Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/11674/2018

THE IMMIGRATION ACTS

Heard at North Shields	**Decision & Reasons Promulgated**
On the 25 September 2019	**On 12 November 2019**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

AND

MS
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Ms Petterson, Senior Presenting Officer
For the Respondent: Mr Olufunwa, instructed on behalf of the appellant

DECISION AND REASONS

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 her. 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 Secretary of State, with permission, appeals against the decision of the First-tier Tribunal (Judge Gumsley), who, in a determination promulgated on the 15th April 2019, allowed his protection claim in the context of the decision made for the appellant's deportation to Somalia.

2. Whilst this is an appeal by the Secretary of State, for ease of reference I intend to refer to the parties as they were before the First-tier Tribunal.

3. The Appellant is a citizen of Somalia. His immigration history is set out within the determination at paragraphs 2-3, and in the papers before the Tribunal.

The appellant's immigration history:

4. It can be summarised as follows. The appellant claims to have arrived in the United Kingdom on 8 September 1998 using a false passport and claimed asylum by post.

5. On 1st July he was sentenced for an offence of criminal damage.

6. On 18 October 2000 he was convicted of six offences; offences of theft, failing to surrender to custody and dealt with for a breach of a conditional discharge and was sentenced to a community order of 100 hours.

7. His claim for asylum was refused on 12 January 2001 (see A1 of the respondent's bundle). It set out the basis of his claim that he claimed to be a member of the Bajuni clan but that the appellant had been requested to complete an SEF in December 2000. He failed to complete this and therefore the respondent considered that he had not established the factual basis of his claim and that displaced minority groups would not necessarily face persecution. The decision set out the appellant had spent 2 years in Kenya, and he failed to claim asylum there. It is recorded that the appellant had not provided sufficient evidence to prove his Somali nationality. It is recorded that the appellant did not appeal against that decision.

8. On 1 March 2001 he was convicted of six offences, (obstructing a police officer, failing to surrender to custody, theft x 2 and forging a document; his community service order was revoked, and he was the subject of a 12-month probation order.

9. On 21 May 2001 he was served with an IS. 151.A notice as an illegal entrant but remained in the UK. Another conviction was recorded on the 17 July 2001 for theft x 2 and failing to surrender to custody.

10. On 21st of January 2002 he was convicted of 2 offences of theft and on the 22 February 2002 he was convicted of theft, attempting to pervert the course of justice and failing to surrender to custody and was sentenced to 3 months imprisonment.

11. On 14th of January 2009 he was dealt with for breaching an earlier imposed DTTO and failing to surrender to custody and sentenced to a total of eight weeks imprisonment. The appellant was detained under immigration powers on 10 February 2009.

12. He remained in the UK without valid leave until 24 April 2009 when he made a further asylum application. The basis of his claim is recorded in the decision letter of 5 November 2009 (at C3 of the respondent's bundle).

13. He claimed to be a Somali national who was born and had lived in Kismayo. He lived with his mother, brother and sister. He did not know his father. He no longer knew where his family lived as he had not been in contact with them for 11 years. He did not have a job in Somalia but did "anything to get by, buying and selling. Things like that." He claimed that he had suffered persecution as a Bajuni living in Kismayo and on a few occasions was beaten by other clan members when he was in his 20s. In 1995 he decided to leave Somalia and was aided by a man who helped people from the local area. Paid him US$2000 to take him to Kenya. He was provided with a false passport. He stayed in Kenyan for two years and supported himself by doing cash in hand jobs. He did not claim asylum in Kenya at any point as no one was claiming asylum there. He was arrested in Kenya for being Somalian but was able to secure his release by bribing officers. In 19 9080 travel from canyon to the UK and was supplied with passport by the agent. He did not claim asylum on arrival as he was advised not to do so.

14. Linguistic analysis was completed in June 2009 the results of which were documented in a report which found that he spoke a variety of Swahili not found in Somalia and that he spoke a variety of Swahili with certainty that was found in Kenya and that he did not speak any Bajuni. The reasons set out in the report and the decision letter, it was not accepted that he was a member of a Somali minority clan and was believed to be from Kenya.

15. His asylum representations were refused with in country right of appeal which for the second time the applicant did not exercise. The appellant was released on the 2 December 2009. It is recorded in the letter from his representatives at G3 that he was in detention from February 2009 until December 2009 and was released following an acknowledgement by the respondent that the case could not be progressed due to the respondent's inability to verify his nationality.

16. On 31st of January 2011 in the Crown Court he was convicted of one count of possessing a class A drug (crack cocaine) and one count of possessing a controlled drug (class A; crack cocaine) with intention to supply and was sentenced to 2 terms of 30 months imprisonment to run concurrently. The judges sentencing remarks are set out at E1. The appellant was 36 years of age and pleaded guilty to 2 offences; one of supplying crack cocaine of three wraps and the other offence of being in possession of nine wraps of cocaine for his own misuse. As to the circumstances, it was stated that the appellant was running errands for other drug dealers, selling

quantities of class a drug on the street and saw the quantity to a man and had another quantity for his own use. The judge took into account that the previous convictions the appellant had were not for drug dealing but were for "acquisitive offending to fund your drug habit" but found that this was an escalation of gravity in terms of his offending because he was not now stealing in order to fund his own habit passing on drugs to other people. The judge stated that the offences were "not at the highest end of ability but any kind of dealing is serious."

17. On 31 March 2011 the appellant was served with a liability for deportation questionnaire giving him the opportunity to make representations as to why he should not be deported. It is recorded the appellant did not respond.

18. On 9 June 2012 he was again detained under immigration powers.

19. On 4 January 2013 he signed a disclaimer and made an occasion via the Facilitated Return Scheme ("FRS") to return to Somalia which was approved in January but later withdrawn as his nationality had not been verified.

