Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00096/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26th February 2018	**On 23rd May 2018**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

MAM
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant:	Mr S Muquit and Ms V Lovejoy of Counsel, instructed by Freemans Solicitors
For the Respondent:	Mr S Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Somalia born in 1993, who appealed against the Respondent's decision to refuse his protection and human rights claim dated 12 July 2016. His appeal was heard and dismissed by First-tier Tribunal Judge Trevaskis in a decision promulgated on 12 October 2016, from which he was granted permission to

appeal to the Upper Tribunal. In a decision promulgated on 16 January 2017 (annexed to this decision), Upper Tribunal Judge O'Connor found an error of law in the First-tier Tribunal's decision in respect of the appeal on the grounds of Articles 3 and 8 of the European Convention on Human Rights; set aside the decision and directed that it be re-made by the Upper Tribunal. There was no challenge to the First-tier Tribunal's findings in relation to the application of section 72 of the Nationality, Immigration and Asylum Act 2002 or paragraph 339D of the Immigration Rules and consequently, the conclusions in relation to the Refugee Convention and humanitarian protection remain standing.

Article 3 of the European Convention on Human Rights: Relevant legal background and Country Guidance

2. So far as is relevant to this appeal, section 32 of the UK Borders Act 2007 states that a foreign criminal is a person who is not a British Citizen, who is convicted in the United Kingdom of an offence and sentenced to a period of imprisonment of at least 12 months. Section 32(5) of the Act requires the Secretary of State to make a deportation order in respect of a foreign criminal unless one of the exceptions in section 33 applies. The first exception is where removal of the foreign criminal would breach his or her rights protected by the European Convention on Human Rights (or would place the United Kingdom in breach of its obligations under the Refugee Convention – although for the reasons given by the First-tier Tribunal, the Appellant is excluded from protection under the Refugee Convention by virtue of section 72 of the Nationality, Immigration and Asylum Act 2002).

3. In relation to the Appellant's claim that his deportation would breach Article 3 of the European Convention on Human Rights, the burden of proof is on the Appellant to the lower standard of a reasonable likelihood of serious harm.

4. The parties are both agreed that the Country Guidance in MOJ & Ors (Return to Mogadishu) Somalia CG [2014] UKUT 00442 (IAC) is applicable to the present appeal and neither party seeks any departure from it. Aside from the broad findings that generally a person who is an ordinary civilian would not be at risk on return to Mogadishu by reason of absence abroad, general security situation there, from forced recruitment by Al-Shabaab or for any reason relating to clan membership; the key findings for the purposes of this appeal as summarised in the headnote (taken from paragraphs 407(f) to (h), 408, 424 and 425 (the last two specifically dealing with internal relocation)) are as follows:

> *(vii) A person returning to Mogadishu after a period of absence will look to his nuclear family, if he has one living in the city, for assistance in re-establishing himself and securing a livelihood. Although a returnee may also seek assistance from his clan members who are not close relatives, such help is only likely to be forthcoming from majority clan members, as minority clans may have little to offer.*
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> *(viii) The significance of clan membership in Mogadishu has changed. Clans now provide, potentially, social support mechanisms and assist with access to livelihoods, performing less of a protection function than previously. There are no clan militias in*

Mogadishu, no clan violence, and no clan-based discriminatory treatment, even for minority clan members.

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

- *circumstances in Mogadishu before departure:*
- *length of absence from Mogadishu;*
- *family or clan associations to call upon in Mogadishu;*
- *access to financial resources;*
- *prospects of securing a livelihood, whether that be employment or self-employment;*
- *availability of remittances from abroad;*
- *means of support during the time spent in the United Kingdom;*
- *why his ability to fund the journey to the West no longer enables an appellant to secure financial support on return.*

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

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

(xii) The evidence indicates clearly that it is not simply those who originate from Mogadishu that may now generally return to live in the city without being subjected to an Article 15(c) risk or facing a real risk of destitution. On the other hand, relocation in Mogadishu for a person of a minority clan with no formal 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 prospect of having to live in conditions that will fall below acceptable humanitarian standards.

5. In terms of the Article 3 threshold to be applied, the parties are also in agreement that the present case is not a "paradigm" case as in MSS v Belgium & Greece 53 EHRR 28 but as confirmed by the Court of Appeal in Secretary of State for the Home Department v Said [2016] EWCA Civ 442, Article 3 was intended to protect persons from violations of their civil and political rights, not their social and economic rights. The return of a person who was not at risk of harm because of armed conflict or violence would not in the case of economic deprivation violate Article 3 unless the circumstances were such as those in N v UK [2005] 2 AC 296 (as summarised by Lady Justice Arden in paragraph 34 of MA (Somalia) v Secretary of State for the

Home Department [2018] EWCA Civ 994). The main conclusion on this point in Said is at paragraph 18 which states as follows:

> *"These cases demonstrate that to succeed in resisting removal on article 3 grounds on the basis of suggested poverty or deprivation on return which are not the responsibility of the receiving country or others in the sense described in para 282 of Sufi and Elmi, whether or not the feared deprivation is contributed to by medical condition, the person liable to deportation must show circumstances which bring him within the approach of the Strasbourg Court in the D and N cases."*

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

> *"26. Paragraph 407(a) to (e) are directed to the issue that arises under article 15(c) of the Qualification Directive. Sub-paragraphs (f) and (g) establish the role of clan membership in today's Mogadishu, and the current absence of risk from belonging to a minority clan. Sub-paragraph (h) and paragraph 408 are concerned, in broad terms, with the ability of a returning Somali national to support himself. The conclusion at the end of paragraph 408 raises the possibility of a person's circumstances failing below what "is acceptable in humanitarian protection terms". It is, with respect, unclear whether that is a reference back to the definition of "humanitarian protection" arising from article 15 of the Qualification Directive. These factors do not go to inform any question under article 15(c). Nor does it chime with article 15(b), which draws on the language of article 3 of the Convention, because the fact that a person might be returned to very deprived living conditions, could not (save in extreme cases) lead to a conclusion that removal would violate article 3.*
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> *…*
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> *28. In view of the reference in the paragraph immediately preceding para 407 to the UNHCR evidence, the factors in paras 407(h) and 408 are likely to have been introduced in connection with internal flight or internal relocation arguments, which was a factor identified in para 1 setting out the scope of the issues before UTIAC. Whilst they may have some relevance in a search for whether a removal to Somalia would give rise to a violation of article 3 of the Convention, they cannot be understood as a surrogate for an examination of the circumstances to determine whether such a breach would occur. I am unable to accept that if a Somali national were able to bring himself within the rubric of para 408, he would have established that his removal to Somalia would breach article 3 of the Convention. Such an approach would be inconsistent with the domestic and Convention jurisprudence which at para 34 UTIAC expressly understood itself to be following.*
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> *29. Having set out its guidance, UTIAC then turned to consider IDPs, about which each of the experts had given some evidence. It recognised that the label was problematic because there were individuals who are considered as internally displaced persons who have settled in a new part of Somalia in "a reasonable standard of accommodation" and with access to food, remittances from abroad or an independent*

livelihood. UTIAC considered that the position would be different for someone obliged to live in an IDP camp, the conditions of some of which "are appalling", para 411. It continued by quoting from evidence of armed attacks on IDP camps, of sexual and other gender based violence and the forcible recruitment of internally displaced children into violence, albeit that it did not accept the evidence it quoted. UTIAC also mentioned overcrowding, poor health conditions and (ironically) that the economic improvements in Mogadishu were leading to evictions from IDP camps in urban centres with vulnerable victims being unable to seek refuge elsewhere.

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

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

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

> *"420. Whilst it is likely that those who do find themselves living in inadequate makeshift accommodation in an IDP camp will be experiencing adverse living conditions such as to engage the protection of article 3 of the ECHR, we do not see that it gives rise to an enhanced Article 15(c) risk since there is an insufficient nexus with the indiscriminate violence which, in any event, we have found not to be at such a high level that all civilians face a real risk of suffering serious harm. Nor does the evidence support the claim that there is an enhanced risk of forced recruitment to Al Shabaab for those in the IDP camps or that such a person is more likely to be caught up in an Al Shabaab attack …*
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> *421. Other than those with no alternative to living in makeshift accommodation in an IDP camp, the humanitarian position in Mogadishu has continued to improve since the country guidance in AMM was published. The famine is confined to history … The "economic boom" has generated more opportunity for employment and … self-employment. For many returnees remittances will be important …*
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> *422. The fact that we have rejected the view that there is a real risk of persecution or serious harm or ill treatment to civilian returnees in Mogadishu does not mean that no Somali national can succeed in a refugee or humanitarian protection or article 3 claim. Each case will fall to be decided on its own facts. As we have observed, there will need to be a careful assessment of all the circumstances of a particular individual."*

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

7. The question of whether the risk of deprivation on return would lead to a violation of Article 3 of the European Convention on Human Rights was revisited in MA (Somalia). Lady Justice Arden, being bound by the decision in Said, confirmed that there is no violation of Article 3 by reason of a person being returned to a country which for economic reasons can not provide him with basic living standards. The Respondent in MA contended that the situation in Somalia was brought about by conflict, which is recognised by the European Court of Human Rights as an exception to the analysis. Lady Justice Arden however concluded at paragraph 63 that:

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

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

> *"42. Aliens who are subject to expulsion cannot in principle claim entitlement to remain in the territory of a contracting state in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling state. The fact that the applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the contracting state is not sufficient in itself to give rise to breach of art 3. The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the contracting state may raise an issue under art 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling. In D v UK … the very exceptional*

circumstances were that the applicant was critically ill and appeared to be close to death, could not be guaranteed any nursing or medical care in his country of origin and had no family there willing or able to care for him or provide him with even a basic level of food, shelter or social support.

