Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07499/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 January 2019	**On 28 January 2019**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

AM
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Toal, Counsel instructed by Wilsons Solicitors
For the Respondent: Mr J McGirr, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Somalia born in 1997. On 24 July 2017 the respondent made a decision to refuse a human rights claim made by the appellant, the effect of which was a decision to deport him as a result of his criminal offending. His appeal came before First-tier Tribunal Judge Wyman ("the FtTJ") who allowed the appeal on Articles 3 and 8 grounds. In relation to humanitarian protection, her decision was unclear.

2. Both parties appealed against the FtTJ's decision and the appeal came before me and Yip J at a hearing on 12 June 2018. We decided that there was no error of law in the FtTJ's decision allowing the appeal on Article 8 grounds but that the FtTJ had erred in her assessment of Article 3, having regard to the decision of the Court of Appeal in *Secretary of State for the Home Department v Said* [2016] EWCA Civ 442. Our initial (error of law) decision is included as an annex to this decision on re-making and reference should be made to it for the full background to the appeal, including our assessment and conclusions in respect of the decision of the FtTJ.

3. As is clear from our error of law decision, the re-making of the decision is concerned with Article 3 and humanitarian protection. At this point it is useful to quote what we said in our error of law decision in respect of Article 3 and humanitarian protection. At [33]–[38] we said as follows:

> "*Ground 3: Article 3*
>
> 33. The Respondent challenges the FtTJ's decision that the Appellant's Article 3 rights would be breached on return. The Respondent submits that the FtTJ failed to give clear reasons for her conclusion. The Respondent also complains that the FtTJ failed to take account of assistance available from the Facilitated Returns Scheme or the possibility of clan support. It is also contended that, having found that the Appellant was unskilled, she failed to take account of the prospect of unskilled work or self-employment, given the economic boom in Mogadishu. Mr Avery suggested that an able-bodied person should not have a difficulty in reintegrating.
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> 34. Mr Hoshi for the Appellant argues that this aspect of the FtTJ's decision as well-reasoned. He says that the FtTJ went through the checklist in *MOJ* carefully, explaining her finding that he would be destitute on return. He contends that no error of law has been identified and that Ground 3 is in reality just a bare disagreement with the FtTJ's decision.
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> 35. The FtTJ set out the County Guidance from the headnote of *MOJ* in full. However, she did not refer to the subsequent decision of the Court of Appeal in *Secretary of State for the Home Department v Said* [2016] EWCA Civ 442, to which we referred the parties. It would appear that *Said* was probably not drawn to her attention. Indeed, it was not relied upon in the Respondent's Grounds of Appeal.
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> 36. In *Said*, Burnett LJ said [28]:
>
> > "I am unable to accept that if a Somali national were able to bring himself within the rubric of para 408, he would have established that his removal to Somalia would breach article 3 of the Convention. Such an approach would be inconsistent with the domestic and Convention jurisprudence …"
>
> Paragraph 408 deals with the point included as xi. in the headnote.
>
> 37. Although the FtTJ did carefully consider the checklist in *MOJ* and, as we have already indicated, made important factual findings, including that the Appellant would not be able to rely on clan support, it appears from her judgment that she regarded an assessment that the Appellant fell within the category described at xi. in the headnote as the end of the matter.

> Having regard to *Said*, this represents an error of law and we do not consider that the FtTJ's finding in relation to Article 3 can be maintained.
>
> 38. Having concluded that the FtTJ erred in law in her conclusions in relation to humanitarian protection and Article 3, we set aside those parts of her decision (in so far as it can be said that she made any decision on humanitarian protection). We consider that there needs to be a further hearing in the Upper Tribunal for a re-making of the decision in those respects only. The FtTJ's decision to allow the appeal on Article 8 grounds on the basis that he came within para. 399A is to stand."

4. At the resumed hearing before me sitting alone, Mr Toal's focus was solely in relation to Article 3. He accepted that the appellant had been convicted of a serious crime (the offences having been robbery, attempted robbery, two counts of possessing an imitation firearm and one of having a blade in a public place, for which he received a total sentence of five years' detention). Mr Toal said that he was not arguing that the appellant should not be excluded from humanitarian protection.