20. On 15 April 2013 decision to deport it was made on the basis that the Home Office believe that he was a national of Kenya. The deportation was signed and served upon the appellant on 18 April 2013, but no response was received. He did not appeal that decision.

21. Whilst the appellant claimed that he would apply for asylum for a third time, this was not confirmed in writing as requested. The Kenyan authorities refused to issue the appellant with a travel document and arrangements are made to remove the appellant to Somalia in June 2014. However on 5 June 2014 he submitted further asylum representations which were treated as an application to revoke the deportation order. He further representations were set out in a letter from his legal representatives exhibited at G3 of the respondent bundle. The representations were intended to comply with pre-action protocol and also as fresh representations in accordance with paragraph 353 of HC 395 and sought cancellation of the removal directions.

22. In those representations it set out that the appellant was a national of Somalia and not Kenya, having been born in southern Somalia and having remained there during his early childhood. However the age of 12 or 13 along with his family he moved to Kenya where he stayed until his arrival in the UK.

23. On 20 January 2018 he was sent a one-stop warning but no response was received, it was followed by a section 72 warning letter and again no response was received.

24. On 24 May 2018 he was convicted at the Magistrate's Court of one count of damage one count of the use of threatening and abusive insulting words or behaviour and

was sentenced to a community order with an electronic tagging curfew requirement and was fined £85.

25. On 10 July 2018 the deportation order made against the applicant was revoked by the Home Office and the notice of decision to deport the appellant was made on 15 April 2013 was withdrawn.

26. On 12 July 2018 a new decision to deport was made notifying him that S 32(5) of the UK Borders Act 2007 placed a duty on the respondent to make a deportation order unless he could demonstrate that one or more of the exceptions set out in section 33 of that act apply to him. In response to that decision, he submitted representations dated 25 July 2018 setting out why he should not be deported.

27. A signed deportation order against him was made on 11 September 2018 and a decision to refuse his protection and human rights claim was made on 17 September 2018.

The decision letter:

28. The decision letter set out the immigration history as summarised above. As regards section 72 of the Nationality, Immigration and Asylum Act 2002 (hereinafter referred to as the "NIAA 2002"), the respondent set out that the appellant continued presence in the UK constituted a danger to the community and that he had committed a particularly serious crime. In reaching that conclusion the respondent took into account the nature of the offences which were possession and production of class a drug with intent to supply in 2011 and that such offences were particularly serious due to the harm they cause to society as a whole. Furthermore despite his submissions, he continued to commit criminal offences in the UK having been convicted on 24 May 2018 of one count of damage and public order offence for which he was sentenced to community order with the tagging curfew requirement. Consequently his protection claim on the grounds it could not satisfy subparagraph 334 (iv) of the Immigration Rules and the Refugee Convention did not prevent his removal from the UK. His claim was therefore certified that the presumption of section 72(2) of the NIAA 2002 applied to him.

29. As to the protection claim advanced by the appellant, consideration was given to the representations made in 2014 and in July 2018. The basis of his claim was that he was a member of the Bajuni clan (a minority clan in Somalia) who claim to have arrived on 8 September 1998. He feared that if returned to Somalia he would face mistreatment due to his ethnicity. It was further asserted that he would be at risk on return to Somalia due to the general security situation and that due to the humanitarian conditions in Mogadishu that would constitute a breach of Article 15 © of the Qualification Directive.

30. It was accepted by the respondent that the appellant was a national of Somalia and also that he was from a minority clan in Somalia (the Bajuni).

31. When considering risk on return as a member of a minority clan, the respondent considered the decision of MOJ & Others (Return to Mogadishu) CG [2014] UKUT 00442 and paragraphs (vii)- (xi).

32. The respondent concluded that there was evidence of a Bajuni clan presence in Mogadishu and it was considered that he would be able to seek assistance from members of his own clan upon return (see CPIN Somalia: a majority clan are minority groups in south and central Somalia paragraph 7.4.4).

33. Paragraph 9.3.1 of the CPIN evidence the fact that the diaspora continue to return to Somalia and the rate of return is expected to increase and that people are able to re-establish themselves upon return to Somalia (see paragraph 9.3.3).

34. The appellant's own circumstances were taken into account and that in his application for asylum in 2009, he stated that he was a Somali national who could speak Swahili and English and that both his parents were dead. He made reference to an old brother did not provide his details or those of any extended family members in Somalia. It was noted that he was from a family of traditional fishermen and completed both his preliminary and primary education before working as a fisherman, a job he continued after the attack on his village in April 1993. He demonstrated his resourcefulness after discovering his father's body by supporting himself both in Kismayo, Lamu and Mombasa (Kenya) where he secured employment as a waiter. It was unclear as to how he had supported himself during the 20 years in the UK but his linguistic skills and previous skills in Somalia would assist him in securing a livelihood upon return to Mogadishu or another area of Somalia where other members of the clan reside (see paragraph 7.4.1 and 7.4.2).

35. In summary, it was considered that the appellant had failed to establish that:-
    - he was not able to access the economic opportunities that have been produced by the economic boom;
    - that he would not have access to clan support in Mogadishu,
    - that he did not have any family or extended family members remaining in Somalia might help him to re-establish is life there and that he had no real prospect of securing access to a life on return;
    - that he would face the prospect of living in circumstances which are acceptable in humanitarian protection terms.
    - He had any kind of profile before his departure from Somalia or any evidence of such a profile now on return.

36. As to Article 15 (c) of the qualification directive, the respondent made reference to MOJ and others and others at paragraphs 407 (a) to (e) and that returning him Somalia would not cause the UK to be in breach of Article 15 (c) of the qualification directive.
37. As to internal relocation following return to Mogadishu, it was stated that other than the statement in representations of 2014, the appellant had not provided any further

explanation or independent evidence to substantiate the claim that he could not internally relocate. Therefore it was considered that he would be able to establish himself in Mogadishu on return or another area where the Bajuni are located. He would also be able to make an application via the facilitated return scheme which would provide him with financial assistance to ease his reintegration into life in Somalia.