43. The court does not exclude that there may be other very exceptional cases where the humanitarian considerations are equally compelling. However, it considers that it should maintain the high threshold set in D v UK … and applied in its subsequent case law, which it regards as correct in principle, given that in such cases the alleged future harm would emanate not from the intentional acts or omissions of public authorities or non-state bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country.

44… Advances in medical science, together with social and economic differences between countries, entail that the level of treatment available in the Contracting State and the country of origin may vary considerably. While it is necessary, given the fundamental importance of Article 3 in the Convention system, for the Court to retain a degree of flexibility to prevent expulsion in very exceptional cases, Article 3 does not place an obligation on the Contracting State to alleviate such disparities through the provision of free and unlimited healthcare to all aliens without a right to stay within its jurisdiction. A finding to the contrary would place too great a burden on the Contracting States."

9. Separately, the Appellant contends that matters have moved on from D and N following the Strasbourg Court's decision in Paposhvili v Belgium (Application no. 41738/10) as an extension of the N v UK criteria; such that the focus had moved to the decision to expose an individual to harm rather than about the blame for the innate harm which may be caused. However, Paposhvili was in the specific context of expulsion of individuals suffering from serious illness and found that there may be "other very exceptional cases" within the meaning of N v UK raising an issue under Article 3 where "the removal of a seriously ill person, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy .." [paragraph 183]. This was considered by the Court of Appeal in AM Zimbabwe v Secretary of State for the Home Department [2018] EWCA Civ 64 to intend only a modest extension of the protection under Article 3 in medical cases and in any event, at present, the cases of D and N remain binding. For all of these reasons, the decision in Paposhvili does not assist the Appellant in the present appeal.

Article 8 of the European Convention on Human Rights

10. In relation to the Appellant's claim that his deportation would breach Article 8 of the European Convention on Human Rights, the burden of proof is on the Appellant to the normal civil standard of the balance of probabilities. The requirements in relation to such a claim, in so far as they are set out in the Immigration Rules and relate to this appeal are:

"398. Where a person claims that their deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention, and

(a) …

(b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or

(c) …,

the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

399. …

399A. This paragraph applies where paragraph 398(b) or (c) applies if –

(a) the person has been lawfully resident in the UK for most of his life; and

(b) he is socially and culturally integrated in the UK; and

(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported."

11. By virtue of section 117A of the Nationality, Immigration and Asylum Act 2002, Part V of that Act applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches Article 8 of the European Convention on Human Rights and as a result would be unlawful under section 6 of the Human Rights Act 1998.

12. Section 117A applies to the public interest considerations in all cases and section 117C applies additional considerations to cases involving foreign criminals. So far as relevant to this appeal, those sections provide:

"**Section 117B. Article 8: public interest consideration applicable in all cases**

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

…

117C. Article 8: additional considerations in cases involving foreign criminals

(1) The deportation of foreign criminals is in the public interest.
(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
(4) Exception 1 applies where –
  (a) C has been lawfully resident in the United Kingdom for most of C's life,
  (b) C is socially and culturally integrated in the United Kingdom, and
  (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.
(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted."

13. In NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662, the Court of Appeal held that on a proper construction of section 117C(3) for "medium offenders" (i.e. those with sentences of between one and four years' imprisonment) there should be added "or unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2" at the end. This brings the provisions in section 117C of the Nationality, Immigration and Asylum Act in line with those in paragraph 398 and following of the Immigration Rules.

14. A broad approach should apply to the analysis of a foreign criminal's integration into the country to which it is proposed that he be deported. Lord Justice Sales held as follows in Kamara v Secretary of State for the Home Department [2016] 4 WLR 152, at paragraph 14:

"The concept of a foreign criminal's "integration" into the country to which it is proposed that he be deported, as set out in section 117C(4)(c) and paragraph 399A, is a broad one. It is not confined to the mere ability to find a job or sustain life while living in the other country. It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use. The idea of "integration" calls for a broad evaluative judgment to be made

as to whether the individual will be enough of an insider in terms of understanding how life in the society of that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life."

The Respondent's decision

15. In his decision letter dated 7 July 2016, the Respondent dealt firstly with the revocation of the Appellant's refugee status, then his exclusion from Humanitarian Protection, the application of section 72 of the Nationality, Immigration and Asylum Act 2002 and finally considered the Appellant's right to respect for private and family life. The Appellant's claim that his removal to Somalia would be in breach of Article 3 of the European Convention on Human Rights was considered within the section dealing with cessation of refugee status.

16. In reliance on the country guidance case of **MOJ**, the Respondent considered that the Appellant had the option of accessing support from clan members as well as being supported by financial remittances from abroad and that there was no risk of harm to him on return to Mogadishu. It was further considered that there were no significant obstacles to the Appellant's reintegration in Somalia, as an adult male in reasonable health he was able to adapt to life in the United Kingdom and had sufficient ties to Somalia, including language, cultural background and social network. The Appellant would be able to use skills gained in the United Kingdom to gain lawful employment in Somalia.

17. In relation to Article 8 of the European Convention on Human Rights, the Respondent considered the Appellant's circumstances in accordance with paragraphs 398 to 399 of the Immigration Rules and section 117A to 117D of the Nationality, Immigration and Asylum Act 2002. The Appellant had not established any family life with children or a partner in the United Kingdom such that he could not meet any of the requirements of paragraph 399 of the Immigration Rules.

18. In relation to private life, the Respondent did not accept that the exception in paragraph 399A of the Immigration Rules was met because although the Appellant had been lawfully resident in the United Kingdom for most of his life, it was not accepted that he was socially and culturally integrated in the United Kingdom due to his criminal history. It was also not accepted that there would be very significant obstacles to his integration to Somalia because he could learn the culture and language there, albeit he would have retained some knowledge of his mother tongue and he would have retained some familiarity of with the country from his childhood. The Appellant was considered to be able to find accommodation in Mogadishu, with support from family and friends in the United Kingdom if needed. He was a healthy, adult male who could find employment in Mogadishu. With reliance on the detail of the Appellant's criminal history, there were no very compelling circumstances to outweigh the public interest in deportation.

The evidence

19. I had before me a large bundle of specific and background country evidence in relation to the current situation in Mogadishu as well as Somalia more generally, together with reports from two expert witnesses, evidence from the Appellant and his immediate family and substantial written submissions from the parties. I set out in relatively more detail below the expert evidence and witness evidence in this appeal and refer to the wider background information where relevant. I have taken into account the background evidence in full when determining this appeal, although it is not necessary to refer to each and every part of it in this decision and the lack of express reference to it should not be taken to indicate any lack of consideration of the same.

Expert evidence

20. The Appellant relies on reports from two experts, first, Dr S Bekalo (Med, PhD), a Research and Development Education Fellow at Leeds University who has first-hand experience of living and working with people of East/Horn of Africa since the 1960s and has written articles and reports in particular in relation to Ethiopia, Eritrea, Somalia and the Sudan. Secondly, Dr J Mullen (PhD) who was previously a Senior Lecturer in International Development and Conflict at the University of Manchester and who has held a number of other academic, director and advisory posts with a particular interest and focus on Somalia over an extended period of time.

21. There is a report dated 4 May 2017 and an addendum report dated 8 May 2017 from Dr Bekalo, the latter in response to queries and comments from the Respondent. In the main report, Dr Bekalo was asked to comment on the problems the Appellant would likely face if returned to Somalia with his profile, in particular his inability to speak Somali and limited ability to speak Swahili, in relation to the prospects of integration and securing access to livelihoods: being a returnee from the United Kingdom with little or no clan, family contacts or support network; and the overall issues of return or internal relocation within Somalia for the Appellant.

