



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/32717/2014

Heard at Field House  
On 16 December 2019

Decision Promulgated  
On 13 January 2020

**THE IMMIGRATION ACTS**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

SY  
(anonymity order made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr Briddock instructed by Duncan Lewis & Co Solicitors (Harrow Office)

For the Respondent: Mr T Lindsay Senior Home Office Presenting Officer.

**DECISION AND REASONS**

1. This is the resumed hearing of an appeal that came before a panel composed of the Honourable Mr Justice Lane and Upper Tribunal Judge Hanson who concluded in the determination of 9 March 2018 as follows:

41. At the hearing on 5 March, we announced we had concluded that the respondent did have power under section 76 of the 2002 Act to revoke the appellant's indefinite leave to remain and that the First-Tier Tribunal Judge had erred in law in holding that he could not substitute his discretion for that of the respondent. Accordingly, the decision in the appeal fell to be remade.

42. Having heard submissions from Mr Bundock and Mr Wilding, were further concluded that, given the passage of time since the hearing in December 2014, up-to-date evidence concerning the appellant would be required. The Tribunal accordingly adjourned the remaking of the decision (to be taken in the Upper Tribunal), having made case management directions.

### Preliminary issue.

2. Mr Briddock raised as a preliminary issue that although it appears to have been given that the decision to revoke ILR under section 76 engages article 8 and that the relevant date is the date of the hearing it was necessary for this tribunal to decide as a preliminary issue: (i) whether article 8 ECHR is engaged by the decision to revoke ILR; and (ii) whether the relevant date is the date of the Secretary of State's decision, which in this case is 22 July 2014, or the date of hearing, 16 December 2019.
3. The appellant's case is that article 8 is engaged and that the relevant date is the date of the hearing but refers to two decisions which post-date the Upper Tribunal's decision in this appeal, the first of which is *R (on the application of J1) v Special Immigration Appeals Commission v Secretary of State the Home Department* [2018] EWHC 3193 (Admin) [J1] heard by Supperstone J who handed down judgement on 23 November 2018. The case concern revocation of ILR under s76 of the 2002 Act in a case brought under the previous appeal regime as is this appeal.
4. At [40] of [J1] it is written:
  40. I conclude that the appeal against the revocation of the Claimants ILR is to be considered by reference to the facts in existence at the time of the decision unless Article 8 ECHR is engaged, in which case, having regard to the approach adopted by SIAC in *ZZ*, and the observation of the Court of Appeal in that case (see paras 32 – 33 above) the position may be different. I will therefore next consider whether Article 8 is engaged in the present case.
5. In considering whether article 8 was engaged on the facts of [J1] it was found at [71]:
  71. In the present case, as a result of the events and decisions described in Ms Balmforth's witness statement at paras 10 and 11 (see para 50 above, and see the SIAC judgement at para 6 set out in Factual Background at para 5 above), the Claimants ILR has been revoked but there is no extant decision to grant him limited leave with conditions. That being so, in my view, Article 8 is not engaged in this case.
6. Mr Briddock refers to the later decision of the Court of Appeal who on 16 April 2019 handed down its judgement in *Balajigari v Secretary of State for the Home Department* [2019] EWCA Civ 673 which considered whether article 8 was engaged in a decision not to grant ILR and concluded it was engaged.
7. It was submitted on the appellant's behalf that whilst *J1* consider the revocation of ILR under section 76 and *Balajigari* the refusal to grant ILR under the Immigration Rules, both considered whether article 8 applies to an ILR decision.

The Court of Appeal set out its main judgement on this point at [90] in the following terms:

90. We returned to the case where the effect of the refusal of an application for T1GM ILR does not in itself render the applicant liable to removal forthwith (subject to suspension pending administrative review), either because a period of limited leave granted previously has not yet expired or because the appellant is entitled to leave on some other basis. This is less straightforward, but we do not believe that the position is fundamentally different. The Secretary of State's decision that the appellant's case falls within paragraph 322(5) necessarily means that any existing leave can be curtailed under paragraph 323 and that any application for leave to remain on a different basis would fall to be refused: Part 9 applies of course to leave to remain (or enter) on any ground. Indeed logically the Secretary of State *ought* to curtail any existing leave to remain in such a case, since the basis of ground (5) is that the migrants presence in the UK is undesirable (and that there are no discretionary grounds why he or she should be granted leave nonetheless). That being so, it seems to us that an applicant in this category is, in substance, equally "liable to removal" with an applicant who at the moment of refusal only enjoyed section 3C leave. Any other result would inevitably lead to cases with arbitrarily different results. In the nature of things any period of unexpired leave for T1GM ILR applicants is likely to be short, and it will be unsatisfactory to say that article 8 was engaged in the case where the refusal renders the applicant liable to removal forthwith but not where he or she still had a few days limited leave to run.
8. The underlying decision in this appeal is the Secretary of State's decision that the appellant is liable to deportation and that he will be removed from the United Kingdom if his removal is possible for legal reasons. In this case a letter dated 22 April 2014 addressed to the appellant confirms that the Secretary of State, having considered and assessed the circumstances of his case, decided not to pursue cancellation/cessation of his refugee status which remained intact.
9. There is merit in Mr Briddock's submission that decisions of the Court of Appeal are binding and are to be preferred over a judgement of the High Court, although the position of the Upper Tribunal in relation to this matter is that article 8 has always been engaged on the facts, making the relevant date the date of the hearing.
10. In this appeal the Secretary of State in the Notice the Immigration Decision also made the decision to grant the appellant [SY] limited leave to remain of 6 months, such grant to take effect at the end of the period when the appellant can appeal under section 82(1) Nationality, Immigration and Asylum Act 2002, or one an appeal brought under that section is finally determined, withdrawn or abandoned, (or when it lapses under section 99 of that Act). As that period has not yet expired there has been no such grant to date or notice of any conditions that may be attached to the same.

