect him to work without physical aids which would not be available in Mogadishu. The claimant had established he would face a real risk of persecution and serious harm on return to Mogadishu.

My assessment of the disputed facts

21. As regards the country conditions in Mogadishu, both parties were content to rely on the findings made by the Upper Tribunal in **MOJ and Others (return to Mogadishu) Somalia CG** [2014] 00442 (IAC) (hereafter "**MOJ**"), although (as I shall return to below) Mr Harding disputed the correctness of the legal criteria applied by the UT panel in that case to the facts of the claimant's case.

22. The only disputed issues of fact specific to the claimant in this case concern when he left Mogadishu; who financed his (first) wife's journey to the UK; whether his brother is alive and in a position to support the claimant if returned to Mogadishu; whether he would be able to work in Mogadishu; and whether he would be able to receive any support from clan or family or friends if returned to Mogadishu.

23. Given that the SSHD has accepted key aspects of the claimant's case relating to his minority clan identity and home area (Mogadishu), Mr Harding is entitled to make the point that it should be easier than otherwise for the claimant to show these other elements of his claim are credible. The SSHD does not dispute that the claimant and his first wife were victims of a violent attack on them circa 1994 in Mogadishu. That said, the SSHD's acceptance of the claimant's original asylum claim has always been based on his assessment that his former wife had given a consistent and credible account. In this regard, I note that there is nothing to suggest that the claimant has made any efforts to

obtain a statement from her addressing the discrepancies between her asylum statements and his. Nor, despite stating that it was his cousin (not his brother) who financed his former wife's journey to the UK, is there anything to suggest he has sought to obtain evidence from this cousin in support.

24. Also significant are the discrepancies regarding the year the claimant and his wife left Mogadishu and the identity of the relative who was killed in the 1994/1995 incident in which the claimant was injured. They are not just discrepancies between his evidence and hers (he saying it was his brother; she saying it was her brother), but between his own asylum interview account and his later statements. The claimant has said that his asylum interview answers regarding these two matters were a simple mistake, but he signed the interview record as true and correct and did not seek to correct it until over two years later.

25. Furthermore, albeit a minor inconsistency, the claimant's own evidence about his own personal history in Mogadishu was inconsistent as regards the date he married his first wife (1986/7 versus 1994).

26. I have considered the claimant's evidence in the context of the evidence as a whole before me and as set out in previous witness statements and oral testimonies. I do not find he has provided a satisfactory explanation for the identified discrepancies. I am not persuaded that he has shown his brother was killed in 1994/1995 or that he left Mogadishu shortly after or that it was his cousin (rather than his brother) who financed his journey to the UK in 2003. I consider that his former wife's evidence on each of these issues is to be preferred. I note that he also has a sister (currently said to be living in Dubai, although that is not entirely clear) whom he could be expected to turn to for some financial help, if needed. I am not persuaded that his fellow clan members in the UK (who are said to support him presently) would cease all support if he is returned to Mogadishu. As a result, I do not accept that he has no close family in Mogadishu or that he would have no-one in a position to support him if returned to Mogadishu.

27. I have considered the evidence relating to the claimant's capacity to work. There is no up-to-date medical evidence and on the claimant's own evidence he is no longer in receipt of disability benefit. The medical documentation there is indicates that he has reduced mobility due to an old gunshot wound in his leg and has received physio help. He was said in February 2014 to be fit for work if adaptations to his workplace were made. In September 2013 he was advised he can still do jobs where sitting down. Whilst his reduced mobility would prevent him from undertaking a range of jobs, it would not in my judgement prevent him from taking a sedentary job and there is nothing to suggest that for that he would need sophisticated adjustments (that is, adjustments only

available in the West) to help him with discomfort. Whilst the shop he worked at in Mogadishu in the early 1990s will have gone, he has experience of shop work and also (in the UK) of driving.

28. I am not persuaded either that the claimant would be left unsupported by either his sister in Dubai or by friends from the same Reer Hamar clan in the UK, at least by way of assisting him until he has had time to get on his feet in Mogadishu.