22. In relation to language, Dr Bekalo refers to Somali being the main and only language across Somalia (except perhaps in the southern coastal areas near the Bajuni Islands were similar family languages of Bajuni and Swahili are spoken) and the inability to speak Somali would seriously affect a person's integration into society and their ability to secure livelihood opportunities. The Appellant's proficiency or lack of proficiency in Swahili would not have any significant value in the context of Somalia as it is not widely used. English would potentially be useful in large cities in Somalia but is not necessarily vital as it is not widely used and would mostly be useful for a high-profile job or a high-profile institution, but securing such employment would not be solely dependent on English language ability but also to do with having the right contacts and other skills. Dr Bekalo referred to the need for a person to have particular qualifications or a special skill set to access the scarce opportunities in the fiercely competitive job markets in Somalia. English in addition to Somali is an asset

but Somali would be an essential requirement locally to run any business or survive in the wider socio-economic culture and economy.

23. As to country conditions, Dr Bekalo acknowledged the encouraging efforts in positive progress in Mogadishu referred to in MOJ but noted that the government and allied forces are still struggling to defend their own institutions and VIPs, let alone safeguard the safety and security of vulnerable individuals and minority groups. He states that travel throughout Somalia remains extremely dangerous. Further, that despite this, well-connected Somalis from the diaspora have recently started returning to Somalia to start a new life but those returnees are relatively few and far between. Of those who have managed to maintain and/or establish some sort of in-country family had powerful clan connections and financial backing; and even those were not adequately safe and protected even in Mogadishu. He refers to other risks of mistreatment, including forced recruitment, traditional discrimination based on clan membership and risks on return from the West as cultural outsiders.

24. Dr Mullen was specifically asked to comment on three things in his report dated 27 September 2017. First, the Respondent's second skeleton argument regarding constitution of IDP camps and clan affiliation; secondly, the significance of the Appellant's inability to speak Somali; and finally, the reach and influence of the Benadiri clan.

25. Following his initial report, Dr Mullen was asked 21 questions by the Respondent, the answers to which he provided together with an amended version of his original report incorporating the answers. Unfortunately, the questions asked have not been provided to the Upper Tribunal but the answers and the amended report read together are largely self-explanatory and to a great extent explain Dr Mullen's views on the reliability of other background evidence, detail as to IDP camps and about the Appellant's clan and sub-clan. The following is taken from the amended composite report dated 5 November 2017.

26. Dr Mullen responded first to the Respondent's submissions in relation to the constitution of IDP camps and clan affiliation, detailing the drivers for internal displacement, including armed conflict, natural disasters, economic migrants and eviction. Some migration is temporary and happens on a regular basis, with links to agricultural seasons and post-famine returns to agricultural areas; some driven by returns from the Afgoye corridor IDP camp and others due to expulsion from IDP sites in the inner city where land values have rocketed. Dr Mullen questioned the reliability of some of the organisations which the Respondent relies on reports from and consider some to be to statistically-based without sufficient reference to human experience or understanding of conditions in Mogadishu over a longer period of time.

27. In relation to the Appellant's inability to speak Somali, Dr Mullen states that the spoken languages in Mogadishu are Somali, Arabic, English and Italian, the latter two being widely spoken by diaspora returnees but the vast majority of ordinary people use Somali as the language of day-to-day communication. Swahili is spoken

and understood by the Kenyan community in the city as well as Somalis who come from Kenyan border areas. Dr Mullen says that language is a key social skill to summon relationships in the context of a networking environment and a person would need to be fluent in Somali to make personal contact and establish clan relations to act as a catalyst for access to livelihood opportunities. Dr Mullen considers that a lack of ability to speak Somali makes a person vulnerable as it would mark them out as a foreigner to be exploited, socially marginalised and potentially at risk of recruitment by Al-Shabaab for his English language ability. There is also general discontent with returning diaspora taking away jobs from the local population.

28. Dr Mullen refers to reported evidence that the Benadiri clan as a group are returning back to Mogadishu, although they are not accepted to be a homogenous clan as such (instead the term was used to denote groups of elite professionals and business people of Arabian heritage who previously dominated the commercial scene in Mogadishu). The Benadiri are a family of smaller clans under the generic name of Reer Hamar with sub clams prominent in different districts of Mogadishu. The Appellant belongs to one of the least influential Reer Hamar sub-sub-clans, the Qalmashube which only has weak scope as a social network support. The segmented nature of subclan's, sub-subclan's and sub-sub-subclan's means that there would be no perceived social obligation to assist a person of the same smaller grouping.

29. A returning person may be impacted by their criminal history in the United Kingdom, depending on the degree to which the social mores of the subclan in question had been infringed upon. There is however no specific document setting out social laws or their hierarchy but Dr Mullen's experiences that these are equated to mainstream Sunni Islam. In some cases criminal offences are an impediment to return, but not for the voluntary repatriation of refugees from Kenya to Somalia.

30. In a postscript in the amended report from Dr Mullen, he sets out his view that since 2015 there has been a deterioration in the security situation in Mogadishu mainly due to a resurgence in military competence of Al Shabaab and their increasing geographical/administrative control of the adjoining regions to Mogadishu which jeopardises the expected levels of security.

31. A further report dated 14 February 2018 from Dr Mullen was submitted just prior to the appeal hearing as an addendum report on the basis of significant developments since November 2017. It is unclear whether this was specifically requested by the Appellant or produced on the initiative of Dr Mullen. This addendum report comments first on the stability, or instability and vulnerability of a mobile IDP population. In particular, reference is made to large-scale destruction of IDP settlements on the outskirts of Mogadishu and a statement about the same dated 1 January 2018 from the Deputy Special Representative of the Secretary General, Resident and Humanitarian Coordinator for Somalia. That statement referred to 23 IDP settlements housing over 4000 households being destroyed on 29 and 30 December 2017 with no notice and resulting in further displaced persons and that

there were 2 million people displaced due to drought and conflict, half of which were newly displaced in 2017.

32. The addendum report also questions continued economic growth in Mogadishu with an unexpected major slowdown of anticipated growth in 2017 to between 1.5% and 2.5%, down from annual growth rates in the previous three years of 5 to 6%, albeit growth is expected to pick up in subsequent years and to grow steadily over the medium term. Dr Mullen states that a drought in 2017 and deterioration of the humanitarian situation in Somalia have contributed in turn to a reduction in labour market opportunities, increased underemployment and unemployment and restricted opportunities for hiring new recruits as well as creating further opportunities for recruitment into extremist movements. Insecurity is considered to be a relevant factor in the slowdown.

33. Finally, Dr Mullen refers to increasing security challenges from both Al Shabaab and ISIS and a possible downplaying of the actual state of security and inability to secure that issue effectively.

34. Dr Mullen attended the hearing, adopted his written reports and gave oral evidence in English. He was asked very detailed questions in cross examination by the Home Office Presenting Officer in particular about the evidence in relation to IDP settlements and the organisations involved in compiling certain reports. Although on behalf of the Respondent, significant concern was expressed about the reliability of some of Dr Mullen's evidence and the impartiality of some of his views, I do not consider it necessary to set out the very detailed points raised on both sides because the very specific nature of most of the points raised does not directly affect the Appellant's claim or determination of this appeal, not least because there are no individual pieces of background evidence which are determinative and in many areas there was broad agreement. For example, in general it was agreed that there were vulnerabilities within IDP households caused by the (relatively large) number of people in a household, the fact that the majority were female-headed, that the majority were illiterate; had only very informal access to employment and that the majority of IDP inhabitants were children. Dr Mullen did however note that there were different vulnerabilities for international returnees who are forcibly returned although they did not fit within the general IDP profile.

35. In relation to the position of the Reer Hamar, Dr Mullen stated that they were a numerical but not social minority in Mogadishu and that they were returning there to resume economic activity having been a successful mercantile and cultural group before the Civil War. Dr Mullen emphasised the importance of the clan based in Mogadishu for a pool of available support for an individual and the lack of evidence either way as to access to economic opportunities for a person in the Appellant's subclan. There was nothing to suggest discriminatory access to or preventing employment in particular occupations for particular clans although culturally some jobs were not undertaken by specific subclans.

36. Dr Mullen accepted that the use of English has expanded education, particularly in the tertiary sector and is the language of commerce and business for high-level employment although not necessarily for vocational skills. His view was that it was still essential that a person spoke Somali as well as English.

37. Dr Mullen accepted that simpler housing could be found in Mogadishu for $40-$80 per month.

38. In re-examination, Dr Mullen stated that the vulnerability for returnees in relation to the risk of ending up in an IDP camp was the lack of social support network mechanisms which needed to be primed for use, for example with finances which could be used to trigger support. He stated that there is a social expectation of available resources to those returning from abroad and clan support was given on a reciprocal basis.