## **Background**

11. On 13 October 2004 the appellant was recognised as a refugee from Somalia and granted asylum and indefinite leave to remain (ILR).

12. The printout from the Police National Computer relating to the appellant shows 6 convictions for 6 offences the most recent of which on 14 September 2010 is a conviction at Blackfriars Crown Court of attempted wounding for which the appellants was sentenced to 2 years imprisonment.
13. Between 2011 and 2014 the respondent considered whether the appellant's refugee status should be revoked resulting in the decision of 22 April 2014 not to revoke.
14. On 22 July 2014, however, the respondent had decided to revoke the appellant's ILR against which the appellant appealed.
15. Evidence produced for the purposes of the Resumed hearing, in accordance with the earlier directions, includes an updated witness statement of the appellant, a statement by Mr Patrick Ffrench, a report from a Dr Said a Clinical Psychologist, a letter from a Recovery Coordinator of the Single Homeless Project, and a letter from a third party who describes himself as [SY's] cousin.
16. The appellant in his statement dated 11 September 2019 confirms that he was able to spend time talking to Dr Glorianne Said about events that occurred to him in Somalia and, in relation to the current issues, states:
  3. The uncertainty about my status and not knowing about the future has affected me in a very bad way. I think about it all the time. I feel that I am trapped and I am incredibly frustrated. I drink to help me forget my problems but I am doing my best to cut down on my drinking. I am supported by my keyworker Patrick and other people which has helped me a lot but I cannot move forward with my life. I want to be able to do what other people around me do. I want to work, to have my own home and not live in hostels, to be able to travel, to have a family, to stop thinking about what has happened to me before and to feel better and be able to enjoy my life.
  4. I am very sorry for the offences that I committed. Being in prison was a terrible experience and I do not want to go through that again. I have tried my best to keep out of trouble since then and I have not been convicted of any other offences.
  5. I would be very happy if the Tribunal allow my appeal so I can keep my indefinite leave. I just want to have all of my immigration problems and uncertainty behind me and to be able to try to live a normal life.
17. The appellant was accompanied to the hearing, and assisted throughout, by Mr Patrick Ffrench of Sapphire Independent Housing who is employed as a Trainee Project Worker where he has worked since 31 December 2018.
18. Mr Ffrench notes the appellant arrived at Conway House hostel on 1 April 2019 having been referred from a hostel in Hackney. The appellant had a dual diagnosis of substance abuse and mental health issues. Mr Ffrench was assigned as the appellant's project worker, a role he has undertaken since the appellant's arrival. That role involves assisting the appellant with any benefit claims, helping him gain access to support with regard to substance misuse, mental health and housing. Mr Ffrench has also attended appointments with the appellant with other professionals to support him.
19. The appellant is said to engage well with assistance offered at the hostel and to have attended all appointments assigned to him although Mr Ffrench notes the

uncertainty around the appellant's indefinite leave to remain status has resulted in him feeling stressed and apprehensive about his future which has been noted to have a detrimental impact upon his mental health and his alcohol recovery. Mr Ffrench records that the appellant has reduced his alcohol consumption and has been engaging in external support agencies but lack of clarity regarding his status has resulted in him feeling negativity. In relation to the suggestion the appellant should be granted a shorter period of leave Mr Ffrench writes: *"I feel that a grant of a much shorter status would be detrimental to not only [SY's] mental health but the amount of support that I can provide for [SY] in the future"*.

20. Dr Glorianne Said is a Clinical Psychologist who interviewed the appellant on 13 November 2019 accompanied by Mr Ffrench.

21. When noting the appellant's psychiatric history Dr Said writes:

22. I reviewed [SY's] GP records as part of the assessment. His GP records state that [SY] had a diagnosis of Post Traumatic Stress Disorder in 2006 and 2007. [SY] was also noted to have alcohol dependence syndrome in 2007. [SY] was noted to have had a transient psychotic episode following his use of Khat in April 2007. [SY] reported that he has not used Khat since this experience. [SY's] records also identify a significant past event of non-compliance with prescribed medical treatment in 2016. There were no details within [SY's] records of any accessed mental health support.

22. In relation to the psychological assessment Dr Said writes:

23. I have assessed [SY's] overall mental distress using the Clinical Outcomes in Routine Evaluation 10 item version (CORE-10); Barkham et al., 2012). The CORE 10 is a valid and reliable measure of global psychological distress, which is used widely within mental health services in the UK. His clinical score was 26 (possible score range: 0-40): this lies within the clinical range and suggests severe psychological distress.

