Upper Tribunal
(Immigration and Asylum Chamber)

AMA (Article 1C(5) - proviso – internal relocation) Somalia [2019] UKUT 00011 (IAC)

THE IMMIGRATION ACTS

Heard at Manchester CJC	**Decision & Reasons Promulgated**
On 23 October 2018	
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Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AMA
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the appellant: Mr Tan, Senior Home Office Presenting Officer
For the respondent: Mr Hussain, instructed by Broudie, Jackson & Cantor

(1) The compelling reasons proviso in article 1C(5) of the 1951 Refugee Convention, as amended, applies in the UK only to refugees under article 1A(1) of the Convention.

(2) Changes in a refugee's country of origin affecting only part of the country may, in principle, lead to cessation of refugee status, albeit it is difficult to see how in practice protection could be said to be sufficiently fundamental and durable in such circumstances.

(3) The SSHD's guidance regarding the role of past persecution can not in itself form a lawful basis for finding that removal would lead to a breach of the Refugee Convention, given the limited appeal rights at section 82 of the Nationality, Immigration and Asylum Act 2002, as amended and SF and others (Guidance – post-2014 Act) Albania [2017] UKUT 120 (IAC) 10 when read in its proper context.

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DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant.

Introduction

1. The appellant ('the SSHD') has appealed against a decision of First-tier Tribunal ('FTT') Judge Ennals dated 20 November 2017, in which he allowed AMA's appeal against a decision dated 13 June 2017 to make a deportation order.

Background

2. AMA is a citizen of Somalia. He entered the UK in 2006, when he was 14, with his father and siblings, having been granted a settlement visa to join his mother ('M'), who had been granted asylum in the UK on 17 May 2005. AMA was recognised as a refugee when he entered the UK, as evident from the SSHD's more recent decision to cease his refugee status. In his decision dated 13 June 2017, the SSHD expressly acknowledged that AMA derived his refugee status from his mother.

3. M's 2005 asylum statement provided the following information: she was born in Qoryoley, Somalia and this was her last permanent address in Somalia before she left in February 2005; she and her family members are from the Ashraf minority clan; M, her immediate family members and her extended family members were subject to sustained persecution by the Hawiye majority clan during the civil war from 1996; this led to the killings of some family members and the capture of the remaining family members who were used as forced labour and ill-treated at a camp in Qoryoley; female relatives were raped including M's two sisters and many relatives were killed either trying to escape or in attempting to defend themselves including M's two brothers, M's mother, M's nephew and M's uncle; M's husband and the older children escaped from the camp in 2004 during a period of Hawiye in-fighting; M escaped from the camp in March 2005 with the help of her uncle in Saudi Arabia who arranged for an agent to use bribery to facilitate this; M was able to leave the camp but without the younger children and arrived in the UK on 22 March 2015, after travelling via Ethiopia.

4. M was interviewed regarding her asylum claim on 28 April 2005 and recognised as a refugee in a 'grant of asylum' letter dated 17 May 2005. Following this, M's husband and children, including AMA, were granted visas to join M on 3 March 2006, and arrived on 10 April 2006.

5. Between 2009 and 2015, AMA was convicted on five occasions but was not sentenced to a period of imprisonment until 7 March 2012, when he was convicted of production of a controlled drug of Class B and commission of an

offence during a suspended sentence order and sentenced to nine months imprisonment.

6. On 1 April 2016 AMA was notified of a decision to deport him under section 5(1) of the Immigration Act 1971. There then followed a period in which representations were sought regarding the cessation of AMA's refugee status. On 18 January 2017 the UNHCR submitted detailed representations on the proposed cessation of AMA's refugee status. The UNHCR submitted that there were insufficient fundamental changes in Somalia to warrant the application of article 1C(5) of the 1951 Convention relating to the Status of Refugees ('the Refugee Convention') given the individual circumstances of AMA's case. The UNHCR drew specific attention to: the SSHD's failure to address the safety of the route of return from Mogadishu to Qoryoley, AMA's home area; the internal relocation alternative to Mogadishu should not be a relevant consideration when making a decision on the application of article 1C(5); country background reports post-dating the country guidance in MOJ and others (Return to Mogadishu) Somalia CG v SSHD [2014] UKUT 00442 (IAC) demonstrating that clan tensions continue and members of minority clans remain at a particular disadvantage, such that any improvements in Somalia cannot be considered fundamental and durable.

7. On 26 April 2017 AMA was convicted of using threatening words or behaviour, in relation to which he was fined and made the subject of a restraining order.