39. Dr Mullen was asked how a person could identify that they were from the same clan as another. He stated that one way of doing this would be through language or dialect, otherwise skin colour and tone would be considered although this does not always work for genetic reasons and because of previous intermarriages between clans. The other way to corroborate a person's claim to have a particular clan would be through knowledge of the earlier generations in their family. The standard knowledge is to go back 10 generations of the male line in the family with some being able to go back up to 30 generations to trace clan membership. This information can be confirmed by other clan members and elders.

Witness evidence on behalf of the Appellant

40. In the Appellant's written statement signed and dated 16 September 2016, he stated that he was a Somali national, who had come to the United Kingdom at a young age with his family and was subsequently granted indefinite leave to remain. He attended primary and secondary education United Kingdom and describes having changed since entering prison, completing a number of courses whilst in detention. These include carpentry, painting and decorating, a BICs cleaning course, a barber course, an alcohol awareness course, a drugs awareness course and a victim awareness course. Since his release from prison he describes assisting his parents who are both in ill-health. All of the Appellant's family are in the United Kingdom, his mother, father, siblings as well as uncles and cousins. He states that he has no family remaining in Somalia and does not even speak Somali any more. The Appellant is concerned that he would be a target for Al-Shabab on return to Somalia.

41. There are also a number of undated letters from the Appellant which refer to his criminal offending, his fear on return to Somalia, his family and educational background in United Kingdom.

42. The Appellant attended the oral hearing, confirmed his details, adopted the written statements referred to above and gave oral evidence in English. In cross-examination he confirmed the immediate family members he has in the United Kingdom as well as probably five uncles and one aunt, although he stated that he doesn't really keep

up with his wider family as they have their own problems and he has little contact with them apart from on formal family occasions. He said that his wider family did not help him in the United Kingdom so couldn't support him if he was overseas. The Appellant had asked for help but they had said that the could not help him as they have their own family and bills to pay. There had not been any request that they confirm that in writing.

43. The Appellant speaks Swahili and English at home and although he accepted that his father spoke Somali, he did not speak this at home as no other family members understood it. The Appellant said he was brought up by his parents without any knowledge of his clan or family history, that his parents never mentioned this and he did not know anything about it.

44. In her written statement signed and dated 27 February 2017, the Appellant's mother stated that the Appellant had no family left in Somalia, could not speak Somali and left the country when he was a year old as the family fled to Kenya. The family are from a minority clan subject to severe discrimination and persecution in Somalia. The Appellant would not have any clan protection and would be at risk from terrorists in Somalia. In the United Kingdom, the Appellant has changed since his criminal convictions and supports his parents. The Appellant's parents would not be able to send any money to the Appellant in Somalia as they barely make ends meet on the state benefits that they receive.

45. The Appellant's mother attended the oral hearing, confirmed her details, adopted her written statement referred to above and gave oral evidence with the assistance of a court-appointed Swahili interpreter. She confirmed that she was born in Somalia in Ras Kamboni in 1970 and only lived in Mogadishu for a short period of time after getting married. Her husband was from Mogadishu but the family home was in Ras Kamboni. The Appellant's mother speaks Swahili, the language spoken at home by her and her husband and the children. Her husband also speaks Somali and the Af-reer hamar dialect. The Appellant's mother knows something about her family traditions, but not going back as far as even five generations. The Appellant's mother was an only child, her parents are dead, there is no family left in Somalia and she has no direct relatives in the United Kingdom. The Appellant's mother stated that wider family members had been asked if they could help the Appellant, but they have their own responsibilities and children to support the could not do so. She did not know that any evidence from them would be needed and her brother-in-law had recently suffered a bereavement so could not have come to the appeal hearing in any event.

46. In his written statement signed and dated 27 February 2017, the Appellant's father stated that the Appellant travelled from Somalia to the United Kingdom on 16 February 2000 and was granted indefinite leave to remain. The family had fled Somalia because of the dangers happening at that time and which continue. All of his former connections to Somalia are either dead or have fled the country. The Appellant comes from a very small clan named Rerhamar Khalansubb, who are victimised by the larger clans and the Appellant has no contacts in Somalia and does

not speak the language. The Appellant's father is concerned that the Appellant would be at risk on return to Somalia. He would not be able to afford to send him any money if he returned and the Appellant was relied upon for support to his parents.

47. The Appellant's father attended the oral hearing, confirmed his details, adopted his written statement referred to above and gave oral evidence with the assistance of a court-appointed Swahili interpreter. In cross-examination he confirmed that he was born in Mogadishu in 1963 and remained there until fleeing from the civil war as a young man. He stated that his family home with his wife was in Mogadishu. The Appellant's father speaks Somali, the Af-reer hamar dialect and speaks Swahili with his family as that is the common language he has with his wife. He learnt Swahili from involvement in business in Somalia and travel to coastal areas where it is a common language. When he was in Mogadishu, it was common for others to speak and understand Swahili.

48. The Appellant's father knows his family to an extent, up to his great grandfather. They are all now deceased, but he knows where they are buried in Mogadishu. The Appellant's father has tried to teach his children their clan traditions and clan/family history but stated that sometimes they pay attention and sometimes not as modern children who were very western in their ways. Specifically, he had told the Appellant his clan some time ago and that he was named after his father's great grandfather. In re-examination, the Appellant's father said that he told the Appellant about his clan in the United Kingdom, not when he was very young as he would be too young to know important information, but later and when he was told he would listen but he couldn't be sure whether the information was retained or whether the Appellant was interested in it.

49. In her written statement signed and dated 27th February 2017, the Appellant's sister set out details about her family consistent with what her parents had said; that she fears about the Appellant's safety on return to Somalia where he has no family left and that neither she nor her parents would be able to send any money to the Appellant to assist him.

50. The Appellant's sister attended the oral hearing, confirmed her details, adopted her written statement and gave oral evidence in English. In cross-examination she confirmed that she was a single mother in receipt of benefits and had recently been made redundant. She was not sure if any extended family members had been asked to financially support the Appellant and only knows of one uncle and one aunt in the United Kingdom. The Appellant's father had spoken to her about their culture and clan but she was not specifically told about his father or grandfather.

Submissions on behalf of the Appellant

51. On behalf of the Appellant, Counsel submitted that for the following reasons, there was a real risk that the Appellant would be forced to resort to living in an IDP camp in conditions which would breach Article 3 of the European Convention on Human Rights:

(a) the Appellant has been absent from Mogadishu since the age of one and therefore has no meaningful knowledge of life in Mogadishu or in fact in Somalia;

(b) all of the Appellant's family are in the United Kingdom and he has no personal family or other links in Mogadishu, or elsewhere in Somalia;

(c) the Appellant will have no recourse to resources either in the form of family assets left behind in Somalia by his family (because there are none) or from the Respondent as he would be ineligible for financial assistance under the Facilitated Return Scheme;

(d) the Appellant will have no recourse to financial support from family in the United Kingdom as none can reasonably afford it;

(e) the Appellant is unlikely to benefit from any financial social support from fellow clan members given his clan membership will not be identifiable because he has no family links in Somalia and does not speak Somali, let alone any dialect or accent of Somali by reference to which his clan membership can be established. In any event, the Appellant is from a minority clan and a particular sub-clan and sub-sub-clan that is unlikely to be able to provide any assistance;

(f) the Appellant would be unlikely to access employment opportunities brought about by the economic boom in Somalia because he does not speak the principal language of the country and his English language would only be a benefit in addition to that and not of itself. The Appellant is also illiterate in Somali and even if he could learn the language he would not be able to do so in the immediate aftermath of deportation; and

(g) the Appellant would also be unable to access the economic opportunities brought about by the economic boom because of his criminal record and continuing addictions to alcohol and drugs, both of which make him inherently unsuitable for employment.

52. Although it was accepted on behalf of the Appellant that living in an IDP camp would not per se be a breach of Article 3 because there is a spectrum of conditions between locations, it remained the Appellant's claim that he would be forced to resort to a camp with dire conditions which would reach this threshold.

53. In relation to the Appellant's claim under Article 8 of the European Convention on Human Rights, by reference to paragraph 399A of the Immigration Rules and section 117C of the Nationality, immigration and Asylum Act 2002, it was submitted that the Appellant had lived in the United Kingdom for most of his life, was socially and culturally integrated in the United Kingdom and would face very significant obstacles to his integration into Somalia such that his deportation would be a disproportionate interference with his right to respect for private and family life.