Submissions

5. Mr Toal relied on his skeleton argument which represents a detailed and comprehensive articulation of his reasons for arguing that what was said in said in *Said* by Burnett LJ was both *obiter* and indeed wrong in law.

6. I summarise the written and oral submissions as follows. In the skeleton argument Mr Toal refers to existing country guidance decisions in relation to Somalia, namely *NM and Others (Lone women – Ashraf) Somalia CG* [2005] UKIAT 00076, *HH and others (Mogadishu: armed conflict: risk) Somalia CG* [2008] UKAIT 0022, *AM and AM (armed conflict: risk categories) Somalia CG* [2008] UKAIT 00091, *AMM and others (conflict; humanitarian crisis; returnees; FGM) Somalia CG* [2011] UKUT 00445 (IAC) and *MOJ & Ors (Return to Mogadishu) Somalia CG* [2014] UKUT 00442 (IAC). What was said in those cases about humanitarian conditions and displaced persons, and the circumstances of those being forced to live in IDP camps was highlighted.

7. It is argued that what was said in *Said* by Burnett LJ about *MOJ & Ors* failed to take into account the wealth and analysis of background material that was before the Tribunals that issued those country guidance decisions, in particular the Tribunal in *MOJ & Ors*, and is thus wrong in law. It is further argued that in any event what was said in *Said* was *obiter*, as could be seen from, for example, [32] of that decision. It is pointed out that in *Said* there was no reference to the Tribunal's earlier country guidance concerning the issue of whether having to live in an IDP camp would breach Article 3. Thus, it is argued that what was said in *Said* misunderstood the Tribunal's reasoning in *MOJ & Ors*.

8. In contrast, the decision in *MOJ & Ors* was "entirely congruent" with Article 15(b)/Article 3. Furthermore, the suggestion at [28] of *Said* to the effect that [407(h)] of *MOJ & Ors* may have been concerned with internal relocation is not consistent with what was said in *MOJ & Ors* itself.

9. The appellant relies on what was said in *Secretary of State for the Home Department v AH (Sudan)* [2007] UKHL 49 about an expert Tribunal's assessment of the law in its

specialised field and the caution which should be exercised concerning appeals from such Tribunals. It is argued that there is a presumption that the expert Tribunal will have correctly understood and applied the law unless it is clear that it misdirected itself in law. Thus, *Said* should not have interfered with the country guidance given by the specialist Tribunal in *MOJ & Ors*.

10. In his oral submissions Mr Toal amplified his arguments, emphasising what I may describe as the 'chain of assessment' in the Tribunal's country guidance cases of the issue of IDP camps and humanitarian conditions. It was submitted that it is established that exceptional circumstances may lead to a breach of Article 3 as a result of humanitarian conditions, as was in fact accepted in *Said* at [14].

11. The decision in *AH (Sudan)* was emphasised in terms of its applicability to the judgment of the Court of Appeal in *Said*. It was further emphasised that the panel of judges in *MOJ & Ors* was a particularly senior panel. It was thus submitted that it was inconceivable that such an experienced Tribunal would have fallen into the error suggested by Burnett LJ in *Said*.

12. It was acknowledged on behalf of the appellant, as indeed it was in the skeleton argument, that the Court of Appeal itself in *Secretary of State for the Home Department v MA (Somalia)* [2018] EWCA Civ 994 considered itself bound by *Said*. However, it was submitted to me that the Court of Appeal was itself mistaken in treating *Said* as binding because what was said about Article 3 by Burnett LJ was *obiter*. In addition, Mr Toal submitted that *MA* merely adopted *Said* but did not add to it.

13. In his submissions Mr McGirr said that *Said* was good law and should be applied. It was also suggested that the appellant's submissions before me made no reference to Somaliland which is where the appellant was from. It was submitted that it may be possible to return the appellant directly to Hargeisa. As I understood the submission it was to the effect that that would avoid any possibility of the appellant finding himself in an IDP camp in or around Mogadishu.