24. Following my understanding of [SY's], hearing [SY's] report of his main concerns and my clinical interview, I completed an in-depth assessment using structured assessment tools for Post-Traumatic Stress Disorder and Major Depressive Disorder.

23. Dr Said at [75], in which she sets out a summary and recommendation for mental health follow-up, writes:

75. [SY] is understood to be experiencing Post Traumatic Stress Disorder following his experiences in Somalia, as well as being assaulted in his first hostel. He has been managing his mental health difficulties of reliving traumatic memory, feeling unsafe and on edge and difficulties sleeping using alcohol. He is considered to be vulnerable by virtue of his mental health status and is likely to require ongoing support within safe and predictable circumstances to enable him to engage in appropriate care and treatment for his mental health.

24. There is between [61 - 67] of the report a discussion of the implications of maintaining the decision to revoke the appellant's ILR and between [68 - 72] of the implications if ILR is permitted. These are of importance and so are set out verbatim in the following terms:

**Implications of maintained decision to revoke ILR**

61. The challenge to [SY's] Indefinite Leave to Remain (ILR), which [SY] reports becoming aware of in 2014, is believed to have contributed to a gradual period of decline and vulnerability experienced by [SY], as he reported increased frustration and hopelessness. Following his initial appeal and transition to a new place of residence, [SY] became increasingly distressed, relapsed with his alcohol dependency, eventually becoming street homeless for a period of 4 months and residing in a sheltered hostel.
62. With support, [SY] has returned to supported accommodation and is striving to regain sobriety, return to work and access support for his mental health needs. Practically, it was explained by Mr Ffrench, [SY's] key worker, the uncertainty in relation to [SY's] status has implications for [SY] moving on within the residential pathway, as he is unlikely to be progressed into longer term accommodation and it may be hard for him to gain new employment as his right to work may repeatedly become restricted. [SY] spoke how he felt frustrated with delays in progressing with his accommodation in the past and how he felt more stressed when thinking about how he remained in 'temporary' hostels for several years. This was also echoed by [SY's] previous project worker Ms Costa in 2015. Being engaged in work was reported to be very helpful for [SY] in the past. Not being able to work and being unable to move through to more permanent accommodation, it is likely [SY] will feel frustrated and stressed as he did in the past, which will have a detrimental impact on his mental health as increasing stress scores are known to detrimentally impact mental health conditions (Liddell et al., 2019).
63. [SY] reported additional difficulties as a consequence of his leave restrictions. [SY] described feeling very upset as he was unable to get permission to travel to see a close relative who was very ill in summer 2019. [SY's] keyworker reflected that [SY] was very tearful and struggled for a few days, requiring additional support.
64. [SY's] current leave status appears to be greatly preoccupying, which is creating a barrier to him engaging with appropriate care and treatment for his mental health needs. It was noted by Dr Hemmings that it was difficult to elicit a mental health history in her assessment on the 10 September 2019 due to [SY's] preoccupation with his immigration status. Dr Hemmings identified that this was creating increased frustration and anger, which [SY] struggles to control. [SY] was described as feeling 'overwhelmed with the lack of control over his life and future'. In my understanding, [SY] appears to be attempting to cope with his feelings of frustration, stress and overwhelm using alcohol, further compounding his difficulties.
65. The uncertainty in relation to [SY's] immigration status also has implications for his mental state. A key factor in the maintenance of PTSD symptoms is current sense of threat (Grey and Young, 2008; Ehlers & Clark, 2000). Uncertain asylum status typically reduces a person's sense of safety and stability, which maintains post-traumatic stress disorder (Grey and Young, 2008), which appears to be the case for [SY]. Empirical research has shown that trauma-related mental health disorders are strongly influenced by asylum status (Heeren et al., 2014).
66. A long asylum process is a significant contributory factor in the development and maintenance of mental health difficulties and is one of the strongest predictors of reduced quality of life (Leban et al, 2004, 2008). Although [SY] continues to have refugee status in the United Kingdom, his current appeal and proposals to limit his Leave to Remain are considered psychologically similar to the asylum process as

the procedures involving legal appeals and further applications for leave to remain, create uncertainty and threat that resembles the procedures one would go through to claim asylum. Insecure immigration status has been found to be a strong predictor of emotional regulation difficulties similar to what is encountered within Complex PTSD ((Liddell et al., 2019). In my professional understanding, if the decision to revoke [SY's] indefinite leave to remain is maintained, his quality-of-life would be significantly reduced. I consider it likely that [SY] will have a deterioration in his mental health in the future if his ILR is revoked, based on how he has previously coped with uncertainty and feelings of frustration and the known impact of stress on PTSD symptoms (Hareen et al., 2014; Laban et al., 2004; 2008; Liddell et al., 2019).

67. It will be significantly challenging for [SY] to access appropriate mental health support for his PTSD if his indefinite leave to remain is revoked. From a psychological perspective, [SY] is likely to be too preoccupied with the uncertainty of his immigration status to meaningfully engage with evidence-based interventions for PTSD. The increased stress caused by the situation is likely to also present an added challenge for [SY] to limit his alcohol consumption to safe levels. Best practice guidance in the UK also recommends a period of relative stability before engaging in trauma focused therapy (NICE, 2018). From a pragmatic perspective, the current waiting times for evidence-based interventions for PTSD within dedicated mental health services for PTSD in London exceed 12 months, which is longer than [SY's] limited leave status would technically permit. Depending on how [SY's] status is interpreted by service providers, he may not be placed on a waiting list for treatment. There is a low recovery rate for PTSD without treatment; where PTSD is diagnosed 5 months after the trauma only 36.9% of people recover without treatment (Morina, Wicherts, Lobbrecht & Priebe, 2014).