8. On 13 June 2017 a decision was made to cease AMA's refugee status and refuse his human rights claim. The SSHD expressly considered the UNHCR submissions and accepted "*that travel between Mogadishu and Qoryoley may expose [AMA] to risk*" but that he could safely reside in Mogadishu. The SSHD did not address the submission made by the UNHCR that this would in effect require AMA to make use of the internal relocation alternative and was inappropriate for the purposes of the cessation of refugee status.

Appeal to FTT

9. AMA's appeal to the FTT was successful. The FTT concluded that the family history of sustained and egregious persecution over many years was such that article 1C(6) of the Refugee Convention and the SSHD's policy pursuant to this as contained in the Asylum Policy Instruction on Revocation of Refugee Status dated 19 January 2016 ('the Revocation API'), applied in AMA's favour.

10. At [15] to [16] of its decision the FTT rehearsed a summary of the persecution endured by M and her family members from 1996 to 2015 and noted that this account had never been disputed by the SSHD. M's asylum claim was granted without the necessity of an appeal and her statement must have been broadly accepted to be true. The FTT also noted an absence of any evidence from the SSHD to suggest otherwise. On that basis at [17], the FTT found it "*hard to imagine a scenario that better fits the provision in Art 1(C)(6)*". The FTT adopted the language of the Revocation API in reaching the following conclusion:

"Both [AMA] as a young child, and his immediate family, suffered '*truly atrocious forms of persecution*', while they were in a camp, where they survived and witnessed '*particularly traumatic violence against family members, including sexual violence*'".

11. The FTT therefore found at [18] "*that the provisions of Article 1C and para 339A of the Immigration Rules did not apply to [AMA] and so his protection cannot be revoked*".

12. Given this finding, the FTT made it clear at [20] that he did not need to address the submission, based upon MOJ, that AMA could return to Mogadishu, but in any event found "*for what it is worth and without further argument*" that AMA could not safely return to Mogadishu in light of the guidance in MOJ.

Appeal to the Upper Tribunal ('UT')

13. At the hearing before me, Mr Tan confirmed that the SSHD wished to rely upon the grounds of appeal dated 20 November 2017 and did not place reliance upon the later grounds dated 5 January 2018. The 2017 grounds of appeal are three-fold:

    (1) As a dependent on his mother's refugee claim AMA has not demonstrated that he endured the traumatic experiences that she did in Somalia.

    (2) Article 1C(6) of the Refugee Convention cannot override paragraph 339A of the Immigration Rules.

    (3) The FTT failed to properly apply MOJ.

14. Permission was initially refused by the FTT, but granted by the UT in a decision dated 23 March 2018. UT Judge Macleman observed that "*if the judge was right about the facts, it would be hard to argue that the judge went wrong at [17] in finding that the scenario fitted Article 1C(6) of the Refugee Convention and the SSHD's guidance*". Judge Macleman considered that since article 1C(6) is not replicated within 339A of the Immigration Rules, their interaction was not dealt with by the FTT and "*qualifies for debate and answer*".

15. In a Rule 24 notice dated 18 May 2018, it was submitted on AMA's behalf that the FTT did not err in law in applying article 1C(5) of the Refugee Convention, when that is mirrored in article 11 of the Qualification Directive and the SSHD's own policy. Pausing there, although the FTT decision and the SSHD's grounds of appeal refer to article 1C(6), as will be seen from the discussion below, this was a mistake and both must have meant to refer to article 1C(5), because article 1C(6) applies to those who are stateless. No one has ever suggested this regarding AMA.

16. AMA's solicitors also provided the UT with a copy of MS (Art 1C(5)-Mogadishu) Somalia [2018] UKUT 00196 (IAC) (promulgated on 22 March 2018) and placed reliance on this in a covering letter dated July 2018.

17. At the beginning of the hearing before me, Mr Tan realistically acknowledged that the first ground of appeal in which AMA is described as a dependent on his mother's refugee claim and a person who has not necessarily experienced very similar traumatic experiences to her, is difficult to follow. AMA may have gained his refugee status in line with his mother and pursuant to family reunification but he was nonetheless recognised as a refugee in the UK, hence the decision to cease his refugee status. That approach is consistent with 3.7.1 of the Revocation API, which states that the previous policy on family reunion was to grant refugee status and leave in line under the family reunion provisions as a matter of course. Mr Tan also acknowledged that there was no dispute before the FTT that AMA spent much of his childhood with M and other family members, living and working, in effective slavery and in atrocious conditions. The reasons for the principal applicant, M being granted asylum, were therefore very similar to the reasons why AMA was granted refugee status in line with her. In light of this, Mr Tan focused his attention on the second ground of appeal and invited me to find that the FTT erred in law in failing to apply 339A of the Immigration Rules, albeit he appreciated that 339A did not sit comfortably with the SSHD's own policy, as set out in the Revocation API.