Summary of conclusions on the facts

29. The conclusions I have reached on the facts can be summarised as follows. It is accepted that the claimant is a national of Somalia; that he is a member of the Reer Hamar clan; that his home area is Mogadishu; that he left there circa 2001; that in that city in the early 1990s he and his wife suffered persecution at the hands of Hawiye militia (his wife suffered incidents of serious harm in 1991, 1993 and both were victims of a violent attack on them circa 1994/5); that in July 2001 he and his wife fled Somalia and went to Kenya; that in the same year his wife came to the UK; that in October 2001 she was granted refugee status on account of the aforementioned persecution; that he came to the UK in 2003 and was granted refugee status as her dependant; that he too suffered persecution when attacked and wounded in 1994/5; that he and his first wife are no longer married; that he has a history of criminal offending; that if returned to Mogadishu he would have employment opportunities although limited to jobs where adjustments could be made for his reduced mobility; that he has some close family in Mogadishu; and that he could look for some financial support to them plus to his sister (last known to be in Dubai) and fellow Reer Hamar friends in the UK, at least by way of assisting him until he has had time to get on his feet in Mogadishu. The SSHD no longer seeks to certify his case under s.72 of the Nationality, Immigration and Asylum Act 2002.

29. In light of the above findings of fact I turn to address relevant legal issues.

PART B: LEGAL ISSUES

30. At the outset of the hearing Mr Harding sought to argue that there was a preliminary question-mark over UTJ McWilliam's direction that one of the issues to be decided was that of cessation of refugee status. He submitted that the SSHD's decision letter left unclear that it included a cessation decision. As I stated at the time, I reject that submission. The SSHD's decision letter records that: the claimant was notified of the Home Office's intention to cease his refugee status on 8 July 2014; that he responded to this notice on 31 July 2014; that UNHCR was notified of the Home Office's intention to cease refugee status on 5 October 2014; and that UNHCR responded with comments on 31 October 2014 (the gist of which was that the cessation clauses should not be invoked in cases where the individual has committed an offence contrary to Article 33(2)) of the

1951 Convention). At paragraphs 34-36, under the sub-heading "Article 1C", the refusal letter states that "[i]t is considered, for the reasons given below, that paragraph 339A(v) of the Immigration Rules, which mirrors Article 1C(5), applies to your case ...". At paragraphs 47-51 the letter sets out its reasons for rejecting UNHCR's comments on the cessation issue. At paragraph 74, headed "Conclusion" the letter states, inter alia, that:

> "Conclusion
>
> 74. In light of all the evidence cited above it is considered that there has been a sufficient and durable change in the situation in Mogadishu such that your ethnicity would not place you at risk of persecution there. The absence of a large al-Shabaab presence in the city, and the availability of state protection (as outlined in the Humanitarian Protection consideration below) demonstrate that you would not be at a general risk of harm from extremists. Despite your not having lived in Mogadishu since 2001, the support which is available to you, in addition to your own experiences of work, indicate that you would be able to settle in Mogadishu without facing a risk of persecution. It is considered, therefore, that your return there would not result in a breach of the UK's obligations under the ECHR. Furthermore, the changes in Mogadishu since you were recognised as a refugee are sufficiently significant and durable such that you can no longer refuse to avail yourself of the protection of your country of nationality. As such, your refugee status has been revoked under paragraph 339A(v) of the Immigration Rules which mirrors the cessation clause, Article 1C(5) of the Refugee Convention."

31. There is, however, one pertinent point which flows from the consideration of what the decision letter states about cessation. Although it refers to Article 1C(5) of the Refugee Convention, it notes that this provision is mirrored by paragraph 339A(v) of the Immigration Rules. This sub-paragraph in turn transposes Article 11(1)(e) of the Qualification Directive. Accordingly the legal issues I have to decide directly concern the provisions of the Directive rather than Article 1C(5) as such.