Submissions on behalf of the Respondent

54. The Respondent submitted that the Appellant could not meet the threshold to show a breach of Article 3 by his removal to Mogadishu, and the burden was on him to show that he would not receive any support, could not find employment in Mogadishu and could not take advantage of the economic boom from recent years. The Appellant had not provided sufficient evidence of no financial support being available from immediate or wider family in the United Kingdom, there was a lack of documentary evidence such as bank statements and no reasonable explanation why such evidence had not been provided. This is particularly important in the context of the evidence in MOJ that the baseline for IDPs in Mogadishu was about two dollars a day, such that even a little financial assistance from the United Kingdom could go a long way and be significant for the Appellant.

55. The Respondent's case was that the Appellant, as a returnee from the West who spoke English and some Swahili, had work experience and qualifications including those useful to the economic conditions in Mogadishu, would be able to access livelihood opportunities and would not end up in an IDP camp with standards falling below acceptable humanitarian standards. In addition, the Appellant's clan was known to be a business and mercantile clan who are returning to Mogadishu and rebuilding lives and businesses there. Returnees are seen as economic assets and there is no evidence that the Appellant would be hindered by his past in accessing the same. Although the Appellant states to have no knowledge about his clan or background, his father had told him this information and if needed the Appellant could return with knowledge of his family from his father to help integrate in Mogadishu and to identify himself within his clan.

56. In relation to English language, the Respondent submits that the English language is in widespread use in Mogadishu, through education and from the diaspora (from Great Britain, America and Canada, where English would be a primary or secondary language). English is submitted not to be only for high profile jobs in a high profile institution but listed as a simple skill which most employers look for.

57. In relation to employment prospects generally, the Respondent relies upon 2016 the IOM report "Youth, Employment and Migration in Mogadishu, Kismayo and Baidoa". From that the Respondent suggest that although minority people may find it harder to obtain jobs which are advertised among the more populous clans, there is no definition of minority or whether this includes the Benadiri. In any event, the underlying reason for advertising and recruitment within a clan is security and in fact in some districts clan bias may assist the Appellant. Further, clan bias is generally within the realm of highly paid work and most employment is relatively clan neutral.

58. In terms of employment for young people (those under the age of 30) in Mogadishu, more than two thirds were employed full-time and just under half had a second job. Those most likely to face unemployment or under-employment were those with a lack of skills or education, with a third of 26 to 30-year-olds having had no education

at all and education provided in Somalia was not of a high standard. Unemployment in Mogadishu was only 6% and long-term unemployment was rare. Reliance was placed on the economic boom and dynamism of Mogadishu with the average income for young workers being $360 a month. A list of growing industries, including construction and hospitality were set out with monthly earning salaries in the region of $120 per month for carpentry, $70 per month for plumbing and $65 per month as a barber. In particular, reliance was placed on the LANDINFO report of 1 April 2016, "Somalia: relevant social and economic conditions upon return to Mogadishu" which stated that such was the expansion of business investment in Mogadishu over the last few years that employers were compelled to use foreign labour in the building and hotel services industries, including recruitment from overseas of Bangladeshis and Kenyans.

59. The same LANDINFO report refers to simpler housing such as in a dorm or so-called iron sheet house costing between $40 and $80 per month, with more expensive three room apartments costing between $100 and $250 per month.

60. The Respondent submits that the Appellant would be able to rely at the very least on $100 provided by UKVI at his departure and would be more likely to be able to rely on £750 from the Facilitated Returns Scheme as a resettlement grant if he applied after completion of his custodial sentence.

61. In light of the above, the Respondent does not accept that on return the Appellant would reasonably likely end up living in an IDP settlement, but even if he did, there is no uniform experience of life in such a settlement and conditions vary significantly, particularly between the older and newer settlements and those which contain persons from established Mogadishu clans. The older settlements were far more ingrained within their host communities, and more secure with more established livelihood options and include clan elders. There was significant evidence of the varied nature of settlements in Mogadishu from REACH in 2015/16 and further evidence from the IOM and SODMA about the profile of IDPs in particular settlements, showing the significant majority being households headed by women and the majority of inhabitants being children. In addition, 8% of households had specific needs (such as disability, pregnancy, single parents, serious medical conditions, unaccompanied children and victims of gender-based violence). The vast majority also come from the Middle and Lower Shabelle regions, with no connection to the diaspora and which often exist as a very large household predominantly made up of women and children with no urban experience or transferable work skills: as such the majority are specifically vulnerable.

62. In relation to Article 8 of the European Convention on Human Rights, the Respondent relies essentially on the same submissions as to why there would be no very significant obstacles to the Appellant's reintegration in Mogadishu.

Findings and reasons

Article 3 of the European Convention on Human Rights

63. There is little dispute between the parties in this case as to the Appellant's circumstances, save in relation to whether he would be in receipt of any financial support on return to Somalia. The issue in this appeal is whether in the Appellant's circumstances, he would be at real risk of exposure to conditions in Mogadishu which would meet the very high threshold for breach of Article 3 of European Convention on Human Rights as set out above. On the facts, this question turns firstly on whether the Appellant would be financially supported in Mogadishu and/or able to access livelihood opportunities there, if so, Mr Muquit appeared to accept there would be no breach of Article 3 (although of course the Appellant's case was that he would be destitute on return). Secondly, even if not, whether the likely conditions on return would breach Article 3, it being accepted by both parties that conditions in IDP camps varied significantly and mere resort to accommodation in an IDP camp would not per se amount to a breach of Article 3.

64. The Appellant left Somalia as a baby, residing in Kenya for a number of years before coming to the United Kingdom as a child (around the age of 7) and remaining here ever since. It is not disputed that he has no memory or knowledge of Mogadishu or Somalia more generally, having been absent from there from such a young age. Little is known about the Appellant's family circumstances in Mogadishu (or elsewhere in Somalia - there being an inconsistency in the evidence between the Appellant's parents as to where their home was prior to their departure to Kenya) or how they funded their journey to Kenya or onwards to the United Kingdom, but there is evidence that their financial position in the United Kingdom now is not a strong one, with the parents being in ill-health and in receipt of state benefits (including Income Support, Disability Living Allowance and Carers Allowance) and the Appellant's sister being a single mother of a very young child who had been made redundant shortly before the last hearing in this appeal. There is no evidence as to the current whereabouts or circumstances of the Appellant's brother.

65. A limited number of bank statements had been provided for the Appellant's parent's account which, other than one instance showing a withdrawal of £2000, generally show a relatively low balance and at times the account is overdrawn. There is no evidence from wider family members in the United Kingdom (aunts, uncles or cousins) as to their ability or inability to provide any financial support to the Appellant on return to Somalia, only oral evidence from him and his immediate family that they would not be in a position to do so.

66. There is little evidence from the Appellant as to how he has been supported in the United Kingdom. It can be inferred that this was by his parents when he was a child and also by the state, at least during his term of imprisonment if not at other times as well. The Appellant has some history of employment in the United Kingdom through which he may have been able to support himself for that period of time as well. There is however nothing to suggest the Appellant has any significant savings or other financial resources at his disposal at the current time.

67. On the evidence available I find that the Appellant is unlikely to return to Somalia with any significant savings, nor is he likely to receive any significant or regular

financial support from his immediate family members in the United Kingdom on return to Somalia. I also find it unlikely that the Appellant would receive any financial support from wider family members in the United Kingdom given that there is no indication of any close relationship, current or recent support from them. However, I do find that it is possible, even on the limited means of his family in all their circumstances, that some small and/or irregular financial support could be given from his immediate family. Even small amounts from the United Kingdom may be of relatively significant assistance to the Appellant given the poverty line is $2 a day and the very different economic situation and much lower living costs in Somalia compared to the United Kingdom.

68. The Respondent relies on the Appellant being given a grant by UKVI at his departure of at the very least $100 and potentially up to £750 through the Facilitated Returns Scheme. There is little evidence before me of either source of finance for the Appellant, and although I accept the smaller amount is likely to be available to him, he would not be likely to satisfy the conditions for the larger grant under the Facilitated Returns Scheme, such that it would be a matter of discretion by the Respondent as to whether any further support would be available. The lower amount on departure is likely to be of immediate benefit to the Appellant initially on arrival, but not a sufficient sum to sustain him for very long.

69. The Respondent has not challenged the Appellant's evidence that he has no remaining familial links in Mogadishu, nor in Somalia more generally. Although I have some concerns about the credibility of the Appellant and his parents due to the number of discrepancies and inconsistencies in their evidence (for example as to the way in which the Appellant sets out his immigration history which has changed over time and is inconsistent with his parent's account and the Respondent's records; as to the Appellant's knowledge of his family and clan; as to where the Appellant's parent's lived in Somalia; and as to whether any other members of the family had been convicted and imprisoned) there is nothing before me to suggest that the Appellant has any remaining family in Somalia.