38. In respect of Articles 2 and 3 of the ECHR, it was not considered that on the evidence he demonstrated a real risk of big subjected to unlawful killing, or torture or human or degrading treatment upon deportation to Somalia. This was because his claim that he could not return to Somalia due to his ethnicity, the general country situation in Somalia and his inability to internally relocate were not accepted.

39. At paragraphs 62 – 69 the respondent set out the reasons why it was considered that he was excluded from humanitarian protection.

40. At paragraphs 71 – 82 the respondent considered Article 8 of the ECHR and in accordance with section 117 A-D in part 5A of the NIAA 2002 (as inserted by the Immigration Act 2014). The appellant claimed that he had establish a substantial private family life over the last 20 years but that he had not submitted any evidence in support of his Article 8 claim.

41. It was considered that his deportation was conducive to the public good and in the public interest because he been convicted of an offence for which he been sentenced to a period of imprisonment of less than four years but at least 12 months and therefore in accordance paragraph 398 of the immigration rules, the public interest requires deportation unless an exception to deportation applied. The appellant had not made any submissions in relation to family life or family life with a partner and therefore paragraphs 399 (a) and (b) did not apply.

42. As to his private life it was not accepted that he had been lawfully resident in the UK for most of his life; this is because he claimed to arrive in the UK on 8 September 1998 aged 23 years 11 months and he was now aged 43 years 11 months and had never held leave to remain in the UK.

43. It was not accepted that he was socially culturally integrated in the UK. Whilst he had been in the UK 20 years it was inevitable that he had friendships, but no submissions be made to demonstrate that any of the relationships were at the level of dependency or emotional attachment over the normal ties of friendship. It was considered that his periods of imprisonment removed him from society and that the nature of his index offence along the fact that he committed a total of 27 offences demonstrated a lack of social and cultural integration as well as disregard for the immigration rules along with the laws and societal norms of behaviour in the UK. There was no evidence that it made a significant positive contribution to the local community and has no evidence of his current financial independence. Any ties made were made when he had uncertain immigration status.

44. It was also not accepted that there were very significant obstacles to his integration having spent his childhood up to the age of around 12 or 13 in Somalia so he would have retained some knowledge of language, customs and society to aid his reintegration. He was believed in good physical health. His previous history demonstrated that he was able to adapt to a life in a new country of which had no prior knowledge of both in the UK and in Kenya when he moved there with his family. It was unclear if he had any family member still residing in Somalia who provide assistance to ease his reintegration there. In the event that there were no family or extended family members in Somalia, it was considered that he could seek assistance from members of his clan upon return and make an application under the facilitated return scheme to ease his reintegration. He also spoke English which is a language spoken in Somalia and would be able to re-establish is life in Somalia and the clan support would be available.

45. The reasons set out at paragraphs 83 – 89, the respondent set out why there were not very compelling circumstances in the appellant's case.

46. It was therefore concluded that having considered all the available information, the appellant's deportation would not breach the U.K.'s obligations under Article 8 of the ECHR.

The appeal before the First-tier Tribunal:

47. On the 29 September 2018 the appellant submitted grounds of appeal stating that:-
    (1) that he had a well-founded fear of persecution on account of his clan membership as a Bajuni
    (2) the respondent failed to consider his claim for asylum made in 1998 on the basis that he was from Somalia, but the respondent sought his deportation to Kenya;
    (3) he was not a danger to the community as he had not reoffended in the prison sentence was almost 10 years previously.
    (4) The appellant has lived in the UK for 20 years and there will be very significant obstacles to his reintegration to Somalia.

48. The appeal came before the First-tier Tribunal (Judge Gumsley) on 13 February 2019. The appellant did not attend and was not represented. The respondent was represented by a presenting officer. This is a matter that I will return to in due course.

49. At paragraphs 4 – 8, the FTT J noted that there had been no explanation for the appellant's absence and the presenting officer informed the judge that the appellant had failed to sign on when he been asked to do so in January 2019 and had not been reporting regularly prior to that. The judge further noted that until 7 February 2019 the appellant to be represented by solicitors but that the representative withdrew and notified Tribunal by letter dated 7 February they had no instructions and had been

unable to contact the appellant. The letter did not clarify when he had last been in contact. The judge was therefore satisfied that the appellant had been given notice of the hearing and applying the procedural rules decided that he would hear the appeal in the absence of the appellant.

50. As to the evidence filed on behalf of the appellant, the judge noted at paragraph 7 that there was no bundle from the appellant. He recorded that the only evidence provided and available to the Tribunal was a statement that was relatively short (under cover of letter dated 25th of July 2018) and submissions made on his behalf in 2014 and in 2080 alongside some external evidence provided along with the letter in 2014.

51. At paragraph 14 the judge also recorded what he described as "a concession" made by the presenting officer that the respondent's position was that it was submitted that the appellant could be returned to and be expected to live in Mogadishu.

52. The findings and analysis of the FTT J are set out at paragraphs 27 – 49 and summarised at paragraph 50 as follows:
    (1) the appellant is not excluded from claiming asylum by virtue of section 72 of the NIA 2002. However, the judge was not satisfied that there was a risk arising from his membership of the Bajuni clan or for any other convention reason and therefore his asylum claim fails, and his appeal was dismissed on that basis.
    (2) The appellant is excluded from claiming humanitarian protection by virtue of the relevant provisions of the immigration rules.
    (3) Given the circumstances the case and the concession made that it was suggested the appellant could go to anywhere other than Mogadishu, the question of any other internal relocation does not arise.
    (4) For the reasons set out, the judge was satisfied that he would be at risk of destitution, inhumane treatment and serious harm if returned to Somalia (Mogadishu), which would be in breach of his Article 3 human rights. His appeal human rights grounds therefore succeed, and it will be in breach of his human rights (Article 3) or him to be returned to Somalia.
    (5) Given the findings, the judge concluded that it was unnecessary for him to consider Article 8 claim.