Relevant Immigration Rules and The Refugee or Person In Need of International Protection Regulations 2006

32. The relevant Immigration rules relied on by the respondent in the decision letter provide:

> **Revocation or refusal to renew a grant of refugee status**
>
> 338A. A person's grant of refugee status under paragraph 334 shall be revoked or not renewed if any of paragraphs 339A to 339AB apply. A person's grant of refugee status under paragraph 334 may be revoked or not renewed if paragraph 339AC applies.
>
> **Refugee Convention ceases to apply (cessation)**
>
> 339A. This paragraph applies when the Secretary of State is satisfied that one or more of the following applies:

(i) they have voluntarily re-availed themselves of the protection of the country of nationality;

(ii) having lost their nationality, they have voluntarily re-acquired it;

(iii) they have acquired a new nationality, and enjoy the protection of the country of their new nationality;

(iv) they have voluntarily re-established themselves in the country which they left or outside which they remained owing to a fear of persecution;

(v) they can no longer, because the circumstances in connection with which they have been recognised as a refugee have ceased to exist, continue to refuse to avail themselves of the protection of the country of nationality; or

(vi) being a stateless person with no nationality, they are able, because the circumstances in connection with which they have been recognised as a refugee have ceased to exist, to return to the country of former habitual residence

In considering (v) and (vi), the Secretary of State shall have regard to whether the change of circumstances is of such a significant and non-temporary nature that the refugee's fear of persecution can no longer be regarded as well-founded.

33. Regulation 4 of the Refugee or Person In Need of International Protection Regulations 2006 define actors of protection as follows:

"1. In deciding whether a person is a refugee or a person eligible for humanitarian protection, protection from persecution or serious harm can be provided by:

(a) the State; or

(b) any party or organisation, including any international organisation, controlling the State or a substantial part of the territory of the State.

2. Protection shall be regarded as generally provided when the actors mentioned in paragraph (1)(a) and (b) take reasonable steps to prevent the persecution or suffering of serious harm by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the person mentioned in paragraph (1) has access to such protection.

3. In deciding whether a person is a refugee or a person eligible for humanitarian protection the Secretary of State may assess whether an international organisation controls a State or a substantial part of its territory and provides protection as described in paragraph (2)."

Relevant provisions of the Qualification Directive 2004/83/EC of 29 April 2004

Article 2

34. Article 2 of the Qualification Directive provides that:

"[f]or the purposes of this Directive the following definitions shall apply:

...

(d) 'refugee' means a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply;"

[This definition remains unchanged in the QD(recast)]

35. Article 7 of the Qualification Directive states:

"Actors of protection

1. Protection can be provided by:

(a) the State; or

(b) parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State.

2. Protection is generally provided when the actors mentioned in paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection.

3. When assessing whether an international organisation controls a State or a substantial part of its territory and provides protection as described in paragraph 2, Member States shall take into account any guidance which may be provided in relevant Council acts."

36. For completeness, although the UK has not opted in to the Qualification Directive (recast), reference should be given to the revisions reflected in Article 7 of the QD(recast) (2011/95/EU as these were in part a response to the CJEU ruling in Joined Cases C-175/08, C-176/08, C-178/08, C0179/08, **Aydin Salahadin Abdulla, Kamil Hasan, Ahmed Adem, Hamrin Mosa Rashi & Dier Jamal v Bundesrepublik Deutschland**, 2 March 2010 ("**Abdulla**"):

"Article 7 **Actors of protection**

1. Protection against persecution or serious harm can only be provided by:

(a) the State; or

(b) parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State;

provided they are willing and able to offer protection in accordance with paragraph 2.

2. Protection against persecution or serious harm must be effective and of a non-temporary nature. Such protection is generally provided when the actors mentioned under points (a) and (b) of paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and when the applicant has access to such protection.

3. When assessing whether an international organisation controls a State or a substantial part of its territory and

provides protection as described in paragraph 2, Member States shall take into account any guidance which may be provided in relevant Union acts."

The Article 11(1)(e) issue

37. Article 11(1)(e) [which is mirrored by para 339A(v) of the Immigration Rules] provides that:

"A third-country national or stateless person shall cease to be a refugee, if he or she

...

(e) can no longer, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of nationality".

[Article 11(1)(e) is unchanged in the QD(recast).]

The Tribunal country guidance in MOJ

38. The headnote to the Upper Tribunal decision in **MOJ** states:

(i) The country guidance issues addressed in this determination are not identical to those engaged with by the Tribunal in AMM and others (conflict; humanitarian crisis; returnees; FGM) Somalia CG [2011] UKUT 445 (IAC). Therefore, where country guidance has been given by the Tribunal in AMM in respect of issues not addressed in this determination then the guidance provided by AMM shall continue to have effect.