70. The Appellant has claimed that he has no clan associations to call upon in Mogadishu and would not be able to identify himself as a member of his clan as he does not speak Somali let alone the reer hamar dialect. However, aside from skin tone, the other means of identification is through identification of family members going back a number of generations. The Appellant's father has knowledge of this going back at least five generations and in fact the Appellant is named after his great, great-grandfather. Even if the Appellant claims to have no knowledge of this (which I do not accept as I prefer the Appellant's father's evidence that he had brought up his children with information about their family and clan which is more likely and I find the Appellant's account to be advanced to deliberately distance himself further from Somalia), there is no reason why the Appellant can not familiarise himself with this information before departure.

71. The background evidence shows that the Benadiri are returning to Mogadishu and although are a minority clan in terms of numbers, they have a more significant social

and economic profile within the city, with public appointments in at least one district. As such, although not a majority clan, the position of the Benadiri are such that it seems likely that they would have more to offer than minority clans may be able to. However, there was no evidence before me either way of the specific position of the Appellant's sub-subclan or whether they could or could not be called upon for available support.

72. I find that the Appellant is likely to return to Mogadishu with knowledge of his family and clan from his father and as such is likely to be able to identify himself by reference to his clan and down to his sub-subclan with such information and without needing to be identified by dialect or skin tone. There is nothing before me to suggest that the Appellant would not be able to seek the assistance of clan associations in Mogadishu who may potentially assist with social support and access to livelihoods on return. However, I put this no higher than 'may' given the likely practical difficulties for the Appellant to make contact with his clan (in the absence of speaking their dialect and without any existing connections) and the uncertainty as to whether they would have the means to offer any substantive assistance to him in any event.

73. However, even in the absence of financial resources on return, regular financial support from the United Kingdom, no family or clan support in Mogadishu, I find that the Appellant would be able to secure a livelihood on return and take advantage of the economic opportunities available in Mogadishu for the following reasons.

74. The Appellant has undertaken a number of vocational training courses, including carpentry, painting and decorating, professional cleaning and barbering. He also has some employment experience in the United Kingdom and has undertaken primary and secondary education here. The Appellant has relevant skills and experience for employment in the construction and hospitality sectors in Mogadishu, sectors which have contributed to significant economic growth in recent years (save for smaller anticipated growth in 2017 which is expected to increase again this year and following) and in which there was such an expansion that employers had been compelled to use foreign labour in the building and hotel services industries, including recruitment from overseas of Bangladeshis and Kenyans (as referred to in the LANDINFO report of 1 April 2016). In these circumstances, the Appellant is well placed to take advantage of livelihood opportunities in these sectors.

75. There are two primary reasons relied upon by the Appellant as to why he would not be able to secure a livelihood, by employment or self-employment on return to Mogadishu. First, that he is unable to speak Somali and secondly, that his criminal convictions and drug and alcohol addictions would make him inherently unsuitable for employment.

76. In relation to language, the Appellant speaks English and some Swahili (that being the common language of his parents and a common language in Kenya where he spent his early childhood) and despite his initial written statements to the effect that he no longer speaks Somali, before me, the Respondent seems to accept that he has

never spoken Somali and certainly does not now. The Respondent submits that English is widely spoken in Mogadishu and is of benefit in securing employment not just in high profile jobs but as a basic skill looked for by most employers.

77. The expert evidence submitted by the Appellant is that although English is spoken in Mogadishu, particularly amongst diaspora returnees, the vast majority of ordinary people use Somali as the language of day-to-day communication and although Swahili is spoken and understood by the Kenyan community and those from the Kenyan border areas, it is not of itself of use in the absence of fluency in Somali. Dr Bekalo considered that English would be an asset for employment in a high-profile job or employment within a high-profile institution but Somali would be an essential requirement locally to run any business or survive in the wider socio-economic culture and economy in Mogadishu. Dr Mullen went further to suggest that the lack of ability to speak Somali would make a person specifically vulnerable, but there was lack of supporting evidence for this statement to suggest that language could amount essentially to a risk factor on return.

78. I do not find that the Appellant's inability to speak Somali would prevent him from accessing a livelihood in Mogadishu, particularly by means of employment rather than self-employment. English is widely spoken in Mogadishu, particularly amongst the diaspora and is the common language of instruction in much of the education system. English is also listed as a basic employment skill by employers, not just a desirable skill for high profile jobs or within high profile institutions. Further, either English or Swahili must be sufficient for employment in the building and hotel services industries given the recruitment and use of overseas citizens who are inherently unlikely to speak Somali fluently. From the examples of overseas recruitment in the LANDINFO report, it can be reasonably inferred that Kenyans would be most likely to speak English or Swahili and Bangladeshis more likely to speak English than any other language commonly spoken in Mogadishu. In any event, there is nothing before me to suggest that the Appellant would be unable to learn Somali and any language barrier, for example to self-employment, which I consider more likely than employment for the reasons already given, would only likely be short-term rather than long-term.

79. In relation to the Appellant's criminal convictions in the United Kingdom, it is suggested that he would be unable to access employment for this reason. There is however nothing in the background country material in relation to this which suggests convictions such as those which the appellant has (for theft, drugs and driving offences) would be any barrier to employment or self-employment and the expert evidence, whose opinion was expressly sought on this point, takes the evidence little further. Dr Mullen suggested that a person with a criminal history in the United Kingdom may be impacted by the same depending on the degree to which the social mores of their subclan had been infringed, albeit there is nothing specific setting out the social laws or their hierarchy in relation to the Appellant's subclan against which his conduct can be assessed. It was accepted that criminal offences have not been an impediment to voluntary repatriation of refugees from other countries to Somalia. In these circumstances, I find that it is no more than

speculation based upon how society in the United Kingdom views particular criminal convictions when considering a person for employment, that the Appellant's criminal convictions would cause any impediment to him accessing livelihood opportunities on return to Mogadishu. The Appellant has failed to establish on the evidence that this would cause any specific, or in fact any impediment at all to his ability to access livelihood opportunities on return.

80. There is an almost complete lack of evidence before me as to whether the Appellant remains addicted to drugs or alcohol and if so, none whatsoever as to what the impact, if any, that may have on his ability to access livelihood opportunities on return to Mogadishu. The Appellant's evidence in September 2016 before the First-tier Tribunal was that he was addicted to cannabis, but no longer drank alcohol. There is nothing more recent before me as to whether he continues to use cannabis or continues to be addicted to it. Since his recall to prison in 2016, the Appellant has undertaken rehabilitation courses regarding drugs and alcohol. In these circumstances, the paucity of evidence before me on this point means that I find that the Appellant has not established that there would be any impediment or barrier to him accessing livelihood opportunities in Mogadishu for this reason.

81. In conclusion, in all the circumstances and for the reasons set out above, I do not find that the Appellant would be unable to re-establish himself in Mogadishu and, in particular, he would not face a real risk of destitution as he would likely be able to access the economic opportunities in Mogadishu for employment, or self-employment and also thereby find accommodation in the city. The Appellant would therefore not be at real risk of being forced to live in makeshift accommodation within an IDP camp. The Appellant does not therefore fall within the groups of those at risk for humanitarian reasons identified in **MOJ**.

82. In any event, even if the Appellant, for the reasons he has identified or otherwise, had no clan, family or financial support on return to Mogadishu and (if I am wrong in the finding above) was unable to access livelihood opportunities there, I would not in any event have found that he can meet the very high threshold for breach of Article 3 as set out in the cases of **D** and **N**. It is clear from the Court of Appeal's recent decision in **MA**, as in its earlier decision in **Said**, that there is no violation of Article 3 by reason of a person being returned to a country which for economic reasons cannot provide him with basic living standards. The situation in Mogadishu is no longer one in which impoverished conditions are the direct result of violent activities given that the security situation has significantly improved in recent years (as confirmed in **MOJ**) and the historical conflict issue was expressly rejected by Lady Justice Arden in **MA**. There is no suggestion in the present case that the Appellant would be subject to any particular risk factors in an IDP camp (such as a high level of indiscriminate violence, an enhanced risk of forced recruitment to Al Shabaab nor any gender-based violence), his claim is that he would simply be destitute on return.

83. In these circumstances, it can only be in very exceptional circumstances that there would be a violation of Article 3 given the very high threshold set out in the cases of

D and **N**. The Appellant is a healthy young man who has not established any very exceptional circumstances or compelling humanitarian grounds to show that removal to Mogadishu would even arguably reach the high threshold required to establish a real risk of breach of Article 3. The risk of destitution alone on return is not sufficient to establish a real risk and there are no additional considerations (such as a very serious or terminal health conditions) to be added to this. The Appellant's appeal under Article 3 of the European Convention on Human Rights is therefore dismissed.