18. Mr Tan acknowledged that the third ground of appeal placed reliance on the FTT's failure to properly apply MOJ but this only became material if the second ground was not made out.

19. Finally, I invited Mr Tan to make submissions on the applicability of MS, as this was effectively raised by AMA as an alternative basis for the FTT reaching the decision it did, albeit not one articulated by the FTT. Mr Tam invited me to find that MS is inconsistent with SSHD v MA (Somalia) [2018] EWCA Civ 994 (handed down on 2 May 2018 and unavailable to the Tribunal in MS). Mr Tam however acknowledged that unlike the position in MA, the instant case is definitely an 'internal relocation case'. In other words, the SSHD accepted that AMA could not return to his home area in Qoroyley and he was being expected to relocate to Mogadishu.

20. I then heard from Mr Hussain who invited me to dismiss the SSHD's appeal for three reasons. First, the FTT was entitled to allow the appeal on Refuge Convention grounds, having found that article 1C(5) applied, and such an approach was consistent with policy and EU law. Secondly and in any event following MS, the SSHD was not entitled to cease AMA's refugee status pursuant to article 1C(5) solely on the basis of a change in circumstances in one part of the country of proposed return. Thirdly and in the alternative, as the FTT concluded, the proper application of MOJ was such that AMA is at prospective risk.

21. I reserved my decision which I now provide with reasons.

Discussion

Issue 1 - Application of article 1C(5) of the Refugee Convention

Applicable law

22. The Refugee Convention as supplemented by the Protocol relating to the Status of Refugees of 31 January 1967 ('the Protocol') refers to 'statutory' refugees or pre-1951 refugees at article 1A(1) and then provides the definition of the 'modern' refugee at article 1A(2)

> "the term 'refugee' is to apply to any person who 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it".

23. Article 1C then states as follows:

> "C. This Convention shall cease to apply to any person falling under the terms of section A if:
> …
> (5) He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;
> Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;
>
> (6) Being a person who has no nationality he is, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;
> Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence."

24. Sub-paragraphs (5) and (6) of article 1C draw the reader's attention to a "refugee falling under" section A(1) or article A(1). The second sub-paragraphs of articles 1C(5) and (6) (which I shall refer to as the 'compelling reasons proviso') do not therefore cover all refugees and is limited in its application to refugees falling under article A(1), otherwise known as 'statutory refugees'.

25. Paragraph 136 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (Geneva, 1979) states with reference to article 1C(5):

> "The second paragraph of this clause contains an exception to the cessation provision contained in the first paragraph. It deals with the special situation where a person may have been subjected to very serious persecution in the past and will not therefore cease to be a refugee, even if fundamental changes have occurred in his country of origin. The reference to article 1A(1) indicates that the exception applies to 'statutory refugees'. At the time when the 1951 Convention was elaborated, these formed the majority of refugees. The exception, however, reflects a more general humanitarian principle, which *could* also be applied to refugees other than statutory refugees. It is frequently recognized that a person who - or whose family - has suffered under atrocious forms of persecution should not be expected to repatriate. Even though there may have been a change of regime in his country, this may not always produce a complete change in the attitude of the population, nor, in view of his past experiences, in the mind of the refugee."

26. The reasoning in this passage reflects a long-standing concern on the part of the UNHCR that the cessation clauses in the Refugee Convention were being taken too literally. A similar concern predicated the appellant's submissions in the House of Lords, in R v Special Adjudicator ex parte Hoxha [2005] 1 WLR 1063, [2015] UKHL 19. The House of Lords considered the cessation clauses, and in particular the compelling reasons proviso albeit not in a cessation case. Rather, the case concerned asylum applicants who no longer had a well-founded fear of persecution prior to the determination of their asylum claims, which were in principle well-founded at the time that they fled their country of origin. Nonetheless, the claim that the compelling reasons proviso applied to non-statutory or 'modern' refugees was rejected.