<u>The appeal before the Upper Tribunal:</u>

53. The Secretary of State sought permission to appeal that decision and permission was granted by the First-tier Tribunal Judge Bird on the 12th July 2019 as follows:-

> "The respondent seeks permission to appeal against the judge's decision on the grounds of the judge failed to give clear reasons for allowing the appeal in Article 3 grounds (ground two). It is further alleged that in his assessment the

judge failed to properly apply the guidance given in MOJ and others (grounds 3-7).

It is arguable that the judge failed to give adequate reasons his finding that the appellant would be at risk of destitution, inhumane treatment and serious harm (paragraph 50 (iv) despite the judge's findings at paragraph 48 that the "information on the evidence from him has been limited) as the appellant did not attend. The judges failed to engage clearly with the guidance given in MOJ. An arguable error of law has been made."

54. At the hearing before the Upper Tribunal the Secretary of State was represented by Ms Petterson, Senior Home Office Presenting Officer and the Appellant by Mr Olufunwa, solicitor instructed on behalf of the appellant.

55. Ms Petterson relied upon the written grounds. The argument advanced on behalf of the respondent can be summarised as follows. Ground one (contained in paragraphs 1 –7) submit that the FTT J materially erred in law in his application of the country guidance decision in MOJ and others in allowing the appeal on Article 3 grounds:-

(1) The judge failed to give clear reasons as to why the appellant would have no real prospect of securing access to a livelihood upon return to Mogadishu [46] and that the country guidance decision sets out the expectation is that returnees would be able to access the economic boom and that those returning may in fact have an advantage in securing employment. Furthermore, the evidence in MOJ indicated the prevalence of English-language speakers in Mogadishu and an extensive pool of low skilled employment that is referred to in AAW (expert evidence – weight) Somalia [2015] UKUT 673 which the appellant could take advantage of. It was incumbent upon the appellant to demonstrate why he could not take advantage of the economic boom and by failing to attend the hearing he failed to provide cogent reasons as to why a healthy adult male could not access the labour market. The judge materially erred in law by only considering clan affiliation and remittances from abroad.

(2) It is submitted that the judge misunderstood the influence and need of clan membership and that he did not require clan assistance to obtain employment though it may be of some potential utility and that clan support is only one of the considerations identified in MOJ at (xi) but the judge appeared to have treated this issue as determinative.

(3) As a returnee from the West this would not hinder prospects on return as noted in MOJ at paragraph 351 and the decision of AAW(as cited). The appellant would not be at risk on this basis and it was a factor which could assist him in seeking appointment.

(4) It was noted that the appellant in MOJ had been out of Somalia for an excess of 10 years (AAW it was 17 years) but it was found that both have not shown good reason as to why they could not obtain

employment at a low level with the enhanced status of being a returnee from the West.

(5) In respect of remittances (paragraph 45) while family members may not be able to support entirely (although this is yet to be determined as the appellant felt attend the hearing) some remittances and the facilitated return scheme (see MOJ para 423 and AAW at para 57), coupled with the ability to work avoided any forced residence in an IDP camp and the judge's findings on this matter are insufficient.

56. Ground 2 submits that the decision of the Court of Appeal in Said v Secretary of State for the Home Department [2016] EWCA Civ 422, found that there was no violation of Article 3 by reason only of a person be returned to country which for economic reasons cannot provide him with basic living standards.

57. In her oral submissions, Ms Petterson submitted that in relation to subparagraph 9, the judge failed to identify why the appellant was at risk of destitution and unable to make a living. The burden was upon the appellant to give cogent reasons as to why he could not access the labour market and that clan support was only one of the considerations. At paragraph 43 the judge set out that the appellant's home area was not Mogadishu and would therefore be returning to an area in which he has never lived or had a home and recorded that his last known home where his family were last known to be living was Kismayo (see paragraph [43]), however at paragraph 44, the judge failed to take into account that the appellant would not need clan assistance to obtain employment and that clan support was only one factor. At paragraph 45 the judge sets out the appellant's history. It was submitted that the judge fell into error here and that was the burden was upon the appellant to demonstrate that he would fall into destitution, the judge made the assumption that he would not be able to receive remittances or other help from abroad. Thus she submitted had applied the wrong test and that the appellant had to make out his case that he would be destitute.

58. Mr Olufunwa relied upon the bundle of documents sent undercover of letter of 23 September 2019 which included a witness statement from the appellant dated 7 September 2019 (post hearing), a skeleton argument and information concerning the spent convictions.

59. The skeleton argument sets out that the appellant maintains that he has a well-founded fear of persecution for a Convention reason for which he claimed asylum on entry in 1998. It goes on to state that the Secretary of State's decision was wrong in law and against the weight of the evidence and that previously Secretary of State disputed his nationality until the Kenyan given government confirmed that he was not a Kenyan. As to his offences, it was submitted that the secretary of state failed to consider the appellant could not be a danger to the community given the prison sentence almost a decade ago and he had not reoffended. The offence was not particular serious. The skeleton argument goes on to state that internal relocation was not available because he could travel safely to another place and that the SSHD

had not considered his private life and that he had established a substantial private and family life in the UK for 20 years. The skeleton argument goes on to state that the Secretary of State should consider the Supreme Court's judgement in Kiarie and Byndloss. None of those submissions in the skeleton argument address the grounds of challenge.