(ii) Generally, a person who is "an ordinary civilian" (i.e. not associated with the security forces; any aspect of government or official administration or any NGO or international organisation) on returning to Mogadishu after a period of absence will face no real risk of persecution or risk of harm such as to require protection under Article 3 of the ECHR or Article 15(c) of the Qualification Directive. In particular, he will not be at real risk simply

on account of having lived in a European location for a period of time of being viewed with suspicion either by the authorities as a possible supporter of Al Shabaab or by Al Shabaab as an apostate or someone whose Islamic integrity has been compromised by living in a Western country.

(iii) *There has been durable change in the sense that the Al Shabaab withdrawal from Mogadishu is complete and there is no real prospect of a re-established presence within the city. That was not the case at the time of the country guidance given by the Tribunal in AMM.*

(iv) *The level of civilian casualties, excluding non-military casualties that clearly fall within Al Shabaab target groups such as politicians, police officers, government officials and those associated with NGOs and international organisations, cannot be precisely established by the statistical evidence which is incomplete and unreliable. However, it is established by the evidence considered as a whole that there has been a reduction in the level of civilian casualties since 2011, largely due to the cessation of confrontational warfare within the city and Al Shabaab's resort to asymmetrical warfare on carefully selected targets. The present level of casualties does not amount to a sufficient risk to ordinary civilians such as to represent an Article 15(c) risk.*

(v) *It is open to an ordinary citizen of Mogadishu to reduce further still his personal exposure to the risk of "collateral damage" in being caught up in an Al Shabaab attack that was not targeted at him by avoiding areas and establishments that are clearly identifiable as likely Al Shabaab targets, and it is not unreasonable for him to do so.*

(vi) *There is no real risk of forced recruitment to Al Shabaab for civilian citizens of Mogadishu, including for recent returnees from the West.*

(vii) *A person returning to Mogadishu after a period of absence will look to his nuclear family, if he has one living in the city, for assistance in re-establishing himself and securing a livelihood. Although a returnee may also seek assistance from his clan members who are not close relatives, such help is only likely to be forthcoming for majority clan members, as minority clans may have little to offer.*

(viii) *The significance of clan membership in Mogadishu has changed. Clans now provide, potentially, social support mechanisms and assist with access to livelihoods, performing less of a protection function than previously. There are no clan militias in Mogadishu, no clan violence, and no clan based discriminatory treatment, even for minority clan members.*

(ix) *If it is accepted that a person facing a return to Mogadishu after a period of absence has no nuclear family or close relatives in the city to assist him in re-establishing himself on return, there will need to be a careful assessment of all of the circumstances. These considerations will include, but are not limited to:*

- *circumstances in Mogadishu before departure;*
- *length of absence from Mogadishu;*
- *family or clan associations to call upon in Mogadishu;*
- *access to financial resources;*
- *prospects of securing a livelihood, whether that be employment or self employment;*
- *availability of remittances from abroad;*
- *means of support during the time spent in the United Kingdom;*

- *why his ability to fund the journey to the West no longer enables an appellant to secure financial support on return.*

(x) *Put another way, it will be for the person facing return to explain why he would not be able to access the economic opportunities that have been produced by the economic boom, especially as there is evidence to the effect that returnees are taking jobs at the expense of those who have never been away.*

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

(xii) *The evidence indicates clearly that it is not simply those who originate from Mogadishu that may now generally return to live in the city without being subjected to an Article 15(c) risk or facing a real risk of destitution. On the other hand, relocation in Mogadishu for a person of a minority clan with no former links to the city, no access to funds and no other form of clan, family or social support is unlikely to be realistic as, in the absence of means to establish a home and some form of ongoing financial support there will be a real risk of having no alternative but to live in makeshift accommodation within an IDP camp where there is a real possibility of having to live in conditions that will fall below acceptable humanitarian standards.*

The Court of Appeal decision in **MA(Somalia)** [2018] EWCA Civ 994

39. In **MA(Somalia)** the Court of Appeal was concerned, inter alia, with the ambit of a cessation decision. At [47]-[49] Arden, LJ stated:

"**DISCUSSION**

(1) *Abdulla: cessation of refugee status under the QD involves an individualised and not a generalised evaluation of the changed conditions in the country of origin; the ultimate question under the ceased circumstances clause is simply whether any fear for a Refugee Convention reason has ceased to exist*

47. I accept that it would be inconsistent with the purposes of refugee status, whether under the Refugee Convention or the QD, if protection could be too easily ceased while a person was still in need of international protection or it was not reasonably clear that the need for it had gone. That would hardly solve the problem of persecution and displacement which those instruments are intended to address. Equally, as it seems to me, there is no necessary reason why refugee status should be continued beyond the time when the refugee is subject to the persecution which entitled him to refugee status or any other persecution which would result in him being a refugee, or why he should be entitled to further protection. There should simply be a requirement for symmetry between the grant and cessation of refugee status.

48. The drafters of the QD were no doubt aware of the risk that states which were obliged to grant refugee status under international law would seek to escape from their obligations too readily. Advocate General Mazak in *Abdulla* (at paragraph 45) went so far as to suggest that the ceased circumstances clause should be interpreted "in a cautious manner, fully respecting human dignity." But the CJEU in *Abdulla* did not

develop the concept of human dignity, beyond referring to the statement in Recital 10 to the QD that the QD "seeks to ensure full respect for human dignity". However, there are other aspects of the QD which reflect the provisions of the Refugee Convention and which demonstrate a need to protect refugees. The QD does not refer to changes in circumstances being "durable" (the phrase used in Refugee Convention jurisprudence) but to their being "non-temporary". We have not had any argument on whether this might be a stronger word but the CJEU went on (as it seems to me, provisionally, as this is not an issue that had to be argued on this appeal) to interpret it robustly in *Abdulla*:

> 73 The change of circumstances will be of a "significant and non-temporary" nature, within the terms of article 11(2) of the Directive, when the factors which formed the basis of the refugee's fear of persecution may be regarded as having been permanently eradicated...

49. Another way of putting the point is that the Refugee Convention and the QD are not measures for ensuring political and judicial reform in the countries of origin of refugees. The risks which entitle individuals to protection are risks which affect them personally and individually. It is an *individualised* approach. Just as it is no answer to an asylum claim that there is a legal system which might in theory be able to protect them, so conversely the absence of such a system is not an answer to a cessation decision if it is shown that the refugee has sufficient, lasting protection in other ways or that the fear which gave rise to the need for protection has in any event been superseded and disappeared."

40. At [2] Arden LJ had stated that:

> "2. For the reasons given below, and in the light of the careful submissions that we have had on the important decision of the Court of Justice of the European Union ("CJEU") in Joined Cases C-175/08, C-176/08, C-178/08, C0179/08, *Aydin Salahadin Abdulla, Kamil Hasan, Ahmed Adem, Hamrin Mosa Rashi & Dier Jamal v Bundesrepublik Deutschland*, 2 March 2010 ("*Abdulla*"), I have concluded that:
>
> > (1) A cessation decision is the mirror image of a decision determining refugee status. By that I mean that the grounds for cessation do not go beyond verifying whether the grounds for recognition of refugee status continue to exist. Thus, the relevant question is whether there has been a significant and non-temporary change in circumstances so that the circumstances which caused the person to be a refugee have ceased to apply and there is no other basis on which he would be held to be a refugee. The recognising state does not in addition have to be satisfied that the country of origin has a system of government or an effective legal system for protecting basic human rights, though the absence of such systems may of course lead to the conclusion that a significant and non-temporary change in circumstances has not occurred."

Submission on Article 11(1)(e)

41. Mr Tarlow submits that the SSHD was entitled, pursuant to the Immigration Rules and Article 11(1)(e), and applying the country guidance set out in **MOJ**, to conclude that there

has been a durable change of circumstances in the claimant's country of nationality in that, in his home area of Mogadishu, there was no longer persecution of minority clans by majority clans and there was effective state protection.

42. Mr Harding submits that given that this was a cessation case it was significant that the SSHD's view was at odds with the assessment provided by UNHCR in June 2014 which noted, as regards the issue of availability of state protection, that the security situation in Mogadishu gave rise to serious concerns and that minority clans remain at a particular disadvantage in Mogadishu, southern and central Somalia.