#### **Implications if Indefinite Leave to Remain is permitted**

68. [SY] has demonstrated his ability to progress with his education and employment with consistent support, particularly whilst resident at Endsleigh Gardens Hostel in 2014, as evidenced by the supporting letters from his keyworker in 2015. [SY] has attended appointments with mental health services and engages well with his recovery work through Camden Alcohol Service.
69. [SY] appeared to struggle following the transition to semi-independent accommodation from a supported accommodation hostel, and reported he was less hopeful as he began to feel his situation had hit a stalemate, which appeared to exasperate his PTSD symptoms which he discussed drinking alcohol to cope with. It is my understanding, [SY] is currently in a stable and hopeful situation and he is viewing his appeal hearing as a turning point in his life. [SY] is believed to have a positive and protective relationship with his current keyworker Mr Patrick Ffrench and he has reconnected with his family which is considered to be protective. There is evidence to highlight the protective role support systems, including faith groups, have on mental health (Shields, 2004; Harandi et al., 2017). If allowed to remain in the UK with indefinite leave to remain and with his current support, it is my clinical opinion that [SY] is likely to be able to engage in effective care and treatment for his mental health needs, enabling him to resume employment and gradually work towards living more independently.
70. The National Institute for Health and Care Excellence (NICE, 2018) guidelines for PTSD states that all people with PTSD should be offered a course of trauma focused psychological therapy provided on an individual basis. This treatment should be regular and continuous and delivered by the same person. The trauma focused treatment with the strongest evidence base for people from refugee

backgrounds and those who have experienced multiple traumas is Narrative Exposure Therapy (Thompson et al., 2018; Nose et al., 2016). There is existing evidence which identifies that trauma focused therapy can be successfully delivered for clients with co-morbid difficulties including substance misuse (Boden et al., 2012; Hien et al., 2009; 2015) and emotional regulation difficulties (Bohus et al., 2019).

71. The psychological therapies available, as identified in UK practice and existing literature, for PTSD are effective and have been found to ameliorate PTSD symptoms and improve functional outcomes (NICE, 2018). The therapy, however is demanding and can be temporarily destabilising. It is recommended by NICE that psychological therapy be offered when a client is in a position of relative stability and perceived safety. Having a consistent address, without uncertainty in relation to one's right to remain in the UK and having a supportive personal network are considered to be conditions which would enable stability and perceived safety. This may enable [SY] to engage with appropriate care and treatment which would support him to progress to better psychological health and recover from PTSD and improved occupational functioning.
  72. [SY] reports that he consumes alcohol to help cope with feelings of stress; sleep at night and avoid having bad dreams related to his trauma history. Reduction of these difficulties through effective treatment for his PTSD difficulties may reduce the perceived need for consuming alcohol. [SY] is noted to have consumed more alcohol during more stressful times of his life and times when his PTSD symptoms appear heightened due to his feelings of reduced safety while in specific hostel settings. [SY] is reported to only have committed offences while intoxicated by alcohol. If [SY] is able to continue to manage his alcohol consumption, it is thought that he is better protected against reoffending. It is noteworthy that [SY] has not committed any other offences since his conviction in 2012. If [SY] was able to engage in appropriate care and treatment it is thought likely that both his alcohol use and his risk of reoffending are likely to continue to reduce.
25. Dr Said's report at [73 -74] discussed [SY's] fitness to give evidence and concludes that he was able to give evidence but should be treated as a vulnerable witness. He was, accordingly, treated as a vulnerable witness in line with the published guidance and relevant authorities. Questions put to [SY] were in an appropriate form avoiding openly adversarial challenges the type of concern to Dr Said. Mr Ffrench was able to sit next to [SY] whilst his evidence was given and at no time during the course of the hearing did either [SY], Mr Ffrench or Mr Briddock raise any concerns relating to the manner in which the hearing was conducted or [SY's] ability to partake and receive a fair hearing.

### **Submissions**

26. Mr Lindsay commenced his submissions by relying upon the respondent's decision letter. In relation to the position in law he stated there was no formal concession that Article 8 was engaged in this appeal, his view being that in light of *J1 Article8* was not engaged.
27. It was submitted in assessing the merits that things that could have been considered at the time were considered and remain relevant but that the Tribunal, in light of the decision that Article 8 can be considered in this appeal, needed to look at what had developed since.