Article 8 of the European Convention on Human Rights

84. The Appellant does not claim to have a partner or any dependent children in the United Kingdom and therefore relies only on the private life exceptions in paragraph 399A of the Immigration Rules and Exception 1 in section 117C(4) of the Nationality, Immigration and Asylum Act 2002. There is no dispute that the Appellant has been lawfully resident in the United Kingdom for most of his life (he arrived at the age of seven, claimed asylum as a dependent of his father and was thereafter granted indefinite leave to remain on 11 November 2003) and therefore satisfies sub-paragraph (a) of both provisions.

85. The Respondent does not accept that the Appellant meets sub-paragraph (b) on the basis that his offending history alone shows that he is not socially and culturally integrated in the United Kingdom. Although the Appellant's criminal history dating back to 2009 shows a flagrant disregard for the laws of the United Kingdom and those who live here, I do not find that this alone means that he is not socially and culturally integrated here. The Appellant has been in the United Kingdom since the age of seven, he attended primary and secondary education here, speaks fluent English, has extended family here and has some limited work history. In these circumstances, I find that the Appellant is socially and culturally integrated in the United Kingdom and meets sub-paragraph (b).

86. The final question for the exception under paragraph 399A(c) of the Immigration Rules and section 117C(4)(c) of the Nationality, Immigration and Asylum Act 2002 is whether there would be very significant obstacles to the Appellant's reintegration in Somalia. Although the Appellant is a young, healthy, single adult male who, for the reasons already given above in relation to Article 3, would be able to access livelihood opportunities in Mogadishu, I find, having undertaken the broad evaluative judgment required (as set out in Kamara) that there would be very significant obstacles to the Appellant's reintegration in Somalia.

87. First, the Appellant left Somalia as a baby and other than his nationality, his main connection with and knowledge of Somalia is from his family, all of whom are in the United Kingdom and whose knowledge of Mogadishu and Somalia more generally dates back to around 1994 when they fled the civil war. It can not be disputed that there have been enormous changes in Mogadishu and generally in the intervening 14 or so years. Secondly, the Appellant has no family or contact with anyone in Somalia and has not returned there since his family fled when he was around a year old.

Thirdly, although the Appellant speaks English and some Swahili, he does not speak Somali that that would make his reintegration more difficult (although not of itself a very significant obstacle to reintegration given the use of English and Swahili in Mogadishu as set out above), in particular within his clan as he does not speak the reer hamar dialect. The Appellant could learn Somali and the reer hamar dialect but it seems unlikely that he could become fluent within a reasonable time for the purposes of day to day interactions and private life. Fourthly, although it would be reasonable to expect the Appellant to seek to make contact and establish relationships with his clan, there are no existing links for him to use to do so and the level of support they may or may not give him is far from certain.

88. Although as above I have found that the Appellant would be likely to access livelihood opportunities and sustain life in Mogadishu; the combination of his circumstances are such that his lack of knowledge and understanding of life in Mogadishu with some language barriers means that I find that he would not have a reasonable opportunity to establish and give substance to private life there within a reasonable period of time. I therefore allow the Appellant's appeal on Article 8 grounds on the basis that he satisfies the exceptions to deportation set out in paragraph 399A of the Immigration Rules and section 117C(4) of the Nationality, Immigration and Asylum Act 2002.

Notice of Decision

For the reasons set out by Upper Tribunal Judge O'Connor, the making of the decision of the First-tier Tribunal did involve the making of a material error of law in relation to Articles 3 and 8 of the European Convention on Human Rights and as such it was necessary to set aside the decision.

The appeal is remade in the following terms. The Appellant's appeal is allowed on human rights grounds (Article 8 by reference to the exception in paragraph 399A of the Immigration Rules and section 117C(4) of the Nationality, Immigration and Asylum Act 2002 only) and is dismissed on all other grounds.

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

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

Signed Date 21st May 2018

Upper Tribunal Judge Jackson

ANNEX – ERROR OF LAW DECISION

IAC-FH-LW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00096/2016

THE IMMIGRATION ACTS

Heard at Field House
On 1 December 2016

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

MAM
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms V Lovejoy, instructed by Freemans Solicitors
For the Respondent: Mr P Armstrong, Senior Presenting Officer

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

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

DECISION AND REASONS

Introduction

2. The appellant is a citizen of Somalia born in 1993, who entered the UK with his parents on 4 September 2000. Thereafter he was granted ILR on 11 November 2003 in line with his parents (it appears that the appellant's mother was recognised as a refugee).

3. The appellant appealed to the First-tier Tribunal against a "*decision to refuse a protection and human rights claim*", dated 12 July 2016. On the same date the Secretary of State made a deportation order in the appellant's name, this decision being founded on criminal convictions accumulated by the appellant since 2012.

4. In summary, the appellant has been convicted of attempted robbery in 2012 for which he received a sentence of sixteen months' detention, as well as fourteen drug related offences on 26 June 2014 for which he received a total of 3 years and 6 months' imprisonment. The appellant has a number of other convictions prior to 2012 but the SSHD does not seek to rely upon these. The SSHD has also not sought thus far to place reliance on a conviction for possession of a Class B drug on 13 July 2016, for which the appellant received a fine.

Discussion and Decision

5. The appellant appealed the decision to refuse his protection and human rights claims to the First-tier Tribunal. That appeal was heard by First-tier Tribunal Judge Trevaskis on 27 September 2016 and dismissed on all grounds in a decision promulgated on 12 October 2016. The appellant was subsequently granted permission to appeal to the Upper Tribunal by First-tier Tribunal Judge Grant-Hutchison.

6. On the morning of the hearing before the Upper Tribunal Ms Lovejoy presented the Tribunal, and the respondent, with a skeleton argument identifying three discrete grounds, each containing numerous sub-grounds which, Mr Armstrong submitted, did not obviously coincide with the grounds upon which permission had been granted. As a consequence, Mr Armstrong objected to the admission of these grounds. I decided to hear submissions on the matters raised in the skeleton argument *de bene esse*.

7. During the course of her submissions Ms Lovejoy took the Tribunal through her skeleton argument identifying – at least in her submission – the coincidence between the grounds pleaded therein and the grounds upon which permission had been granted. Her overarching submission was to the effect that: (i) the submissions in the skeleton argument were no more than a re-articulation of the grounds originally drafted and did not incorporate any new or additional grounds: and, (ii) that each ground demonstrated a clear error in the FtT's decision.

8. Dealing with the issues in turn. I am satisfied that all of the submissions made in Ms Lovejoy's skeleton argument, save for those found in paragraphs 16 and 17 thereof, are no more than an elucidation of the grounds originally pleaded.

9. Given the late hour of the production of the 'new' grounds (paragraphs 16 and 17 of the skeleton) and the absence of any reasonable explanation as to why: (a) these grounds were not originally pleaded: and, (b) an application to amend the grounds was not made prior to the hearing, I refuse to admit such grounds which, in any event, have little merit. For reasons which will become apparent below I need not set out these grounds in any detail or refer to them again.

10. Turning then to consider the merits of the admitted grounds. In their elucidated form these can be summarised as follows:

    (i) The FtT concluded in paragraphs 80(vii) and 80 (ix) of its decision that the appellant is from a minority clan and that he has no family or clan associations to call upon in Mogadishu. Nevertheless, in paragraph 80(xi) of its decision the FtT concluded that it was not satisfied that the appellant would not have support available from elsewhere in Somalia. This latter finding is inadequately reasoned;

    (ii) In paragraph 80(xi) of its decision the FtT concluded that the appellant would be in receipt of remittances from abroad upon return to Somalia. The evidence before the FtT was to the contrary. The FtT erred in failing to provide reasons for rejecting such evidence;

    (iii) The reliance by the FtT in paragraph 80(xii) of its decision on the fact that the appellant has 'former links to Mogadishu' is irrational, given that the appellant left Somalia at the age of one;

    (iv) The FtT failed to take account of the fact that the appellant cannot speak Somali;

    (v) The FtT failed to attach due weight to the length of the appellant's residence in the UK when concluding that he was not socially and culturally integrated into the UK.

11. Grounds (i) to (iv) [as identified in the preceding paragraph] seek to undermine the conclusions found in paragraph 80 of the First-tier Tribunal's decision. It is prudent, therefore, for me to set out this, and other material paragraphs, in full:

    "78. It is submitted on behalf of the appellant that, if he is returned to Somalia, he will be without means of support or the ability to establish himself with a home and employment, and will therefore be forced to seek shelter in one of the camps provided for internally displaced persons, or IDP's, where conditions are generally considered to amount to treatment which breaches Article 3.