60. In his oral submissions Mr Olufunwa gave a summary of the appellants background history and that following its arrival in 1998 and his claim made for asylum, is claim was refused three years later in 2001 and during that time he had no permission to work in a drifted into offending. He had also been in detention for periods of time. He submitted that he had struggled with his life and drugs which led to the 30 months imprisonment which led to the deportation decision where the Secretary of State decided to remove him to Kenya even though he was a Somalian national. He was kept in detention between 2012 and 2015 and he had struggled in his existence and was always a penniless. He submitted that when he was young he had committed crimes and is now 45 years of age.

61. It was submitted that the respondent had not considered his private life at all and that he met the exceptions as he was lawfully resident in the UK for most of his life and that he was socially and culturally integrated in the UK and that there would be very significant obstacles to his reintegration.

62. When asked to deal with the challenges raised on behalf of the respondent, Mr Olufunwa submitted that for the reasons set out in paragraph 50 the appellant succeeded in his claim under Article 3 as Mogadishu was not his home town and that there will be problems as a result of his clan which was why he had claimed asylum. He submitted that he had been lawfully resident in the UK for most of his life and that if he had been granted asylum in 1998 he would not be a foreign criminal and that he was pushed into petty chronology for survival. There would be significant obstacles to his integration to Somalia having left 21 years ago and therefore he submitted all the three exceptions are made out in his case.

63. As to the judge's decision, he submitted that the decision could not be faulted and that the judge was correct concerning the life in Mogadishu and that he would have problems there.

64. Mr Olufunwa made reference to the bundle provided and that in relation to his offences they were all pretty crimes and were spent convictions and that the maximum sentence that can become spent is a 30-month prison sentence. Therefore he cannot be deported by virtue of a spent conviction. He submitted that he not been to Somalia since 1998 and that the judge considered the decision of MOJ at paragraph 39 – 41 of his decision. It would be unreasonable to expect him to return to Mogadishu.

Decision on error of law:

65. Having carefully considered the competing submissions of the parties in the light of the decision of the FtTJ, and the applicable case law I am satisfied that the grounds of challenge advanced by the Respondent do demonstrate an error of law in the FtTJ's decision. I shall set out my reasons for reaching this decision.

66. It is submitted on behalf of the Respondent that the judge failed to have regard to the country guidance, MOJ & Others (Return to Mogadishu) CG [2014] UKUT.

67. There is no challenge to the assessment of the FtTJ whereby he dismissed the appellant's claim for refugee status on account of his ethnicity as a Bajuni or risk of indiscriminate violence (Article 15 (c) at paragraphs 41-42. His analysis is consistent with the findings in MOJ that a person who is an ordinary citizen would not be at risk on return to Mogadishu by reason of absence abroad, the general security situation there, from forced recruitment by Al-Shabaab or for any reason relating to clan membership.

68. In MOJ, the Upper Tribunal found that there had been durable change in Mogadishu, in the sense that the Al-Shabaab withdrawal was complete and there was no real prospect of a re-established presence within the city and further that the significance of clan membership in Mogadishu has changed. At the time of that decision, it was found that there are no clan militias in Mogadishu, there was no clan violence and no clan-based discriminatory treatment, even for minority clan members. These are the findings in 2014 based on evidence from the preceding years, which remain binding today, five years later, and whilst the FtTJ made reference to evidence in the more up to date CPIN's available, he was not satisfied that he would be subjected to violence which has reached the required standard for an Article 15 c risk.

69. I was referred to the country guidance head note and set this out below for convenience:

    (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. 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 showed an overdrawn account although father's account 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© 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) (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© 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.

70. The evidence before the FtTJ was extremely limited. There was no bundle of documents presented on behalf of the appellant and the witness statement referred to by the FtTJ of July 2018 and recorded at paragraph 15 (ii) provided no factual detail concerning his circumstances when in Somalia or his circumstances in the United Kingdom thereafter.

71. The appellant's factual background was equally not without its problems. The appellant had not given a consistent account concerning his background. When he originally claimed asylum in 1998 he failed to complete the SEF form and gave no factual detail sufficient for his claim to be established (see decision letter 12 January

2001 at A1). Mr Olufunwa's submission that he should have been granted asylum in 1998 cannot succeed in light of the appellant's failure to comply with providing evidence as to his circumstances. In 2009, his claim for asylum as recorded in the decision letter at C3 was that he had been born and lived in Kismayo with his mother, brother and sister and that he did not know its father. He made reference to being beaten in Kismayo by other clan members when he was in his 20s and 1995 he decided to leave. His inability to provide a consistent account was highlighted by the respondent at paragraph 28 – 29. In the further submissions sent in 2014 recorded at G3, he claimed that he was born in southern Somalia and remained there during his early childhood but that he moved to Kenya when he was aged 12 or 13. Consequently there is no consistent account given by the appellant as to his life in Somalia or any account as to events in the United Kingdom. His claim made on Article 8 grounds was that he had built up and established a "significant private and family life" but no details have ever been forthcoming either before the Secretary of State before the Tribunal.

72. The judge did recognise that the evidence was extremely limited and recorded that in essence the only evidence concerning the appellant was the respondent's acceptance that he was a Somalian citizen, that he was from the Bajuni tribe and the concession recorded [14] that Kismayo was his home area and whether he could be expected to live in Mogadishu (see paragraph 38 for the summary).

73. Given the lack of clear and cogent evidence beyond those basic facts and against the background of non-compliance by this appellant in a number of significant ways, the FtTJ was required to give clear reasons for any findings made bearing in mind that the burden was on the appellant to prove his factual background.