28. It was argued that [SY] had committed a serious offence and that in exercising discretion in the refusal letter all relevant matters known to the decision maker had been taken into account.
29. In relation to the witness evidence Mr Lindsay submitted a report had now been provided but claimed the level of risk had not been considered in the report and that it remained as it was, with a real risk to the UK public.
30. Mr Lindsay submitted that less weight should be attached to Mr Ffrench's evidence as he did not know [SY] and did not have enough knowledge of him. He had only been involved with [SY] since 2019 did not know him sufficiently well to warrant weight being given to his views.
31. In relation to the report of Dr Said it was accepted this is a carefully considered and written report although Mr Lindsay submitted there were a number of problems with it sufficient to warrant little weight being placed upon the same. Specific reference was made to references in the report to [SY] being aggressive and his inability to control the same. Mr Lindsay specifically reference to [8] in which Dr Said, when recording [SY's] history in the UK, writes:

[SY] described living in a residential hostel in Parker Street, in the London Borough of Camden from 2007. [SY] reported feeling on edge, agitated and "scared all the time" while living in this hostel, as he reported a that there were often violent incidents within the hostel. [SY] described that the police would often need to attend the premises due to violence, aggression and damage to the property by other residents. [SY] reported finding it harder to sleep in this hostel. [SY] reported experiencing "flashbacks" (which he describes as memories) and that he felt he was "angry with everyone", that he felt that everyone was against him. [SY] described feeling like other residents were laughing at him. (*[SY] was very agitated within the interview when relaying his experiences at this time. He stood up frequently and pante in the room and require the use of clinical skills to get him to move on from describing his feelings of irritation about his key worker at the time.*)

32. Reference was made to further paragraphs including [20 - 21] in which [SY's] presentation was recorded and specifically [38] which Mr Lindsay submitted was of particular importance. In that paragraph Dr Said writes:
  38. [SY] reported having pronounced difficulty with feeling irritable and angry. He described finding it hard to calm down and that he can spend a lot of time shouting and pacing when he becomes angry. [SY] was observed to become very angry at different points in the assessment interview and required use of clinical skills and support from his keyworker
33. Mr Lindsay also referred to [40] of the report in which it is written:
  40. [SY] described strong feelings of being watchful and alert. He reported that this happens often when he is on his own as he believes someone will try to come in and tried to stab him. [SY] reports being very vigilant to other people's reactions and will begin to get defensive if other people are talking or laughing around him. [SY] explained that these difficulties were particularly heightened when he lived at Parker Street Hostel in 2007.
34. Mr Lindsay submitted that the reaction of [SY] as recorded is a broad statement of fact showing a real risk of further offending.

35. It was submitted that the conclusions of Dr Said are not adequately sourced and failed to deal with significant issues. It was submitted the assessment of risk at [51 - 55] is relevant as it accepts that the risk of reoffending remains low to moderate. Mr Lindsay submitted that regarding length of time [SY] has not offended, Dr Said's views of the same this is mere speculation unsupported by any evidence. Mr Lindsay submitted that the conclusions of the report are based upon the findings to risk and so can carry no weight especially in light of there being no assessment by Dr Said of whether what [SY] is said should be believed. It was submitted the report's conclusions are unsustainable when the report is read as a whole.

36. In relation to [SY's] refugee status, Mr Lindsay did not accept extrapolated results of the study referred to in Dr Said's report which are said to originate from a study commissioned by the Home Office which is being presented as results of a scientific study. It was also submitted Dr Said did not know the full extent of [SY's] antecedents relevant to the claim as recorded at [4] of the report in which [SY] claimed he had not been convicted of other offences. The PNC reveals the following offences:

27/04/2007	Highbury Corner Magistrates	Disorderly Behaviour	Conditional discharge 12 months.
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13/06/07	Horseferry Road Magistrates	common assault	Fine £100 or 1 day (served).
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9/11/07	Wood Green Crown	wounding	imprisonment 2 years.
	Deportation recommended		

7/11/08	Highbury Corner Magistrates	criminal damage	fine £100 or 1 day deemed served.
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29/11/08	Horseferry Road Magistrates	drunk and disorderly	fine £50 or one day deemed served
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14/09/10	Blackfriars Crown	attempted wounding	imprisonment 2 years.
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37. Mr Lindsay submitted it was not accepted the respondent had not exercised discretion as discretion was exercised and the guidance regarding revocation of ILR was properly considered in which antecedents are relevant. Though the passage of time is a factor since the commission of the last offence it was submitted the use of alcohol and offending risk remain relevant issues and that during the time [SY] has been in accommodation it has not been shown that he has changed. It is accepted [SY] has not continually offended but submitted the risk remains.

38. Mr Lindsay submitted that nothing had been produced in the evidence to show that at the date of decision the Secretary of State could have taken any other decision than that which she did. The conclusion in relation to the exercise of discretion was exercised lawfully at the date of decision and there could be no basis of finding otherwise. It was submitted that [SY] committed a serious