27. Lord Hope drew attention to the drafting history of article 1C(5) and concluded that the state parties were not willing either at the time the Refugee Convention was entered into or when it was amended pursuant to the Protocol, to extend the benefit of the compelling reasons proviso to non-statutory refugees – see [16] to [20] of his judgment. The Protocol recognised that new situations had arisen since the Refugee Convention was adopted and that further provisions were needed as persons who had become refugees since 1 January 1951 might not fall within its scope, and it was desirable that equal status should be enjoyed by all refugees. Although the Protocol effectively amended aspects of the Refugee Convention, such that these two instruments provide the cornerstone of the international legal regime for the protection of refugees, the preamble to article 1C(5) was left untouched because, "*although they were aware that events had moved on since 1951, the state parties were still not willing to agree to a relaxation of the limitation that had been expressly written into the proviso*". Having traced the relevant drafting history, Lord Hope concluded that, while the framers of the Refugee Convention had the opportunity to extend the benefit of the compelling reasons proviso to all refugees, a deliberate decision was taken to confine its application to the statutory refugees who had been identified in article 1A(1). A distinction was thus created between them and those identified in article 1A(2).

28. At [21] Lord Hope observed that a further opportunity to address the issue arose when the European Commission was framing its proposal for a Council

Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees. The proposal, which was in the same terms as Article 11 of Council Directive 2004/83/EC ('the QD'), repeated the language of articles 1C(5) and (6) but omitted the provisos. Article 11 of the QD therefore states:

> "1. A third-country national or a stateless person shall cease to be eligible for subsidiary protection when the circumstances which led to the granting of subsidiary protection status have ceased to exist or have changed to such a degree that protection is no longer required.
>
> 2. In applying paragraph 1, Member States shall have regard to whether the change in circumstances is of such a significant and non-temporary nature that the person eligible for subsidiary protection no longer faces a real risk of serious harm."

29. The QD has been superseded for EU members states other than the UK, Ireland and Denmark by the recast Qualification Directive 2011/95/EU ('the recast QD'). Article 11 in the recast QD provides an additional sub-paragraph (3) as follows:

> "3. Paragraph 1 shall not apply to a beneficiary of subsidiary protection status who is able to invoke compelling reasons arising out of previous serious harm for refusing to avail himself or herself of the protection of the country of nationality or, being a stateless person, of the country of former habitual residence."

30. The EU has therefore explicitly amended its law in the form of the recast QD to extend the benefit of the compelling reasons proviso to modern refugees. That does not however assist in the proper interpretation of the Refugee Convention or the QD applicable to the UK. It is clear from the text of these two instruments that there is no legal duty to apply the compelling reasons proviso exception to refugees other than the very limited category of statutory refugees. This analysis was accepted by the House of Lords in Hoxha but has also been accepted by respected academic commentators in the field – see for example, *The Law of Refugee Status*, Second Edition by James Hathaway and Michelle Foster at 6.1.4.

31. Paragraph 339A of the Immigration Rules reflects the wording of the Refugee Convention and the QD and states that a person's grant of asylum will be revoked or not renewed if the Secretary of State is satisfied that:

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

32. Paragraph 339A goes on to state that:

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

33. It follows that I reject Mr Hussain's submission that the FTT was entitled to apply the compelling reasons proviso contained in article 1C(5) (mistakenly referred to as article 1C(6)), to AMA. Such an approach is inconsistent with the terms of the Refugee Convention itself, the applicable QD and paragraph 339A. The FTT therefore erred in law in allowing the appeal on the basis that the SSHD could not rely upon article 1(C) and paragraph 339A, by reason of the application of the proviso.

Applicable policy

34. As Lord Hope noted in Hoxha at [22], the Commission's commentary at the time of the drafting of the QD, contains the following:

> "The Member State invoking this cessation clause should ensure that an appropriate status, preserving previously acquired rights, is granted to persons who are unwilling to leave the country for compelling reasons arising out of previous persecution or experiences of serious and unjustified harm, as well as to persons who cannot be expected to leave the Member State due to a long stay resulting in strong family, social and economic links in that country."

35. That approach is consistent with the SSHD's current position that the proviso vis à vis the Refugee Convention does not apply to a non-statutory refugee but is interpreted as reflecting a general humanitarian principle. At 4.5 of the Revocation API under the heading 'Compelling reasons arising out of previous persecution' the following is stated:

> "Article 1C(5) and (6) of the Refugee Convention contain an exception to the cessation provisions, allowing a refugee to invoke 'compelling reasons arising out of previous persecution' for refusing to re-avail himself or herself of the protection of their country of origin.
> This exception applies to cases where refugees, or their family members, have suffered truly atrocious forms of persecution and it is unreasonable to expect them to return to their country of origin or former habitual residence. This might, for example, include:
> • ex-camp or prison detainees
> • survivors or witnesses of particularly traumatic violence against family members, including sexual violence
> • those who are severely traumatised
>
> The presumption is that such persons have suffered grave acts of persecution, including at the hands of elements of the local population, and therefore cannot reasonably be expected to return. Application of the 'compelling reasons' exception is interpreted to extend beyond the actual words of the provision to apply to Article 1A(2) refugees and reflects a general humanitarian principle.
> As this provision is expected to apply only in the most exceptional of cases, any decision not to proceed with revocation on this basis must be taken by a senior caseworker."