43. Mr Harding states that the claimant asserts both that he has a well-founded fear of persecution in Mogadishu and that the state authorities in Mogadishu are unable to protect him against such serious harm. He also submits that the analysis carried out by the UT in **MOJ** rested on a mistaken understanding of state protection. According to the UNHCR guidelines on cessation, state protection has to be afforded through the state structure by state actions. Yet the assessment by the UT in **MOJ** that there was generally state protection available in Mogadishu was based in part on the availability of support and protection from family and/or fellow clan members. Yet family or clan actors were private, non-state actors. In assessing whether the circumstances in Mogadishu that had rendered the claimant a refugee (in 2003) had changed significantly and durably so that the claimant could no longer "continue to avail himself of the protection of the country of nationality", it was legally impermissible to take account of protective functions performed by non-state actors.

44. Having considered the parties' submissions (including their submissions addressing the issue of whether it was appropriate to make a preliminary reference; see further below), I have determined that in order to decide whether the claimant is caught by the cessation clause set out in Article 11(1)(e) of the Qualification Directive (para 339A(v) of the Rules, it is necessary to establish whether "protection of the country of nationality" within the meaning of the definition of refugee in Article 2 of the same directive must be shown to be available solely on the basis of the protective functions of state actors. The CJEU has already established in **Abdullah** that the concept of protection in play in Article 11(1)(e) is the same as that identified in Article 7, but that decision does not address either the question of whether protection of the country of nationality is confined to state protection or whether, if it is, the availability and effectiveness of state protection is solely to be assessed in terms of what protective functions are carried out by the state actors. On both issues, the state of the law is unclear. There is no CJEU decision which clarifies it. As outlined further below, the case law in the UK has not resolved these issues. Whilst the UT in **MOJ** clearly did consider that support and protection from family and/or clan members were relevant to both issues, they did not identify any higher court authority for that view.

45. Whilst not cited by either party before me, I am aware of the position taken by the Court of Appeal in **AG and others** [2006] EWCA Civ 1342. In that judgment, Hooper LJ accepted that protection in the factual or functional sense was relevant but that it was only relevant at the stage of considering whether there is a real risk of serious harm. At [65] he stated that:

> "...in ordinary parlance [the term protection] may be used to mean the de facto support and assistance which will be available to the claimant (for example from friends, family, clan or similar) which, because it is present, demonstrates that there is no sufficient risk of the kind of harm which might otherwise bring the claimant within either the Refugee Convention or Article 3. Secondly, the word may be used as a technical term of art to describe the apparatus of the state (and query of some other organisation) which provides a sufficient system of discipline, or law and order to demonstrate, in the case of the Refugee Convention, that the country of origin adequately prohibits any risk of persecution which the claimant faces from a non-State source, and, in the case of the ECHR, that a return to the country of origin would not put the UK in breach of its Article 3 obligations. In the former sense the existence of 'protection' is a pure question of fact. In the latter sense, if one gets to it, there have been different expressions of legal opinion on the question whether the 'protection' can only emanate from a state or whether some other organisation in sufficient de facto control may be considered to provide it: see *Gardi v SSHD* [2002] EWCA Civ 750; [2002] 1 WLR 2755."

46. However, there is a very real question as to whether this approach is consistent with established case law on the role of protection, as set out in **Horvath** [2001] 1 AC 489. Whilst UK case law makes clear that the protection inquiry is one that concerns the "well-founded fear of being persecuted" limb of the refugee definition (as set out in Article 1A(2) of the Refugee Convention and as duplicated in Article 2 of the Qualification Directive), it considers that it arises at two points. As stated by Lord Hope in his "Conclusion" in **Horvath**:

> "Where the allegation is of persecution by non-state agents, the sufficiency of state protection is relevant to a consideration whether each of the two tests - the "fear" test and the "protection" test - is satisfied. The proper starting point, once the tribunal is satisfied that the applicant has a genuine and well-founded fear of serious violence or ill-treatment for a Convention reason, is to consider whether what he fears is "persecution" within the meaning of the Convention. At that stage the question whether the state is able and willing to afford protection is put directly in issue by a holistic approach to the definition which is based on the principle of surrogacy. I consider that the Tribunal was entitled to hold, on the evidence, that in the appellant's case the requirements of the definition were not satisfied. I would refuse the appeal."