    79. The starting point for consideration of current risk of such treatment is the country guidance decision reported as MOJ & Others ... The determination was

dated 10 September 2014, following hearings over five days in February 2014. It was an extensive review of evidence, including expert evidence, consisting of 287 pages. I have summarised its findings above. It is for the appellant to show evidence justifying a departure from the country guidance.

80. I have considered the points discussed in the country guidance case and set out in the head note as follows:

(i) I do not find that any of the issues raised by the appellant in this appeal are issues which have not been addressed by MOJ & Others ... because it has not been submitted on behalf of the appellant that there are any such issues relied upon.

(ii) there is no evidence to show that the appellant is not 'an ordinary civilian' within the definition set out therein, and therefore I am not satisfied that, by reason of returning to Mogadishu after a period of absence in a western country, he will be at risk of harm contrary to Article 3 or by reason of indiscriminate violence, either by the authorities or by Al Shabaab.

(iii) I find that the appellant has not provided evidence to dispute the finding that the withdrawal of Al Shabaab from Mogadishu is complete and that there is no real prospect of a re-established presence within the city.

(iv) I find that the appellant has not produced evidence to show that, by reason of the reduction in the level of civilian casualties since 2011, the present level amounts to 'indiscriminate violence' creating a sufficient risk to ordinary civilians.

(v) the appellant has not shown by evidence that he would be unable to reduce his risk of 'collateral damage' in Mogadishu by avoiding areas and establishments that are clearly identifiable as likely Al Shabaab targets, nor that it would not be reasonable for him to do so.

(vi) the appellant has not demonstrated a real risk of forced recruitment to Al Shabaab.

(vii) I am satisfied that the appellant is a member of a minority clan, because that fact is accepted by the respondent. I accept that he is unlikely to be able to access assistance from such clan members. I also accept that he does not have a nuclear family or close relatives in the city to assist him in re-establishing himself on return.

(viii) the appellant has provided no evidence to show that the clans in Mogadishu do not provide, potentially, social support mechanisms nor assist with access to livelihoods. He has not produced evidence to show the existence of clan militias in Mogadishu, or clan violence, or clan-based discriminatory treatment, even for minority clan members.

(ix) based upon my findings in (vii) above, I have made the following findings:

- he has been absent from Somalia since 1994;

- he has no family or clan associations to call upon in Mogadishu;
- he has no access to financial resources in Mogadishu;
- he has reasonable prospects of securing a livelihood, either by employment or self-employment, based upon his past working experience and trade training in the United Kingdom;
- he has not shown that he does not have available remittances from abroad, from his family members;

(x) the appellant has not shown why he would be unable to access the economic opportunities that have been produced by the economic boom, especially as there is evidence to the effect that returnees are taking jobs at the expense of those who have never been away.

(xi) although the appellant has no clan or family support in Mogadishu, I am not satisfied that he does not have such support available to him from elsewhere in Somalia; I find that he will be in receipt of remittances from abroad, and that he will have a real prospect of securing access to a livelihood on return, and therefore he will not face the prospect of living in circumstances falling below that which is acceptable in humanitarian protection terms. This is because the appellant has not only shown his ability to find work and support himself in Mogadishu, but also has adapted to life in the United Kingdom, albeit resorting to criminal conduct.

(xii) I find that the appellant has former links to Mogadishu, and therefore, with access to remittances and the ability to re-establish himself, he is not at real risk of having to live within an IDP camp.

81. As mentioned above, I have considered the background evidence relied upon by the appellant. I find that most of that evidence predates the consideration by the Upper Tribunal leading to the country guidance issued in MOJ & Others ..., and that evidence which postdates the decision is outweighed by the evidence already considered by the Upper Tribunal. Therefore, I am not persuaded that it should properly lead me to any conclusions which are inconsistent with that country guidance.

82. I have considered the submissions made by the UNHCR regarding cessation. I am satisfied that the background evidence to which it refers has been considered by the Upper Tribunal in arriving at the current country guidance, and there is nothing in those submissions which leads me to depart from that guidance.

83. It follows from these findings that I am satisfied that the appellant can be returned to Mogadishu, and will not be at risk on return from persecution or treatment contrary to Articles 2 and/or 3 ECHR, nor from indiscriminate violence."

12. I find that the FtT's decision contains numerous errors of law which, when taken cumulatively, lead me to conclude that it should be set aside.

13. Whilst Mr Armstrong accepted the existence of errors in the FtT's decision, he asserted that there could only ever be one outcome to the appeal on the facts presented i.e. that the appellant's appeal should be dismissed, thus, it was said, despite the errors in the FtT's decision should not be set aside.

14. Given the acceptance by Mr Armstrong of the existence of errors in the FtT's decision I need only set out in summary form the nature of such errors.

15. Broadly, the errors in the FtT's decision relate to its overarching conclusion that the appellant would have sufficient means of supporting himself upon return to Mogadishu that he would not be required to live in an IDP camp and, consequently, that his return would not breach Article 3.

16. There are a number of alternative mechanisms by which support could potentially be obtained by the appellant in Mogadishu; (i) by obtaining employment there as a consequence of his skill set; (ii) by direct financial or social assistance from members of his clan in Mogadishu; (iii) by the receipt of assistance from such clan members in his attempts to obtain employment in Mogadishu; (iv) by receipt of assistance from family members in Somalia in the aforementioned regard; and/or, (v) by receipt of financial assistance from friends or family in the UK, or family members in Somalia. This list is not exhaustive and is not tick box, neither are the aforementioned categories discreet from each other.

17. Moving on to an analysis of the FtT's decision. It is difficult for the reader of such decision to establish what part the finding in paragraph 80(xii) of the FtT's decision, i.e. that the appellant has former links to Mogadishu, played in its overarching conclusion that the appellant would have the ability and means to support himself upon return. More significantly, given (a) that the appellant left Somalia when he was one-year-old and (b) the FtT concluded in paragraphs 80(vii), 80(ix) and 80(xi) of its decision that the appellant has no clan or family associations in Mogadishu to call upon, it is difficult to envisage what former links the FtT was here referring to and relying upon. In all the circumstances it was incumbent on the FtT to identify such links with much greater particularly that it did.

18. Second, the FtT concludes, without any obvious supporting reasoning, that the appellant would have support available to him from *'elsewhere in Somalia'*. Given that the appellant's case has always been (a) that he left Somalia when he was one-year-old, (b) that all the family he has ever known are living in the UK, and (c) that he has no family remaining in Somalia, the aforementioned conclusion of the FtT called for discreet reasoning; particular given its findings on the same evidence that the appellant would not have access to clan or family support in Mogadishu. The conclusion of the FtT that the appellant would have support available from elsewhere in Somalia has no apparent evidential foundation and is inadequately reasoned.

19. Finally, in paragraph 80(xii) of its decision the FtT concludes that the appellant would have access to 'remittances'. By this it is presumed that the FtT were referring

to remittances from family members in the UK. If this is so, once again such conclusion was contrary to all of the evidence before the FtT. In such circumstances it was incumbent on the FtT to provide some reasons as to why it rejected the evidence of the appellant's parents on this issue, particularly given that it must have accepted their evidence on other issues.

20. For the above reasons, I find that the FtT's decision contains a number of errors of law. Furthermore, I do not accept that taken at its reasonable zenith the appellant's appeal is bound to fail. Consequently, I conclude that had the FtT not made the aforementioned errors it could rationally have come to a different decision on the Article 3 ground. I therefore set aside the FtT's decision.

21. I conclude that it is appropriate for the re-making of the appeal to be undertaken by the Upper Tribunal. That re-making will include consideration of both the Article 3 and Article 8 grounds – the decision on the latter clearly also being infected by the aforementioned error. There has been no challenge to the FtT's findings made in relation to the application of either section 72 of the 2002 Act or paragraph 339D of the Immigration Rules and, consequently, its conclusions in relation to the Refugee Convention and humanitarian protections grounds are to remain standing.

Notice of Decision

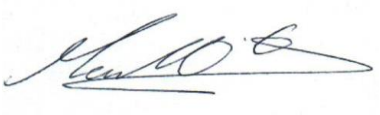
The decision of the First-tier Tribunal contains errors of law capable of affecting the outcome of the appeal and it is set aside.

I direct that the re-making of the decision under appeal will be undertaken by the Upper Tribunal on the basis identified above.

DIRECTIONS

A. The appellant is to file with the Upper Tribunal, and serve on the Respondent, a consolidated bundle of all of the evidence to be relied upon (separately tabulating any evidence that has thus far not been served), so that it is received no later than 21 days prior to the date of hearing.

Signed:



Upper Tribunal Judge O'Connor