14. In his reply Mr Toal referred me to aspects of the FtTJ's decision, submitting that it was clear that she had made her decision with reference to Somaliland as well as Somalia itself.

Assessment

15. So far as humanitarian protection is concerned, as indicated at the outset, it was not contested on behalf of the appellant but that he was excluded from humanitarian protection. It is not necessary for me to consider that matter much further, except to refer to the error of law decision at [12] which sets out the terms of paragraph 339D. It was accepted that the appellant has been convicted of a serious crime. It is not necessary then, for me to analyse further the respondent's case on this as set out in the decision letter, although noting what is said in the error of law decision about the respondent's case in that respect as set out in the decision letter not being entirely clear. To clarify however, I am satisfied that the appellant is to be excluded from the grant of humanitarian protection with reference to paragraph 339D(iv) on the basis that there are serious reasons for considering that he has committed a serious crime.

16. On the *Said* point, I can express my conclusions very shortly. I do not accept that what was said by Burnett LJ in *Said* at [26] and [28] was *obiter*. The court was considering whether the appellant's removal to Somalia would amount to a breach of his Article 3 rights. Quite apart from the detailed legal analysis given by the court on that point, at [1] the issue to be determined in the appeal was identified as whether the Upper Tribunal was right to conclude that the deportation of Mr Said to Somalia would breach his Article 3 rights. A factual and legal analysis of that issue was undertaken. What was said at [32] in the concluding section of the judgment is not a basis for deciding that what was said was *obiter*.

17. Furthermore, as was frankly accepted on behalf of the appellant before me, the Court of Appeal in *MA (Somalia)* itself, at [63], said that it was bound by the analysis in *Said*. It would be a bold step indeed for me to decide that although the Court of Appeal itself said that it was bound by what was said in *Said*, I should find that I was not bound by it. To come to such a conclusion the argument before me would have to be very compelling indeed, and I do not consider it to be so.

18. In any event, even if what was said in *Said* is *obiter*, I consider it to be of such persuasive authority that I should follow it.

19. The brevity of my conclusions in respect of the arguments advanced on behalf of the appellant plainly do not reflect the industry and endeavour involved in the submissions advanced on his behalf. That however, is because I consider it unarguable but that I am bound by the decision of the Court of Appeal in *Said*, just as the Court of Appeal itself felt bound by that decision in *MA (Somalia)*.

20. It was not suggested on behalf of the appellant that there was any other basis by which he could succeed in his appeal on Article 3 grounds other than that upon which the FtTJ based her decision which has been found to be wrong in law and set aside. The inevitable conclusion is that the appellant's appeal on Article 3 grounds must be dismissed.

Decision

21. The decision of the First-tier Tribunal involved the making of an error on a point of law in its conclusions with reference to Article 3 of the ECHR and humanitarian protection. Its decision in those respects having been set aside, the appeal on Article 3 and humanitarian protection grounds is dismissed.

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

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

Upper Tribunal Judge Kopieczek 21/01/19

ERROR OF LAW DECISION

IAC-AH- -V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07499/2018

THE IMMIGRATION ACTS

Heard at Field House
On 12 June 2018

Decision & Directions Promulgated

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Before

MRS JUSTICE YIP
UPPER TRIBUNAL JUDGE KOPIECZEK

Between

AM
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr B Hoshi, Counsel, instructed by Wilson Solicitors LLP
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND DIRECTIONS

1. The parties are identified as Appellant and Respondent as before the First-tier Tribunal. Both have been granted permission to appeal the decision of First-tier Tribunal Judge Wyman ("the FtTJ") promulgated on 22 March 2018 which allowed

his appeal against deportation under Article 8 and Article 3 grounds but did not allow the appeal on humanitarian protection grounds.

2. The Appellant's appeal raises a single simple point, namely that, having found that the Appellant was not excluded from humanitarian protection and that his appeal should be allowed on Article 3 grounds, the FtTJ ought to have formally allowed the appeal on humanitarian protection grounds pursuant to s. 84(1)(b) of the Nationality, Immigration and Asylum Act 2002.