36. The FTT was entitled to note that the SSHD's policy was relevant, in so far as the "*truly atrocious*" past persecution suffered by AMA and his family members, was undisputed and might be relevant if the need to consider internal

relocation arose. However, that finding in itself could not form a lawful basis for finding that AMA's removal from the UK would breach its obligations under the Refugee Convention – see the limited appeal rights at section 82 of the Nationality Immigration and Asylum Act 2002, as amended. Any challenge to the failure to apply a policy can no longer form the basis of a ground of appeal to the FTT – see ES (s82 NIA 2002; negative NRM) Albania [2018] UKUT 335 (IAC) at [27] and [28]. The only issue before the FTT in this case was whether AMA continued to qualify for protection under the Refugee Convention. It is important to read the headnote in SF and others (Guidance – post-2014 Act) Albania [2017] UKUT 120 (IAC) 10 to the effect that even in the absence of a 'not in accordance with the law' ground of appeal, the Tribunal ought to take the SSHD's guidance into account if it points clearly to a particular outcome, in its proper context. SF involved an assessment of the reasonableness of expecting a child to leave the UK, and the SSHD's own guidance was relevant to assisting the Tribunal to make judgments, consistent with the approach that would be taken by the SSHD – see [10] to [12].

37. In any event, the FTT did not allow the appeal because of a breach of policy but used the wording of the policy to support the view that article 1(C)(5) applied. For the reasons provided above the compelling circumstances proviso could not be lawfully applied so as to underpin a decision to allow the appeal on asylum grounds.

Issue 2 – Internal relocation and cessation

38. In MS, UT Judge Kopieczek concluded that the SSHD is not entitled to cease a person's refugee status pursuant to article 1C(5) solely on the basis of a change of circumstances in one part of the country of proposed return. The nub of his reasoning is to be found at [51] to [57].

> "51. The Secretary of State's position as set out in the decision letter dated 15 September 2015 states at [53] and [54] that the circumstances under which the appellant was granted refugee status have now changed, because although it was accepted he was from Kismayo, "you were granted refugee status due to the situation in Mogadishu". However, relying on *MOJ & Ors*, the Secretary of State says that "there has now been a significant and enduring change in Mogadishu". Quite clearly therefore, the Secretary of State puts the situation in Mogadishu at the heart of the decision to cease the appellant's refugee status.
>
> 52. However, in my judgement the Secretary of State's approach in this respect is fundamentally flawed. The basis of the appellant's refugee claim (or more accurately the basis of his mother's claim upon which he was a dependant) is that he had a well-founded fear of persecution in the country of his nationality, Somalia. That well-founded fear of persecution arose in his home area of Kismayo. Naturally, the issue of internal relocation would have been a factor that was considered at the time of the decision to grant refugee status to the family. Presumably, although the information has not been provided, internal relocation to Mogadishu was not considered a viable option at the time. In my view it is contrary to the humanitarian principle of surrogate protection under the Refugee Convention for the Secretary of State to be able to seek to identify an area of a country where it could be said that an individual no longer has a well-founded

fear of persecution, and to which he could now relocate if the claim were now made.

53. The UNHCR's Cessation Guidelines make the point that not being able to move or to establish oneself freely in the country of origin would indicate that the changes have not been fundamental. The Secretary of State does not suggest that the appellant's claim to refugee status in terms of the risk to him in his home area has been extinguished by reason of fundamental and durable changes in the country as a whole.

54. Although it was suggested on behalf of the respondent in submissions that there was no difference in principle between the grant or the cessation of refugee status, because a person is only a refugee so long as there is no safe area of return, I do not agree. There is, in my judgement, a very significant philosophical and indeed practical difference between the grant and the cessation of refugee status, illustrated by the UNHCR Cessation Guidelines, but also reflected in the two authorities to which I have referred.