47. For the House of Lords in **Horvath**, which drew on the analysis of Lord Hoffman in **Reg. v. Immigration Appeal Tribunal, Ex parte Shah** [1999] 2 A.C. 629, 654, the protection inquiry is principally to be carried out in the context of the "being persecuted", not the "well-founded fear" inquiry. That is because, unless protection is seen as an interdependent part of the concept of persecution ("Persecution = Serious Harm + The Failure of State Protection"), it would be possible for persons to qualify as a refugee simply by showing a

well-founded fear of serious harm, even if they would be fully protected against it. That would violate the principle of surrogacy. Further, the 'protection inquiry' is clearly a "holistic" one which seemingly requires applying the same concept of protection at every point.[1]

48. If the analysis in **AG** were right, the two tests of protection that have to be made under the "well-founded fear of being persecuted" limb of the refugee definition would not be two aspects of a "holistic" assessment but would apply two different sets of criteria: one a purely factual or functional test and the other (treating protection as a term of art to concern the apparatus of the state only) focussing solely on the acts of state actors. Whilst it is consistent with a holistic approach that the degree of state protection may indirectly be a factor in judging whether a person has a well-founded fear (see **Horvath** as above; and **Svazas**, para 28), it is difficult to understand why the nature of this test - whether a factual or functional one or a formalistic one or a mixture of both - should differ between one and the other, particularly given that they are interrelated. In both applications protection must surely have the same qualities of effectiveness and (seemingly also) accessibility and non-temporariness.

49. **MOJ** is not as such a case about refugee protection but rather subsidiary (humanitarian) protection. However, it is settled UK case law that the terms "persecution", "ill-treatment" within Article 3 ECHR (and by implication therefore the term "serious harm" under Article 15 (or at least 15(b)) of the QD) are broad equivalents: see **R(Bagdanavicius) v Secretary of State for the Home Department** [2005] UKHL 38. Hence the assessment of protection in **MOJ** under Article 15 of the QD has a clear bearing on the issue of refugee protection under Article 2(e) of the Qualification Directive (and Article 1A(2) of the Refugee Convention) and its cessation under Article 11 of the same Directive (and Article 1C(5) of the Refugee Convention) as well. The position of the UT in **MOJ** presupposes that although the relevant protection must be state protection, the assessment of the effectiveness of that protection requires consideration of protective functions in a wide sense to include those carried out by family and clans. A similar approach appears to be adopted by the European Court of Human Rights as regards the concept of protection against Article 3 ECHR ill-treatment in **R.H. v Sweden** (Application no 4601/14), 10 September 2015 at para 73. Accordingly, there is a significant lack of clarity regarding the meaning of the term "protection" within Article 11(1)(e) and Article 2(e) of the Qualification Directive.

50. In considering whether it is necessary to make a reference, I have had regard to the submissions made by the SSHD as to whether such a step was appropriate. Four main objections were raised, namely: (i) that "the proposed reference relates to the provisions of

[1] See **Svazas** [2002] EWCA Civ Civ 74 and **R (Bagdanavicius) v Secretary of State for the Home Department** [2005] UKHL 38 at paras 29-30.

Council Directive 2004/83/EC, which (subject to the foregoing) is no longer in force as a provision of EU law and has been repealed. As such, the national courts should determine the meaning and effect of the relevant law"; (ii) "...the meaning of 'protection' in the QD (and Immigration Rule 339A) is clear. Where there is no well-founded fear in the receiving state, the only permissible conclusion will be that the returnee cannot refuse to avail himself of the protection of his country of nationality. Any contrary conclusion would be perverse, and would be contrary to the language, context and purposes of the QD"; (iii) "[a]pplying the country guidance in **MOJ**... to the facts of the present case, there is no arguable well-founded fear of serious harm in the receiving state. On this basis the question of whether state or non-state actors will provide protection to the [claimant] does not arise" and the case of **Horvath** "confirms that the issue of state protection only arises once the tribunal has concluded that a well-founded fear exists...[whereas] there is no well-founded fear in the present case". The SSHD's submissions also suggested (iv) that since the Court of Appeal in another cessation case, **MA(Somalia)**, had recently decided not to make a reference, I should take the same course in this case.