3. The Respondent contends that the FtTJ was wrong to find that the Appellant was not excluded from humanitarian protection and that she was wrong to allow the appeal under Article 8 or Article 3.

4. It is agreed that the Appellant's appeal stands or falls with our conclusions on the Respondent's appeal in relation to the findings that the Appellant was not excluded from humanitarian protection and that his Article 3 rights would be breached if he were returned.

The background to the appeal

5. The Appellant is a citizen of Somalia. He is now aged 20. He came to the United Kingdom in 2001, aged 4. The Appellant's mother was granted refugee status. In 2002, the Appellant's brother was granted leave to remain as he had been included on their mother's asylum claim. The Appellant's claim for leave was refused as supporting documentation was not provided for him. In 2007, the Appellant's mother and brother were granted British citizenship but the Appellant's application for naturalisation was refused as he did not then have valid leave to remain. He was granted indefinite leave to remain in 2010.

6. The Appellant began offending as a teenager and further offending led to a Youth Rehabilitation Order. He breached the terms of that order and went on to commit further serious offences. In July 2013, aged 15, he was convicted of two counts of robbery, one attempted robbery, two counts of possessing an imitation firearm and one of having a blade in a public place. He was sentenced to a total of five years' detention. That sentence reflected the totality of his offending, the longest sentence for an individual offence being 36 months on each of the two robberies.

7. The Appellant was issued with a decision to deport. In December 2015, he submitted representations as to why he should not be deported. His protection and human rights claims were refused in April 2016. There followed a series of appeals and fresh decisions, as set out in the FtTJ's decision, culminating in the Respondent's decision dated 24 July 2017 to refuse the Appellant's protection and human rights claims and to maintain the decision to deport him. It was against that decision that the FtTJ allowed his appeal on Article 8 and Article 3 grounds.

The Respondent's grounds

8. The Respondent's grounds contend that the FtTJ:

i. failed to give adequate reasons for finding the Appellant was not excluded from humanitarian protection;

ii. erred in law in finding that the Appellant was socially and culturally integrated in the UK and that he would face significant obstacles to integration if returned to Somalia or Somaliland;

iii. failed to give adequate reasons and erred in law in finding that Article 3 would be breached if the Appellant was returned.

Ground 1: exclusion from humanitarian protection

9. The Respondent referred to the very brief reasons given by the FtTJ at paragraphs 122 to 123. Although the offences were committed while the Appellant was a juvenile, the nature and seriousness of the offences and evidence contained in the forensic psychology report of Dr Cordwell suggested he remained a danger to the community. Therefore, the Respondent contended, the FtTJ should have found that he was excluded from humanitarian protection under para. 339D of the Immigration Rules.

10. Mr Hoshi acknowledged that the reasons given by the FtTJ were not very clear. However, he defended the reasoning on the basis that it adequately dealt with the submissions made by the Respondent at the hearing. Mr Hoshi, who appeared below, told us that the submissions now being made about the contents of the psychological report and the risk of re-offending were not made to the FtTJ. The sole basis on which the Respondent gave for excluding the Appellant from humanitarian protection was "In view of the sentences passed on you, it is considered that your crime is serious enough to justify the loss of your protection." The FtTJ dealt with the Respondent's contention on the basis of the submissions made to her by noting that the Appellant was only 15 when sentenced and that, according to the sentencing judge, he had been influenced by others.

11. In those circumstances, we have some sympathy for the FtTJ and understand the brevity of her reasons. However, we do consider that there was an error of law in this part of her decision.

12. It was not entirely clear which sub-paragraph of para. 339D was relied upon by the Respondent. Sub-paragraphs iii and iv required consideration. A person will be excluded from the grant of humanitarian protection if:

> *iii. there are serious reasons for considering that they constitute a danger to the community or to the security of the United Kingdom; or*
>
> *iv. there are serious reasons for considering that they have committed a serious crime;*

Sub-paragraph iv was inserted by an amendment made in November 2016. However, the Respondent's decision made in July 2017 continued to refer to the rule as it was before that amendment. The Respondent therefore referred to sub-paragraph iii but the reasoning referred only to the seriousness of the crime(s) committed by the Appellant.