74. I accept the submission made by Ms Petterson that the judge did not give adequate reasons for finding that he would have no prospects of securing access to a livelihood in Somalia. The assessment is made at paragraph 44 – 46 and whilst the judge took into account that the appellant had not lived in Somalia since he was 24 years of age (although that was contrary to the appellant's account given in 2014), the FtTJ did not give weight to a number of factors in this assessment as recorded in the decision of MOJ. As to his language ability, given his length of residence and his asserted claim to be culturally integrated to the UK, his English language ability was a relevant consideration. At its highest the judge took into account at [45] that the appellant "seems to be able to now speak English." There was no assessment as to how that ability to speak English would assist in establishing a real prospect of securing access to a livelihood upon return to Mogadishu. The prevalence of language speakers there alongside the pool of low skilled employment were aspects of the analysis which was missing.

75. In addition there was no consideration of the material in MOJ and others concerning the expectation that returnees would be able to access the economic boom. The Tribunal addressed this point in the CG case:

> "It is beyond doubt that there has been huge inward investment, large-scale construction projects and vibrant business activity. Land values are said to be "rocketing" and entrepreneurial members of the diaspora with access to funding are returning in significant numbers in the confident expectation of launching successful business projects. The question to be addressed is what, if any, benefit does this deliver for so called "ordinary returnees" who themselves are not wealthy businessmen or highly skilled professionals employed by such people. "

The conclusion reached concerning the view that economic opportunities were available only for "the elite", at para 349, was this:

> "This is a view that is not altogether easy to understand, and we are unable to agree with it. The evidence is of substantial inward investment in construction projects and of entrepreneurs returning to Mogadishu to invest in business activity. In particular we heard evidence about hotels and restaurants and a resurgence of the hospitality industry as well as taxi businesses, bus services, drycleaners, electronics stores and so on. The evidence speaks of construction projects and improvements in the city's infrastructure such as the installation of some solar powered street lighting. It does not, perhaps, need much in the way of direct evidence to conclude that jobs such as working as building labourers, waiters or drivers or assistants in retail outlets are unlikely to be filled by the tiny minority that represents "the elite".

76. In this context, The FtTJ did not have regard to the evidence, discussed in MOJ that returnees are said to be taking jobs at the expense of long term residents who have never been away, or the evidence that many of the unemployed youth of Mogadishu are simply not looking for work, being content to live idle lives, while being in receipt of support from remittances from abroad, food and other aid available and, in some cases, rental income from agricultural land that they do not wish to work themselves (see paragraph 43 of AAW).There was no reference in the analysis as to why a healthy male adult would not be able to access the labour market. Nor did it take in to account the evidence in the decision letter that he had employment in Somalia as a fisherman and had also been able to be self- supporting in Kenya where he had employment as a waiter and had obtained sufficient resources to leave Kenya and obtain entry to the UK (see paragraph 52 of the decision letter).

77. The analysis centres upon the need of clan support. At paragraph [44] the FtTJ made reference to their being a presence of Bajuni in Mogadishu but cited the decision in MOJ that "although people can sometimes obtain support from their clan such help is only likely to be forthcoming from majority clan members, as minority clans they have little to offer." Whilst at paragraph 353 it was stated that "it may be that, like other residents of Mogadishu, he would be more likely to succeed in accessing a livelihood with the support of a clan or nuclear family." But, again, that observation must be read together with the sentence that precedes it:

"For those reasons we do not accept Dr Hoehne's evidence that it is only a tiny elite that derives any benefit from the "economic boom". Inevitably, jobs have been created and the evidence discloses no reason why a returnee would face discriminatory obstacles to competing for such employment. It may be that, like other residents of Mogadishu, he would be more likely to succeed in accessing a livelihood with the support of a clan or nuclear family." Therefore being from a minority clan did not mean that he could not access the economic boom.

78. The FtTJ did not have regard to the evidence, discussed in MOJ that returnees are said to be taking jobs at the expense of long term residents who have never been away, or the evidence that many of the unemployed youth of Mogadishu are simply not looking for work, while being in receipt of support from remittances from abroad, food and other aid available and, in some cases, rental income from agricultural land that they do not wish to work themselves (see paragraph 43 of AAW).

79. Whilst the FtTJ found that he had no family living in Mogadishu, as set out in MOJ and AAW at [64], the absence of that support was not a disqualification to access to work.

80. On the question of whether the FtJ wrongly failed to take into account the possibility of financial assistance in terms of return packages available, that was an issue raised in the decision letter at paragraph 58 (see MOJ at [239] and [423]).The FtTJ stated at [45] that he would be entitled to assistance from the respondent by that it would be "finite." The reference in MOJ is to a grant of up to £1,500 for voluntary returnees. This appellant would not be a voluntary returnee, based on his immigration history. However in AN & SS (Tamils – Colombo – risk?) Sri Lanka CG [2008] UKAIT 00063 it was said that a person could not argue destitution in circumstances where they refuse to avail themselves of such a grant simply by refusing to return voluntarily. This was a further factor which was not take into account in the overall assessment and even if it were a " finite amount" there was no consideration as to whether that would assist him in the short term and alongside any ability to work which could avoid any possible residence in an IDP camp as found by the FtTJ at [47].

81. I do not accept the submission made on behalf of the appellant that the FtTJ addressed those matters which were relevant to the issue of return to Somalia. And I therefore accept that the submissions made on behalf of the respondent that the FtTJ did not provide a full and clear analysis concerning risk of return.

82. This brings me to the second ground which relates to the FtTJ's conclusion that the appellant would be at risk of inhuman or degrading treatment of serious harm therefore allowed the appeal on Article 3 grounds.

The "Said point":

83. The respondent submits that the FtTJ erred in law in allowing the appeal on Article 3 grounds and relies upon the decision of the Court of Appeal in Said v SSHD [2016] The decision in Said has been referred to in a number of decisions which include SSHD v MA (Somalia) [2018] EWCA Civ 994 and in SSHD v MS (Somalia) [2019] EWCA Civ 1345.The FtTJ did not make any reference to the decision in Said or the later decision of MA (Somalia). Ms Petterson was aware of the decision of MA (Somalia) which was in support of her appeal. Neither advocate addressed the decision any further in their submissions before the Upper Tribunal.