- offence which justified revocation of his ILR that he had not established any good reasons for concluding otherwise.
39. In behalf of [SY] Mr Briddock submitted it was important to consider the issues at the date of the hearing not just at the date of decision in accordance with article 8 ECHR.
  40. It was submitted that Mr Lindsay had addressed the 2014 decision and that therefore the issue clearly related to that appertaining at the date of the hearing in accordance with [SY's] skeleton argument that the exercise of discretion must consider all the circumstances including the respondent's relevant policy or guidance and the considerations identified as relevant therein.
  41. It was submitted the respondent had not properly exercise discretion as in the reasons for revocation there was no mention of the respondent's own policy applicable at the time and no reference to the fact the respondent has a discretion or the manner in which the same had been exercised.
  42. Mr Briddock referred to [44] of *J1* in which the High Court record evidence from the Head of the Special Case Unit within the Home Office setting out clearly how the Secretary of State had exercised discretion in that case. It is submitted the statement showed that clear reasons had been given as to why discretion had been exercised in the manner in which it had, contrary to the position in [SY's] appeal where there is no mention of discretion or the basis on which it had been considered.
  43. Mr Briddock submitted the respondent conflated the revocation of [SY's] refugee status with his ILR and that although some issues could be relevant to both the decision-maker does not say this is so. It was submitted that the decision-maker applied the wrong test.
  44. It was submitted the respondent's guidance at the relevant time sets out reasons for not revoking ILR in which article 8 ECHR is mentioned.
  45. Mr Briddock submitted [SY] did not receive a lengthy prison sentence and that 9 years had passed since the index offence in 2010. It was submitted that is relevant to assessing whether risk is reduced and that on the evidence the risk element had been reduced. It was submitted that Mr Lindsay's reference to previous convictions did not establish a current real risk.
  46. Mr Briddock submitted [SY's] mental health arose as a lack of access to treatment and that if he was to remain in the UK without ILR there will be no access to mental health support and treatment he requires which could lead to anger issues and commission of other offences and [SY] presenting as a danger to society.
  47. It was submitted weight could be placed upon the evidence of Mr Ffrench who had known [SY] since April 2019 in a professional capacity where he had had involvement with him on a daily basis. Mr Ffrench had given clear evidence that [SY's] alcohol use had reduced. This is his professional assessment.
  48. It was submitted the fact [SY] had not offended for some time and that there are compelling reasons/circumstances in this matter is relevant. [SY] is a refugee from Somalia, a status which is not likely to change in the future.
  49. It was further submitted the respondent's guidance states there could be circumstances in a case where it was not appropriate to revoke ILR.

50. It was submitted the issue in this case is the clear risk that arises from the impact of revocation and replacement of ILR with limited leave to remain, which Mr Briddock submits will have a debilitating effect on [SY] and is likely to hold him back in circumstances where he is more likely to lapse into vulnerability, rough sleeping, alcohol abuse and possibly antisocial behaviour. The grant of limited leave for a periods of 6 months will mean [SY] will not have the security that a grant for a longer period of time to remain in the United Kingdom will provide. The refusal clearly refers to the decision to revoke ILR and replace it with 6 months restricted leave but also to keep [SY's] position under regular review creating uncertainty as he could be removed.
51. Mr Briddock submitted that the article 8 assessment should fall in [SY's] favour with discretion being exercised differently and the appeal allowed.

### Discussion

52. It was found by the Upper Tribunal in the error of law hearing and decision of 9 March 2018 that the respondent did have the power under section 76 of the 2002 Act to revoke the appellant's indefinite leave to remain and that the First-Tier Tribunal Judge had erred in law in holding that he could not substitute his discretion for that of the respondent, as a result of which the appeal fell to be remade.
53. The respondent's decision is the Reasons for Revocation of Indefinite Leave dated 22 July 2014. At [1 - 22 (the numbering appearing to be erroneous as 12 is followed by 17)] reasons are given in the following terms:
1. On 22 April 2014, I wrote to inform you of the intention of the Home Office to revoke your Indefinite Leave to Remain. You were also provided with an opportunity to submit representations in support of your continuing entitlement to Indefinite Leave.
  2. No such representations were received regarding this.
  3. In your particular case, you applied for asylum on 23 January 2004. Your application was based on a fear of persecution if returned to Somalia, due to being a member of a minority clan. You claim that you were beaten on a regular basis and that your sisters were raped on several occasions. You claim that due to the civil war you fled to Ethiopia for two years but then returned to Somalia in 2003. Whilst in Somalia you claim to have been stabbed twice and also beaten about the head with a rifle - one such attack left you unconscious for up to three hours.
  4. Your application for asylum was refused on 3 March 2004, however it was allowed at appeal on 20 August 2004. Your appeal was allowed first on the basis that the Bravanese people was still at risk of persecution and secondly under Article 8 as it was determined that because of your fragile mental state, you were dependent on the support provided to you by your family, all of whom had been granted refugee status in the United Kingdom. On 13 October 2004 you were granted refugee status and Indefinite Leave to remain.
  5. On 14 September 2010 at Blackfriars Crown Court you were convicted of one count of attempted wounding, and sentenced to two years imprisonment.
  6. On 28 March 2011 you were served with a notice of your liability for deportation (ICD 0350AD) which included a section 72 warning. No representations were received in regard to this notice.
  7. On 4 May 2011 you were notified of our intention to revoke your refugee status.
  8. On 9 June 2011 the UNHCR were notified of our intention to revoke your refugee status and on 6 July 2011 the UNHCR responded.