55. If the Secretary of State's position was to hold good, it would mean that a person claiming asylum would be in a more advantageous position than a person who already has refugee status and whose status the Secretary of State seeks to rescind. Thus, if the person whose claim for asylum depends on an assessment of an internal flight option, that individual would have that issue assessed on the basis of undue harshness and the reasonableness of internal relocation. However, in the case of a person whose refugee status is to be taken away, once it is decided that there is a part of the country in which the change of circumstances is of such a significant and non-temporary nature that the person's fear is no longer regarded as well-founded (in that area), that individual may be returned without the sort of examination of the issues of undue harshness and reasonableness of return to that particular area which would occur in considering a grant of refugee status. That is so notwithstanding the respondent's Asylum Policy Instruction on revocation of refugee status which I have set out at [42], which does not provide full coverage of the issue of internal relocation.

56. Thus, what was recognised in *Hoxha* as being the need for a "strict" and "restrictive" approach to cessation clauses would be significantly undermined. Put another way, it would make it easier to cease a person's refugee status than to make a grant of refugee status; a position which is contrary both to logic and principle.

57. In those circumstances, I am satisfied that the FtJ was correct to conclude that the respondent was not entitled to cease the appellant's refugee status on the basis only of the change in circumstances in Mogadishu since his claim was made. That is not to afford the UNHCR Cessation Guidelines a status of being determinative of the issue in question, but in my view it does mean that those Guidelines are correct in what they say in this respect."

39. The relevant UNHCR Cessation Guidelines (10 February 2003) state at [6] that when interpreting the cessation clauses, it is important to bear in mind the broad durable solutions context of refugee protection informing the object and purpose of these clauses. The changes need to be of a fundamental nature and durable. The UNHCR Cessation Guidelines also emphasise at [15] that a crucial

question is whether the refugee can effectively re-avail himself or herself of the protection of his or her own country, and at [17] say this:

> "In contrast, changes in the refugee's country of origin affecting only part of the territory should not, in principle, lead to cessation of refugee status. Refugee status can only come to an end if the basis for persecution is removed without the precondition that the refugee has to return to specific safe parts of the country in order to be free from persecution. Also, not being able to move or to establish oneself freely in the country of origin would indicate that the changes have not been fundamental."

40. Mr Tan submitted that the conclusion at [57] in MS that [17] of the UNHCR Guidelines is correct, was reached without the benefit of the Court of Appeal's judgment in MA, which applied the CJEU decision in Joined Cases Abdulla and others v Bundesrepublik Deutschland, 2 March 2010 (C-175/08 - C179/08). It should be noted that Judge Kopieczek made it clear that he was only referred to two authorities. These did not include Abdulla - see [45] of MS. MA was handed down after MS was promulgated. In addition, MA was not an 'internal relocation case' and neither was Abdulla. MA was a Somali national whose home area was in Mogadishu, where the SSHD proposed to remove him. Abdulla involved Iraqi nationals who were granted refugee status on the basis of persecution suffered at the hands of Saddam Hussain. The German authorities wished to revoke their refugee status relying upon the QD on the basis that although the conditions in Iraq remained generally unsettled, there had been the requisite change of circumstances such that there could no longer be said to be a well-founded fear of persecution. The judgments in MA and Abdulla therefore say little about internal relocation in the context of cessation.

41. In MA, judgment was given by Arden LJ, with whom Peter Jackson LJ agreed. Extensive references were made to the country background evidence as set out in MOJ at [9] and the reasons for the CJEU's conclusion in Abdulla, that cessation of refugee status under the QD involves an individualised and not a generalised evaluation of the changed conditions in the country of origin at [47] to [60]. Arden LJ accepted that lacking a well-founded fear of specific persecution, refugee status ceases even if the general security situation in the country of nationality is not stable and the general living conditions do not ensure a minimum standard of living. In short, Arden LJ found that it was necessary to simply determine whether any fear for a Refugee Convention reason ceased to exist such that it could be described as "significant and non-temporary" within the terms of article 11(2) of the QD. In reaching that conclusion, Arden LJ accepted at [47] that it would be inconsistent with the purposes of refugee status if protection could be ceased "*too easily*" but equally "*there is no necessary reason why refugee status should be continued beyond the time*" when the refugee is subject to persecution. Arden LJ rejected the submission that the grounds for cessation could go beyond the grounds for recognition of refugee status so as to include "*humanitarian standards*" or the protection of "*human rights in general*", and observed that "*there should be the requirement for symmetry between the grant and the cessation of refugee status*" – see [47], [51], [56] of the judgment.