84. As confirmed by the Court of Appeal in Secretary of State for the Home Department v Said [2016] EWCA Civ 442, Article 3 was intended to protect persons from violations of their civil and political rights, not their social and economic rights. The return of a person who was not at risk of harm because of armed conflict or violence would not in the case of economic deprivation violate Article 3 unless the circumstances were such as those in N v UK [2005] 2 AC 296 (see paragraph 34 of MA (Somalia)). The main conclusion on this point in Said is at paragraph 18 which states as follows:
"These cases demonstrate that to succeed in resisting removal on Article 3 grounds on the basis of suggested poverty or deprivation on return which are not the responsibility of the receiving country or others in the sense described in para 282 of Sufi and Elmi, whether or not the feared deprivation is contributed to by medical condition, the person liable to deportation must show circumstances which bring him within the approach of the Strasbourg Court in the D and N cases."

85. There is some concern expressed by the Court of Appeal in Said as to possible conflation between factors relevant to the assessment of internal relocation, humanitarian protection and Article 3 in MOJ, which need to be set out in full. The discussion is at paragraphs 26 to 31 which states as follows:

> "26. Paragraph 407(a) to (e) are directed to the issue that arises under Article 15(c) of the Qualification Directive. Sub-paragraphs (f) and (g) establish the role of clan membership in today's Mogadishu, and the current absence of risk from belonging to a minority clan. Sub-paragraph (h) and paragraph 408 are concerned, in broad terms, with the ability of a returning Somali national to support himself. The conclusion at the end of paragraph 408 raises the possibility of a person's circumstances failing 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.
>
> ...

28. In view of the reference in the paragraph immediately preceding para 407 to the UNHCR evidence, the factors in paras 407(h) and 408 are likely to have been introduced in connection with internal flight or internal relocation arguments, which was a factor identified in para 1 setting out the scope of the issues before UTIAC. Whilst they may have some relevance in a search for whether a removal to Somalia would give rise to a violation of Article 3 of the Convention, they cannot be understood as a surrogate for an examination of the circumstances to determine whether such a breach would occur. 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 which at para 34 UTIAC expressly understood itself to be following.

29. Having set out its guidance, UTIAC then turned to consider IDPs, about which each of the experts had given some evidence. It recognised that the label was problematic because there were individuals who are considered as internally displaced persons who have settled in a new part of Somalia in "a reasonable standard of accommodation" and with access to food, remittances from abroad or an independent livelihood. UTIAC considered that the position would be different for someone obliged to live in an IDP camp, the conditions of some of which "are appalling", para 411. It continued by quoting from evidence of armed attacks on IDP camps, of sexual and other gender-based violence and the forcible recruitment of internally displaced children into violence, albeit that it did not accept the evidence it quoted. UTIAC also mentioned overcrowding, poor health conditions and (ironically) that the economic improvements in Mogadishu were leading to evictions from IDP camps in urban centres with vulnerable victims being unable to seek refuge elsewhere.

30. It is immediately apparent that the discussion of this evidence, which is culled from expert reports, understandably touches on concerns about violence, which in Article 3 terms would be analysed by reference to the approach in MSS and Sufi and Elmi cases, and aspects of destitution, which would be analysed by reference to the approach in the N and D cases. The conflation continues in para 412:

> "Given what we have seen, and described above, about the extremely harsh living conditions, and the risk of being subjected to a range of human rights abuses, such a person is likely to found to be living at a level that falls below acceptable humanitarian standards."

Having further discussed the contradictory evidence about how many people lived in IDP camps, UTIAC concluded that "many thousands of people are reduced to living in circumstances of destitution" albeit that there was no reliable figure of how many people lived in such destitution in IDP camps. The determination continued:

> "420. Whilst it is likely that those who do find themselves living in inadequate makeshift accommodation in an IDP camp will be

> experiencing adverse living conditions such as to engage the protection of Article 3 of the ECHR, we do not see that it gives rise to an enhanced Article 15© risk since there is an insufficient nexus with the indiscriminate violence which, in any event, we have found not to be at such a high level that all civilians face a real risk of suffering serious harm. Nor does the evidence support the claim that there is an enhanced risk of forced recruitment to Al Shabaab for those in the IDP camps or that such a person is more likely to be caught up in an Al Shabaab attack ...
>
> 421. Other than those with no alternative to living in makeshift accommodation in an IDP camp, the humanitarian position in Mogadishu has continued to improve since the country guidance in AMM was published. The famine is confined to history ... The "economic boom" has generated more opportunity for employment and ... self-employment. For many returnees' remittances will be important ...
>
> 422. The fact that we have rejected the view that there is a real risk of persecution or serious harm or ill treatment to civilian returnees in Mogadishu does not mean that no Somali national can succeed in a refugee or humanitarian protection or Article 3 claim. Each case will fall to be decided on its own facts. As we have observed, there will need to be a careful assessment of all the circumstances of a particular individual."

31. I entirely accept that some of the observations made in the course of the discussion of IDP camps may be taken to suggest that if a returning Somali national can show that he is likely to end up having to establish himself in an IDP camp, that would be sufficient to engage the protection of Article 3. Yet such a stark proposition of cause and effect would be inconsistent with the Article 3 jurisprudence of the Strasbourg Court and binding authority of the domestic courts. In my judgement the position is accurately stated in para 422. That draws a proper distinction between humanitarian protection and Article 3 and recognises that the individual circumstances of the person concerned must be considered. An appeal to Article 3 which suggests that the person concerned would face impoverished conditions of living on removal to Somalia should, as the Strasbourg Court indicated in Sufi and Elmi at para 292, be viewed by reference to the test in the N case. Impoverished conditions which were the direct result of violent activities may be viewed differently as would cases where the risk suggested is of direct violence itself."