9. On 22 April 2014 you were informed that the revocation of your refugee status is not being pursued. However you remain a person liable to deportation but cannot be deported for legal reasons and it was the intention to revoke your ILR. No representations were received in response to this notice.
10. You have been convicted of a crime which is believed to be sufficiently serious to warrant your deportation. While after careful consideration of all the known facts it has been concluded that you cannot be deported for legal reasons this does not mean that your crime was not particularly serious.
11. Section 72(2) of the Nationality, Immigration and Asylum Act 2002 states that 'a person shall be presumed to have been convicted of a final judgement of a particularly serious crime and to constitute a danger to the community of the United Kingdom if -
  - he is convicted in the United Kingdom of an offence, and
  - sentenced to a period of imprisonment of at least 2 years.

12. It is noted in the Judge's Sentencing Remarks, that the following was stated:

"What the probation officer says in her presentence report is that your actions were extremely reckless and could easily have had fatal consequences for the victim..."

In regard to your offence the Judge states the following:

"I am quite satisfied that you were drunk at the time and that is the background to why you behaved in such a dangerous and life-threatening way at the time".

The Judge further notes:

"So the problem is that you are a man who has a tendency to be aggressive and indeed violent and it may very well be that this is when you drink too much. That is certainly what happened in this case.

It is therefore maintained that the Judge noted the seriousness of your crime.

17. It is noted that you were sentenced to 2 years imprisonment and therefore meet the two-year threshold which defines a particularly serious crime. As you are liable to deportation, but cannot be deported for legal reasons, the Home Office is proposing to revoke your Indefinite Leave in view of the fact that Section 76(1) of the Refugee Convention now applies.
18. In light of the above, the Home Office is satisfied that, subsequent to obtaining Indefinite Leave, your conduct is so serious that it warrants the revocation of your status.
19. Section 76 of the Nationality, Immigration and Asylum Act 2002 gives the Secretary of State the power to revoke indefinite leave to enter or remain in the United Kingdom (IL) where:
  - 1) The person is liable to deportation, but cannot be deported for legal reasons.
  - 2) Leave was obtained by deception and the person would be liable to removal because of the deception, but cannot be removed for legal or practical reasons.
  - 3) The person, or someone of whom is a dependent, ceases to be a refugee as a result of
    - a. Voluntarily availing himself of the protection of his country of nationality,

- b. Voluntarily re-acquiring a lost nationality,
- c. Acquiring the nationality of a country other than the United Kingdom and availing himself of its protection, or
- d. Voluntarily establishing himself in a country in respect for which he was a refugee.

- 20. In light of the above, it has been decided to revoke your Indefinite Leave in view of the fact that Section 76(1) of the Nationality, Immigration and Asylum Act 2002 applies to you. This decision has been recorded as determined on 16 July 2014.
- 21. You have a right of appeal against the decision to revoke your Indefinite Leave to Remain under section 82(2)(f) of the Nationality and Immigration Act 2002.

- 54. There is arguable merit in Mr Briddock's submission that there is no indication in the refusal letter of any consideration being given to the exercise of discretion. Whilst, as indicated during the hearing, the difficulty faced by the decision-maker was the failure of [SY] to respond to notices advising him of the respondent's intentions, there was still an obligation upon the decision-maker to consider the discretionary aspects even if the result of that consideration was on the basis of the limited evidence available.
- 55. The ability to challenge the exercise of discretion in this case has already been decided.
- 56. There was in existence at the relevant date a policy regarding the exercise of discretion when considering whether it was appropriate in all the circumstances to revoke ILR which recorded that there may be exceptional circumstances in an individual case where it would not be appropriate to revoke a person's indefinite leave, notwithstanding the fact that they appear to fall within the remit of this policy. Examples might include, but are not limited to, persons with serious mental health issues, victims of human trafficking or victims of domestic violence. Each case must be considered on its individual merits.
- 57. The guidance also recognises that passage of time spent in the UK may constitute a reason for not revoking indefinite leave, with that of more relevance being the length of time that has passed since the incident which is causing the review of a person's continuing entitlement to indefinite leave. The decision maker was required to factor in that the longer the person has been in the UK or, more crucially, the more time it has been since the incident, the less likely it will be appropriate to revoke ILR. There is no mention of how this aspect has been assessed in the decision. Even if [SY] had not responded to the notification of the intention to revoke his ILR issues such as length of time that had passed since the commission of the offence are matters of which the decision-maker would have been aware and should have given due consideration to.
- 58. As this is a case in which discretion should have been exercised having given consideration to the exercise of the power accordance with the respondent's own guidance's, which has not been shown to have been the case, the decision is unlawful.
- 59. It considering whether to substitute an alternative decision, the preliminary finding recorded above is that article 8 ECHR can be considered on the facts of this case and so matters must be considered at the date of the hearing, especially

in light of the fact that those matters relied upon by [SY] are relevant to compelling and compassionate circumstances.

60. The protected right being relied upon by [SY] in his private life in the UK it not been submitted that family life recognised by article 8 exists on the facts.
61. I find weight can be placed upon the report of Dr Said and the evidence of Patrick Ffrench. The reasons relied upon by Mr Lindsay in support of his assertion little weight should be attached to their evidence have no merit. Dr Said is professionally qualified to produce the report which sets out her opinion of [SY]. Whilst the PNC may give rise to questions concerning the reliability of some of [SY's] self-reporting the assessment in the report is not based solely on this factor. It is also the case that the PNC records events prior to the event that led to the decision under challenge in 2014. It is not a case of [SY] stating that he had not offended since 2010 and the PNC disclosing otherwise.
62. Patrick Ffrench is, arguably, the person best placed to give the evidence regarding [SY's] progress as he sees him on a daily basis as his assigned keyworker and is a person with whom [SY] has clearly developed a close and trusting relationship.
63. Mr Lindsay in his submissions commented upon the assessment of risk undertaken by Dr Said at [51 – 55] of the decision under challenge which is in the following terms:

51. When reviewing risk, factors that are taken into consideration include what are understood to be 'static' factors and others which are known as 'dynamic' factors (Coid, 2016).