13. The FtTJ ought to have identified the relevant sub-paragraphs and considered all the material evidence with reference to the tests set out there.

14. The test for what constitutes a "serious crime" within the meaning in sub-paragraph iv is not set out in the rules. Mr Avery suggested it is to be decided by reference to s.72 of the Nationality, Immigration and Asylum Act 2002. Mr Hoshi contended that the presumption that someone convicted of an offence for which they were sentenced to a period of imprisonment of at least two years shall be presumed to have been convicted of a particularly serious crime and to constitute a danger to the public should not apply here. The FtTJ set out s.72(2) in her decision and said that she had taken it into account. It is not clear, however, how she reconciles her conclusion at paragraph 97 with the conclusion at paragraph 123 that the Appellant is not excluded from humanitarian protection.

15. Some guidance as to the principles applicable in assessing whether something constitutes a serious crime is to be found in *AH (Algeria) v Secretary of State for the Home Department* [2012] EWCA Civ 395. That was a case involving exclusion from refugee status under Article 1F. However, we consider that the reasoning may be applied in considering the loss of humanitarian protection. In *AH*, Ward LJ said [52]:

> "Although an ordinary word, "serious" has shades of meaning and the appropriate colour is given by the context in which the word is used. What may be serious for one purpose may not be serious for another. The context here is that the crime which the refugee has committed must be serious enough to justify the withholding of the protection he would otherwise enjoy as a person having a well-founded fear of persecution …"

He went on [54]:

> "Sentence is, of course, a material factor but it is not a benchmark. In deciding whether the crime is serious enough to justify his loss of protection, the Tribunal must take all facts and matters into account, with regard to the nature of the crime, the part played by the accused in its commission, any mitigating or aggravating features and the eventual penalty imposed."

16. It does not seem to us that the FtTJ did take all material facts and matters into account in coming to the conclusion that she did. She referred to the mitigating factors that the Appellant was only 15 and had been influenced by others but does not appear to have balanced the serious aggravating factors. The Appellant committed two robberies armed with an imitation handgun. In one case, he used it as a weapon, "pistol whipping" the victim, causing a laceration to his head. This was plainly very serious offending, as the sentencing judge said. The Appellant's age and the influence of others were reflected in the sentence, which otherwise would have been significantly longer.

17. Further, having set out the findings of Dr Cordwell that there remained a high risk of the Appellant reoffending with a moderate to high level of future interpersonal violence, the FtTJ did not carry this through into her consideration of whether the Appellant was to be excluded from humanitarian protection.

18. In the circumstances, we are satisfied that the FtTJ fell into error in her conclusion that the Appellant was not excluded from humanitarian protection, because she failed to take all relevant factors into consideration.

19. It is not apparent that the FtTJ in fact made any actual decision on the Appellant's claim for humanitarian protection. In light of what we say below, such a decision will be required in due course.

Ground 2: private life under para 399A IR

20. The parties were agreed that, as the longest sentence for any one offence was three years' detention, the Appellant's case fell to be considered under para. 399A. The Respondent accepted the first limb (lawful residence in the UK for most of his life) was made out but challenged the FtTJ's findings on the other two limbs. In relation to social and cultural integration, the Respondent referred to *Bossade (ss.117A-D interrelationship with Rules)* [2015] UKUT 415 (IAC) and stressed that integration in the UK should not be based on length of residence alone. The Respondent contended that the pattern of his offending demonstrated that he was not culturally and socially integrated and that his detention from the age of 15 had isolated him from society. The Respondent also contended that the FtTJ failed to address the question of why a healthy, young single male could not integrate into Somalia and failed to give clear reasons for finding that he could not form a private life on return. The Respondent also challenges the FtTJ's finding that there were very compelling circumstances as set out under para. 398(c).