86. The question of whether the risk of deprivation on return would lead to a violation of Article 3 of the ECHR was considered in MA (Somalia). The Court of Appeal consider that it was bound by the decision in Said, and confirmed that there is no violation of Article 3 by reason of a person being returned to a country which for economic reasons could not provide him with basic living standards.

87. It had been advanced in MA that the situation in Somalia was brought about by conflict, which is recognised by the European Court of Human Rights as an exception to the analysis. The Court however concluded at paragraphs 63 -64 that:-

> "63. The analysis in *Said*, by which this Court is bound, is that there is no violation of Article 3 by reason only of a person being returned to a country which for economic reasons cannot provide him with basic living standards. Mr Sills however contends that that situation is brought about by conflict, which is recognised by the European Court of Human Rights as an exception to this analysis.

It is true that there has historically been severe conflict in Somalia, but, on the basis of *MOJ*, that would not necessarily be the cause of deprivation if the respondent were returned to Somalia now. The evidence is that there is no present reason why a person, with support from his family and/or prospects of employment, should face unacceptable living standards".

88. It is well established that in Article 3 cases where the risk to the individual is not from treatment emanating from intentionally inflicted acts of the public authorities in the receiving state or from those of non-State bodies in that country when the authorities there are unable to afford him appropriate protection; it is only in very exceptional circumstances that there would be a violation of Article 3. The principles are summarised by the European Court of Human Rights in N (see paragraphs 42-44).

89. In the decision of The Secretary of State for the Home Department v MS (Somalia [2019 EWCA Civ 1435, Hamblen LJ made observations between [73] and [76] of his judgment as to the correct approach to be taken to consideration of whether Article 3 is made out in respect of the particular risk, and the guidance given by the Upper Tribunal in its country guidance decision in MOJ.

90. At paragraph 73-74, Hamblen LJ made reference to headnote (xi) which sets out paragraph 408 of the decision in MOJ and that paragraph 408 referred back to the matters set out in paragraph 407h. At paragraph 75, Hamblen LJ made reference to the decision in Said that the court disapproved of paragraph 408 of the guidance insofar as it purported to establish the circumstances which removed Somalia would infringe Article 3. On the facts of the decision before the court, it was determined that the FTT by relying upon applying paragraph 408 in determining whether there will be a breach of Article 3, accordingly applied the wrong legal test.

91. As set out above, the Court of Appeal in Said, MA (Somalia) and MS (Somalia). confirmed that the test to be applied in relation to Article 3 in cases such as the present, is that set out in N, such that it is only in very exceptional circumstances that there would be a violation of Article 3 and there would be no such violation by reason of a person being returned to a country which for economic reasons cannot provide him with basic living standards.

92. When looking at the decision of the FtTJ in the present appeal it seems to be the position that he allowed the appeal on the basis that the appellant he would not be able to secure any livelihood on return and would therefore be a risk of destitution,

inhuman treatment and serious harm. This is confirmed at paragraph 50 (iv) in his concluding paragraph. Accordingly the FtTJ did not apply the correct legal test.

93. I do not ignore the point in Said that factors in paragraphs 407(h) and a 408 of MOJ may have some relevance to an assessment of Article 3, but in light of the error having been established in Ground 1, it has been demonstrated on the factual assessment that he could not meet the high threshold established in N for a breach of Article 3, or in the alternative to show that relocation to Mogadishu would be unreasonable or unduly harsh.

94. I am therefore satisfied that the decision of the FTT J did involve the making of an error on a point of law and the decision is set aside.

95. I am required to consider how the decision should be remade. In this respect I should refer to the position of his legal representatives. Mr Olufunwa has previously represented the appellant. At the hearing before the FtT it was recorded that the appellant had been represented until "7 February 2019… however, his representative withdrew and notified the Tribunal by letter that day that they had done so, as they had no instructions had been unable to contact the appellant." However before this Tribunal Mr Olufunwa stated that he had not withdrawn from representing the appellant and has therefore not been re-instructed. He stated that he had been on record as acting for him throughout the process save that he was not on record on the day of the hearing. He stated the next time he had contact with him was when he called one of his friends and the appellant contacted him immediately after the hearing. He said that he had received an email from the appellant sending him the determination. He made reference to having written to the respondent on 31 July 2019 to confirm that he was still representing the appellant but that this was ignored. However it does appear that no confirmation was sent to the Tribunal directly and throughout the proceedings since the re-promulgation of the decision in April 2019, the appellant has been noted as having "no representative."

96. The position has therefore been clarified by his legal representative that he remains instructed on behalf of the appellant and remains in contact with him which explains the witness statement in the bundle dated 7 September 2019. In those circumstances, and given the nature of the appeal, I consider that the appeal should be remitted to the First-tier Tribunal where further fact-finding and analysis will be undertaken at that hearing with the appearance of the appellant who has legal representation. As he continues to be legally represented, there would be nothing to prevent a full witness state being prepared and his attendance at the hearing. Further argument will also include the issues raised in relation to Article 3. As the FtTJ allowed the appeal on Article 3 grounds he did not consider Article 8, and that also remains outstanding.

97. I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal. That reads as follows:

"[7.2] The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-
(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

98. Thus, I have reached the conclusion that it is appropriate to remit it to the First-tier Tribunal for a fresh decision on all matters.

Notice of Decision

99. The decision of the First-tier Tribunal involved the making of an error on a point of law and is therefore set aside. It is remitted to the First-tier Tribunal for a fresh hearing.

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. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Upper Tribunal Judge Reeds

Date 29/10/2019

Upper Tribunal Judge Reeds