42. I appreciate that at first glance this might appear inconsistent with Judge Kopieczek's observation in MS that there is a "*very significant and practical difference between the grant and the cessation of refugee status*". However, upon closer scrutiny, any difference in approach between MA and MS is more apparent than real. At no stage in his reasoning did Judge Kopieczek suggest that the cessation enquiry is a wider or more generalised one that includes the consideration of humanitarian standards unrelated to the requirements within the Refugee Convention. Indeed, Judge Kopieczek appears to agree with the need for symmetry between the grant and cessation of refugee status, when he deprecates any differences in approach to the consideration of internal relocation at [55]. Similarly, Arden LJ's approval of symmetry between the grant and the cessation of refugee status, does not obviate the obvious differences that exist. First, the burden of proof is on the applicant to establish that he is entitled to refugee status, but the burden of proof is upon the state to demonstrate that refugee status should cease. Secondly, there is a strict and restrictive approach to cessation for reasons explained by Lord Brown in Hoxha at [65-66] and the UNHCR Cessation Guidelines. That is reflected in the high and exacting test that must be met. Contrast this with the benefit of the doubt given to asylum claimants. Thirdly, whilst the same lower standard of proof must be applied when deciding whether the person meets the requirements of the Refugee Convention at both stages (see [88] of Abdulla), for there to be cessation there is the discrete and additional requirement that any change in circumstances must be of a "significant and non-temporary" nature, such that the factors which formed the basis of the refugee's fear of persecution may be regarded as having been "*permanently eradicated*" (see [73] of Abdulla).

43. Notwithstanding the differences set out above, I accept there remains a symmetry between the grant and the cessation of refugee status. As the CJEU observed in Abdulla at [89]:

> "At both of those stages of the examination, the assessment relates to the same question of whether or not the established circumstances constitute such a threat that the person concerned may reasonably fear, in the light of his individual situation, that he will in fact be subjected to acts of persecution."

44. In addition, the individual approach to determining whether a person is entitled to refugee status remains when considering whether to revoke that status. As the CJEU in Abdulla indicates at [76], for the purposes of assessing a change of circumstances, regard must be had to "*refugee's individual situation*". In MA, Arden LJ approved of the "*individualised approach*" in this respect, at [49].

45. All the ingredients in article 1A(2) of the Refugee Convention must therefore be met at both stages of the examination: when determining status and whether to cease that status. This commonly requires the following: (i) a well-founded fear of persecution; (ii) for reasons relating to a Convention Reason; (iii) making the person unable or unwilling to avail himself of the protection of the country. The final ingredient is based upon the principle of surrogacy and necessarily

includes an enquiry as to whether the person can be expected to seek protection in another part of his country of origin. The widely accepted test is whether the person can be reasonably expected to internally relocate – see Januzi v SSHD [2006] UKHL 5 at [7-8] and [48-49].

46. The wording of article 1C(5) also supports this symmetrical approach. It clearly refers not just to "*the circumstances in connection with which he has been recognised as a refugee*" having "*ceased to exist*" but also to the person not being able to avail himself "*of the protection of the country of his nationality*". The principle of surrogacy is therefore found in both article 1C(5) and article 1A(2) of the Refugee Convention. There is therefore a prima facie argument that if a person is able to avail himself of protection in one part of the country then (unless that protection lacks the positive qualities required of it, including being effective / durable / fundamental / significant / non-temporary), they do not meet the refugee definition, and if they are being considered for cessation they are no longer a refugee. In other words, if effective protection is available then a person does not meet the definition of a refugee.

47. However, the reality of the situation is that the expectation that a person can avail himself of the protection of another part of his country of nationality, i.e. through internal relocation, only arises for consideration where it is accepted that there is a well-founded fear of persecution for a Convention Reason in the home area of that country. It is difficult to envisage how and in what circumstances a well-founded fear of persecution can be said to be "non-temporary", "significant" or "permanently eradicated" in a country for a particular person, wherein it is accepted that it continues in the person's home area of that same country and / or the person cannot safely move around the country. The necessary requirement for the changes to be fundamental and durable is most likely to be absent. It follows that the availability of internal relocation is generally unlikely to be a material consideration when applying article 1C(5) of the Refugee Convention or article 11 of the QD.

48. Although I note the difference in approach with the first part of [17] of the UNHCR Cessation Guidelines, in principle there remains a requirement to apply the same refugee definition for both the grant of status and cessation, and this includes a consideration of internal relocation. However, given the nature of the demanding test required to be met for cessation, it is difficult to see how in practice 'an internal relocation case' can meet the required threshold. To that extent, there is force in the last sentence of [17] of the Guidelines that where safety is limited to a specific part of the country, that would indicate that the changes have not been fundamental. At [57] of MA Arden LJ was prepared to treat the Guidelines as an important text for the purposes of interpreting the QD replicating the Refugee Convention, but considered [17] of the Guidelines to merely address internal relocation, which is separately dealt with in the QD – see [39] and [57] of MA. The Court of Appeal therefore did not provide any clear view on the correctness of [17] of the Guidelines.