21. Mr Hoshi contended that this ground was wholly devoid of merit. He said that the FtTJ's decision on the second limb was clearly not based on length of residence alone and that the challenge to the finding that he was socially and culturally integrated into the UK amounts to nothing more than a bare disagreement with the FtTJ's conclusion. Further, he supported the FtTJ's conclusion that there would be very significant obstacles to his integration in Somalia as being underpinned by detailed and careful reasoning. He pointed out that, even if the Respondent was successful on the arguments under para. 399A, the finding that there are "very compelling circumstances" within the meaning of para.398(c) would mean that the public interest in deportation would be outweighed and the FtTJ's decision on Article 8 grounds must be preserved. The Respondent had not identified any separate grounds for challenging that finding, although Mr Hoshi accepted that the grounds did contain a bare challenge to that finding.

22. At paragraphs 100 and 101 of the decision, the FtTJ found that the Appellant was socially and culturally integrated into the UK. She noted the Respondent's argument that the Appellant's offending meant that he was not socially and culturally integrated. Against this, she noted that the Appellant had lived here since he was 4 years old and that he attended school here. He speaks English fluently and had local friends. Indeed, she noted that he was involved in offending behaviour with local contacts.

23. We do not think that the involvement in offending with British criminals can properly be relied on as demonstrating social and cultural integration. Offending behaviour cannot properly be said to evidence social integration. However, this part of the FtTJ's reasoning needs to be read in light of the observation that the Appellant was influenced by others. Those others, it appears, were the "local contacts". The FtTJ might have expressed herself better but if paragraph 100 is read as a whole it is clear that she understood that the Appellant's offending counted against him in considering the issue of integration but did not consider that it prevented a finding of social and cultural integration in all the circumstances of the case.

24. We agree with Mr Hoshi's submission that it is readily apparent that the FtTJ's decision was not based on length of residence alone. While there are some similarities with the case of *Bossade*, equally there are differences. Bossade was older than this Appellant and had spent significant periods of his residence in prison, excluded from society. Even when not in prison, his pattern of offending showed that his lifestyle was anti-social. Each case must, of course, turn on its particular facts. The Appellant had come to the UK at the age of 4 and was 15 when he committed the relevant offences. He had been excluded from society through his detention and had not spent time in the community as an adult. His behaviour continued to be anti-social during his first three years in custody, but he then became more settled and compliant. The FtTJ, who had the benefit of hearing the Appellant give evidence, had to weigh the factors pointing towards and away from social and cultural integration. Having done that, she found in the Appellant's favour on this issue.

25. We do not say that all judges would have reached the same conclusion. However, this was a case in which a balancing of competing considerations was required, and we consider that the FtTJ was entitled to reach the conclusion that she did.

26. The FtTJ dealt with the question of whether there would be very significant obstacles to the Appellant's integration back in Somalia or Somaliland at paragraphs 102 to 111. On any view, this involved fairly detailed reasoning.

27. The FtTJ properly cited the leading case, *Kamara v SSHD* [2016] EWCA Civ 813 and also had regard to the Country Guidance in *MOJ & Ors (Return to Mogadishu) Somalia CG* [2014] 442 (IAC). The FtTJ therefore correctly identified the legal framework within which she was to consider all the evidence placed before her.

28. The Respondent complains that the FtTJ "failed to give clear reasons as to why a healthy young single male who would have had the benefit of a United Kingdom education where there are no language issues would not despite some difficulties and challenges not be able to form a private life". With respect, this somewhat misstates what the FtTJ was required to decide. She was not considering whether "a healthy young single male" could form a private life but whether this young man with his particular circumstances could. She made important findings, which are not challenged, including that he would have no support or financial provision from his family; he had very limited understanding of his clan background and would not get

support from a clan; he would have no reasonable prospect of securing employment. The Appellant had not returned to Somalia at all since he left. Mr Hoshi further pointed out that the Appellant's ties to Somaliland were in practice non-existent. His paternal grandfather had been born there into a majority clan but had left when he was young. The Appellant had no other connection to Somaliland.