51. I shall address each of these objections in turn. As regards (i), Council Directive 2004/83/2004 continues to be applied by the UK, as transposed by the Immigration Rules and the 2006 Regulations. As regards (ii), whilst it is correct to say that (on the basis of higher court authority) where there is no well-founded fear in the receiving state, the issue of the availability of protection does not arise, it is clear from the highest UK domestic authority (**Horvath**) that in assessing whether a well-founded fear of being persecuted exists, one element that has to be factored in is whether there is available protection; the protection inquiry is a 'holistic' one. In relation to (iii), whilst the SSHD asserts that the claimant in the instant case has not shown a well-founded fear, part of his claim is that he has such a well-founded fear because he will not receive effective protection, and existing country guidance (**MOJ**) envisages that the question of whether a person has a well-founded fear of persecution or equivalent ill treatment has to be assessed in part by reference to whether there is available protection and in that respect it recognises that one "aspect" of whether there is protection available concerns clan membership and family support. Whilst the Tribunal in **MOJ** considered that clan membership had become "more of a social support mechanism than a protection mechanism", it still saw both as relevant considerations in assessing the availability of state protection: at (*viii*) of the head note to **MOJ** it was noted that "[c]*lans now provide, potentially, social support mechanisms and assist with access to livelihoods, performing less of a protection function than previously*" ("less of a protection function" is not the same as "no protection function"); see also paragraphs 342 and 360. I would add that the SSHD's argument as submitted to me appears to sit very uneasily with that advanced by Counsel (Mr Waite) for the Secretary of State in **MA (Somalia)**. It was noted at [27] of **MA (Somalia)** that "Mr Waite accepts that the institutions or parties which provide protection in general for individual citizens may be relevant in several respects to

a cessation decision, for example in determining whether a fear of persecution continues to exist." (see also [68]).

52. As to (iv), the issue posed by the instant case was not before the Court of Appeal in **MA(Somalia)** and the request for a reference concerned a different issue, namely whether It must follow from the analysis of the CJEU in ***Abdulla*** that the recognising state does not have to investigate whether there would be an Article 3 ECHR violation if the refugee was returned to his country of origin: see [61]-[22].

PART C: QUESTIONS TO THE CJEU

53. Accordingly, the questions I propose to ask the CJEU are as follows:

[Since the UK has not opted in to the QD (recast), the following relate to provisions of the QD.]

(1) **Is "protection of the country of nationality" within the meaning of Article 11(1)(e) and Article 2(e) of the Qualification Directive to be understood as state protection?**

(2) **In deciding the issue of whether there is a well-founded fear of being persecuted within the meaning of Article 2(e) of the QD and the issue of whether there is protection available against such persecution, pursuant to Article 7 QD, is the 'protection test' or 'protection inquiry' to be applied to both issues and, if so, is it governed by the same criteria in each case?**

(3) **Leaving to one side the applicability of protection by non-state actors under Article 7(1)(b), and assuming the answer to question (1) above is yes, is the effectiveness or availability of protection to be assessed solely by reference to the protective acts/functions of state actors or can regard be had to the protective acts/functions performed by private (civil society) actors such as families and/or clans?**

(4) **Are (as is assumed in questions (2) and (3)) the criteria governing the 'protection inquiry' that has to be conducted when considering cessation in the context of Article 11(1)(e), the same as those to be applied in the Article 7 context?**

PART D: DIRECTION JOINING UNHCR AS INTERVENOR

Direction

54. In part because UNHCR was consulted by the Secretary of State for the Home Department when considering whether to make a cessation decision on the claimant in this case; in part because UNHCR has a supervisory responsibility for providing guidance on the

operation of the Refugee Convention (see recital 15 of the QD which states that consultations with the UNHCR "may provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention") and in part because UNHCR has unparalleled access to relevant sources relating to the issues identified in the questions posed to the CJEU in this reference, I hereby join UNHCR as a party to the domestic proceedings, so that they are able, if they choose, to make submissions to the CJEU.

55. By virtue of my decision to make a preliminary reference, the proceedings in the Upper Tribunal are stayed to await the outcome of CJEU proceedings.

Signed Date: 22 March 2019

H H Storey

Dr H H Storey

Judge of the Upper Tribunal