#### Risk to others

52. Static factors relating to [SY's] risk to others include [SY's] exposure to past violence and his involvement in aggressive acts as a perpetrator are considered to be static factors. In my clinical opinion these factors increase overall risk but are not considered to a big predictor of his increased likelihood of risk or harm to others.
53. [SY's] subjective experience of stress, his alcohol use, uncertainty in relation to his future and living situation are understood to dynamically influence his ability to regulate his emotions. These are considered to be protective factors, which lower his understood risk to others. Protective factors include the presence of supportive others such as [SY's] keyworker and his family; predictably in his living situation and his ability to work are also considered to be dynamic in nature.
54. [SY] denied having thoughts or intentions to harm others. Without a decline in his mental health or escalation in his alcohol dependency is understood to be low-moderate. This is informed by the long period of time [SY] has not been involved in violent or aggressive acts towards others as well as his improved functioning with his current support system in place, his relative sense of safety in his current hostel and reduce his alcohol intake.

#### Risk to self

55. [SY's] risk to self is considered to be low. [SY] denies any thoughts or intent to harm himself or take his own life. He denies any previous attempts at taking his

own life or harming himself. [SY] is thought to be vulnerable to self-neglect when his mental health is poor, highlighted by his increased alcohol use and his experiences of ill-health as a consequence of his alcohol consumption.

64. What the report of Dr Said does is record a situation that existed both at the date of the respondent's decision and the date of hearing.
65. [SY's] situation is one in which he cannot be removed from the United Kingdom as a result of the fact he has been granted refugee status that the respondent has decided not to revoke. Had refugee status been revoked the issues at large will have been different, for if any challenge to that decision failed [SY] as a person liable to be deported, would be removed from the United Kingdom and the date for such removal would be set. The current situation, however, is that [SY] is to remain in the United Kingdom. The respondent's stated intention, in line with normal practice, is to grant restricted leave in the hope that at some point in the future country conditions may change warranting revocation of [SY's] protection status. The power the respondent to do so is not an issue in this appeal.
66. The focus is really upon the impact of the removal of [SY's] ILR and the imposition of the shorter period of leave and whether that will result in a disproportionate interference in a protected right. The importance of the evidence from Dr Said is that it sets out the consequences if the decision to revoke ILR is maintained and reinstated. That view is supported by the evidence of Patrick Ffrench who records the positive progress made by [SY] in a settled environment and the potential risk of lack of certainty in relation to key life issues.
67. The evidence, to a certain extent, points to the conundrum in this case, in that [SY] committed a serious offence which entitled the respondent to consider deporting him from the United Kingdom and would no doubt have done so had this been legally possible, and which, absent discretionary circumstances warranting a different decision, justify the revocation of his ILR on the one hand, yet the clear evidence that without the degree of certainty the grant of ILR provided, including access to long-term treatment for mental health issues and the ability to secure long-term housing and employment, there is a real risk [SY] will deteriorate in terms of his mental health, alcohol consumption, and behaviour, such that he is likely to present a real risk to members of the public.
68. Whilst [SY's] refugee status remains in place the public interest weighs heavily in favour of ensuring that all that can be done is done to ensure any risk to and from [SY] is reduced and properly managed. The evidence of Dr Said is clearly that the only way this can be effectively achieved is through the grant of a stable period of leave.
69. I find it is made out there are compelling and compassionate circumstances in this case as identified in the evidence of Dr Said and Patrick Ffrench. There is also the undisputed evidence that since 2010 [SY] has not reoffended and that the chances of him reoffending are substantially reduced with the recommended support package being made available. There is also clear evidence that the circumstances that led to the earlier offending are directly linked to his mental health and consumption of alcohol as a means of dealing with identified



problems which a longer stable period of leave should enable him to address in a clinical setting, especially in light of the support that is currently available to him.

70. I find on the facts that the Secretary of State has failed to discharge the burden upon her to establish that any interference with [SY's] private life brought about by the revocation of his ILR is proportionate. I find that the proper exercise of discretion in this case leads to a conclusion that it is not appropriate to revoke [SY's] ILR during a period that he cannot be removed from the UK as a result of his refugee status. There are identified factors clearly attributed to the change of his status which it has not been shown can be resolved by the grant of restricted leave or any other proposed solution.

### **Decision**

71. **I remake the decision as follows. This appeal is allowed on human rights grounds.**

Anonymity.

72. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant [SY] is granted anonymity throughout these proceedings. No report of these proceedings (in whatever form) shall directly or indirectly identify the appellant. Failure to comply with this order could lead to a contempt of court.

Signed.....  
Upper Tribunal Judge Hanson

Dated the 7 January 2020