29. It is true that the FtTJ did not refer to the possibility of the Appellant taking advantage of the reintegration package worth £1500 which is mentioned in *MOJ*. It is not clear whether this was specifically raised before her. However, even if it was, we do not consider the failure to specifically mention that amounts to an error of law given the thorough reasoning set out in the decision.

30. The FtTJ gave more than adequate reasons for her conclusion on this issue. Her reasoning contains no error of law and she was entitled to decide as she did.

31. Within Ground 2, the Respondent also challenges the FtTJ's finding that there were "very compelling circumstances" in the Appellant's case. The Respondent refers to paragraph 116 of the decision. If fact, the finding and the reasoning for it comes earlier, see paragraphs 112 to 113. Given our conclusion that the FtTJ was entitled to find that the Appellant's case fell within para. 399A, it is unnecessary for us to consider this aspect further.

32. We reject Ground 2 of the Respondent's appeal and uphold the FtTJ's decision in relation to Article 8.

Ground 3: Article 3

33. The Respondent challenges the FtTJ's decision that the Appellant's Article 3 rights would be breached on return. The Respondent submits that the FtTJ failed to give clear reasons for her conclusion. The Respondent also complains that the FtTJ failed to take account of assistance available from the Facilitated Returns Scheme or the possibility of clan support. It is also contended that, having found that the Appellant was unskilled, she failed to take account of the prospect of unskilled work or self-employment, given the economic boom in Mogadishu. Mr Avery suggested that an able-bodied person should not have a difficulty in reintegrating.

34. Mr Hoshi for the Appellant argues that this aspect of the FtTJ's decision as well-reasoned. He says that the FtTJ went through the checklist in *MOJ* carefully, explaining her finding that he would be destitute on return. He contends that no error of law has been identified and that Ground 3 is in reality just a bare disagreement with the FtTJ's decision.

35. The FtTJ set out the County Guidance from the headnote of *MOJ* in full. However, she did not refer to the subsequent decision of the Court of Appeal in *Secretary of State for the Home Department v Said* [2016] EWCA Civ 442, to which we referred the parties. It would appear that *Said* was probably not drawn to her attention. Indeed, it was not relied upon in the Respondent's Grounds of Appeal.

36. In *Said*, Burnett LJ said [28]:

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

Paragraph 408 deals with the point included as xi. in the headnote.

37. Although the FtTJ did carefully consider the checklist in *MOJ* and, as we have already indicated, made important factual findings, including that the Appellant would not be able to rely on clan support, it appears from her judgment that she regarded an assessment that the Appellant fell within the category described at xi. in the headnote as the end of the matter. Having regard to *Said*, this represents an error of law and we do not consider that the FtTJ's finding in relation to Article 3 can be maintained.

38. Having concluded that the FtTJ erred in law in her conclusions in relation to humanitarian protection and Article 3, we set aside those parts of her decision (in so far as it can be said that she made any decision on humanitarian protection). We consider that there needs to be a further hearing in the Upper Tribunal for a re-making of the decision in those respects only. The FtTJ's decision to allow the appeal on Article 8 grounds on the basis that he came within para. 399A is to stand.

39. The parties are to have careful regard to the following directions:

DIRECTIONS

(1) Any further evidence relied on by either party is to be filed and served no later than seven days before the next date of hearing.

(2) In respect of any person whom it is proposed to call to give oral evidence, there must be a witness statement drawn in sufficient detail to stand as evidence-in-chief such that there is no need for any further examination-in-chief. Any such witness statement must be filed and served no later than seven days before the next hearing.

(3) All further evidence relied on by either party must be contained within a supplementary paginated and indexed bundle and must be filed and served no later than seven days before the next day of hearing.

(4) There must be a skeleton argument on behalf of the appellant filed and served no later than seven days before the next date of hearing.

(5) The parties must at the next hearing be in a position to make submissions as to what findings of fact made by the FtTJ can be preserved.

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

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

Mr Kopieczek dated 16/07/18