49. Changes in the refugee's country of origin affecting only part of the country may, in principle, lead to cessation of refugee status provided that the

protection available is sufficiently fundamental and durable notwithstanding the absence of this in other parts of the country. It is difficult to see how in practice protection could be said to be fundamental and durable in these circumstances, but it is not necessarily impossible (particularly in a very large country). In so far as MS states that as a matter of principle, refugee status cannot cease solely on the basis of a change of circumstances in one part of the country of origin, I disagree. Whilst in principle internal relocation is relevant to whether a refugee can continue to refuse to avail himself of the protection of his country of nationality, generally speaking or as a matter of practice, it is likely to be very difficult to cease refugee status in an 'internal relocation case'. This is because by necessary implication there will be a part of the country where a well-founded fear of persecution continues (or else internal relocation would not arise) and in such circumstances the requirement that the change in circumstances be fundamental and durable or "significant and non-temporary" is unlikely to be met.

50. Mr Tan accepted that this is an 'internal relocation case' i.e. the SSHD accepted that AMA could not safely return to his home area in Qoryoley, but that he could internally relocate to Mogadishu, a city he has never lived in. Mr Tan was unable to explain how, in the context of a country such as Somalia, with a lengthy and fluid history of complex and egregious persecution by various actors in the face of an either non-existent or very weak state apparatus, there can be the requisite "significant and non-temporary" change in circumstances, if, as here, a person is accepted to have a well-founded fear of persecution in one part of the country. Mr Tan was unable to come close to explaining how the circumstances that led to AMA being granted refugee status can be said to be permanently eradicated when he is unable to travel outside of Mogadishu to his home area (the distance between Mogadishu and Qoryoley being a mere 120km).

51. It follows that although the FTT erred in law in allowing the appeal by applying the compelling reasons proviso to AMA, this is not a material error of law. On no reasonable view of the evidence would a Tribunal be able to conclude that the change in circumstances meets the high test for cessation when the SSHD has accepted that AMA remains at risk of persecution in and cannot travel to his home area.

Issue 3 – MOJ

52. The FTT did not consider that it needed to address safety in Mogadishu pursuant to MOJ, given its primary conclusion that the compelling reasons proviso applied such that the SSHD could not lawfully cease AMA's refugee status. However, the FTT briefly indicated that AMA would not be safe in Mogadishu is any event. Although all the relevant considerations pertaining to AMA were not considered, the FTT's conclusion is supported by the following extract from MOJ at [425]:

> "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."

53. Significantly, any assessment of internal relocation would have to include not just the safety but also the reasonableness of relocation i.e. whether it would be unduly harsh for the individual to relocate. The Upper Tribunal recently reviewed the authorities in support of the holistic approach to internal relocation at [79] to [90] of AAH (Iraqi Kurds - internal relocation) Iraq CG UKUT 212 (IAC). That holistic approach includes the extent and impact of past persecution – see SSHD v AH Sudan [2007] UKHL 49 at [5] and [20]. This in turn includes the extent to which the compelling reasons proviso applies to the refugee, given the SSHD's acceptance that it has a role to play in the Revocation API.

54. As set out above, Mr Tan did not place reliance on the first ground of appeal. There is therefore an un-appealed factual finding that AMA, and his close family members were the victims of atrocious and sustained persecution over the course of many years. The Revocation API recognises the role that the compelling reasons proviso might play as a matter of policy when making a cessation decision. When this is combined with the country guidance in MOJ, as summarised at [406] and [407], to the effect that AMA has no former or current links to Mogadishu and as a minority clan member will be unable to seek assistance from majority clan members or minority clan members, it is difficult to see how a conclusion could be reached that internal relocation to Mogadishu, for AMA, could be said to be anything other than unduly harsh, even on the assumption that AMA would be able to receive remittances from abroad.

55. If I am wrong in my approach to the second ground of appeal, I would nonetheless dismiss the SSHD's appeal for the reasons I have set out above in relation to the third issue.

Decision

56. The FTT's decision did not involve the making of a material error of law and I do not set it aside.

Signed: *UTJ Plimmer*

Ms M. Plimmer
Judge of the Upper Tribunal

Date:
6 November 2018