Upper Tribunal
(Immigration and Asylum Chamber)

SB (refugee revocation; IDP camps) Somalia [2019] UKUT 00358 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 June 2019	
Further written submissions on 31 July and	……
8 August 2019	

Before

THE HON. MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SB
(ANONYMITY ORDER MADE)

Respondent
(Claimant)

Representation:

For the Appellant: Mr I Jarvis, Senior Home Office Presenting Officer
For the Respondent: Mr R Toal and Mr D Sellwood, instructed by Wilson Solicitors LLP
(Claimant)

(1) In Secretary of State for the Home Department v MS (Somalia) [2019] EWCA Civ 1345, the Court of Appeal has authoritatively decided that refugee status can be revoked on the basis that the refugee now has the ability to relocate internally within the country of their nationality or former habitual residence. The authoritative status of the Court of Appeal's judgments in MS (Somalia) is not affected by the fact that counsel for MS conceded that internal relocation could in principle lead

to cessation of refugee status. There is also nothing in the House of Lords' opinions in R (Hoxha) v Special Adjudicator and Another [2005] UKHL 19 that compels a contrary conclusion to that reached by the Court of Appeal.

(2) The conclusion of the Court of Appeal in Secretary of State for the Home Department v Said [2016] EWCA Civ 442 was that the country guidance in MOJ & Ors (Return to Mogadishu) Somalia CG [2014] UKUT 00442 (IAC) did not include any finding that a person who finds themselves in an IDP camp is thereby likely to face Article 3 ECHR harm (having regard to the high threshold established by D v United Kingdom (1997) 24 EHRR 43 and N v United Kingdom (2008) 47 EHRR 39). Although that conclusion may have been obiter, it was confirmed by Hamblen LJ in MS (Somalia). There is nothing in the country guidance in AA and Others (conflict; humanitarian crisis; returnees; FGM) Somalia [2011] UKUT 00445 (IAC) that requires a different view to be taken of the position of such a person. It will be an error of law for a judge to refuse to follow the Court of Appeal's conclusion on this issue.

DECISION AND REASONS

1. The claimant is a citizen of Somalia, born on 28 September 1977 in Kismayo, where he lived until 1991 when, aged 13, he fled to Kenya. The claimant then made his way to the United Kingdom, where he was recognised by the Secretary of State as a refugee and given indefinite leave to remain in the United Kingdom. The claimant was accepted to be a member of the minority Bajuni clan.

2. At some point, the claimant developed a gambling addiction. His thirst for money was such that he engaged, in an organised way, in taking driving theory tests for others who would have been in difficulties in passing the test, owing to their lack of proficiency in English. In 2014, he was convicted and sentenced in respect of seven such offences; in 2016 he was convicted of sixteen such offences; and in 2017 he was convicted of two such offences. The 2017 convictions involved concurrent sentences of eighteen months' imprisonment.

3. Both the Probation Service and an Independent Clinical Psychologist assessed the claimant as being at low risk of re-offending and as posing a low risk of serious harm.

4. The claimant has a son, born in the United Kingdom in 2005, who was taken into care in 2013. In 2018, the intention of Social Services was to return the son to the claimant's care. Relevant professionals have concluded that the claimant's deportation would have a profoundly negative effect upon his son.

5. In May 2018, the Secretary of State decided that the claimant should be deported, as a foreign criminal, pursuant to section 32 of the UK Borders Act 2007. The Secretary of State's letter referred to an earlier communication to the claimant, in which he had been informed of the Secretary of State's intention to revoke the claimant's refugee status. Representations had been made on the claimant's behalf, in response to that intention. Paragraph 338A of the Immigration Rules provided that a person's grant of refugee status shall be revoked if certain circumstances apply. In the case of the claimant, the circumstance in question was said to be that described in paragraph 339A(v), namely that the claimant "can no longer, because the circumstances in

connection with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of nationality". Reference was made to Article 1C(5) of the 1951 Geneva Convention, which paragraph 339A(v) was intended to reflect.

6. The Secretary of State's decision letter stated that there had been a fundamental and non-temporary change in Somalia. Extensive reference was made by her to the views of the United Nations High Commission of Refugees (UNHCR), who had been approached by the Secretary of State in connection with the question of whether the claimant should continue to be recognised as a refugee. In this regard, the Secretary of State made it plain it was not being contended that the claimant's criminality had any bearing on this issue. The question was entirely whether there had been a requisite change in the conditions in Somalia.

7. The decision letter explained why the Secretary of State took the view that Kismayo was now a place to which the claimant could return. The letter also explained why, in the alternative, the claimant could remain in Mogadishu (which would be the place in Somalia to which he would be returned by the Secretary of State).

8. In reaching this conclusion, the Secretary of State placed particular weight on the country guidance given by the Upper Tribunal in MOJ & Ors (Return to Mogadishu) Somalia CG [2014] UKUT 00442 (IAC). Having set out extracts from the findings in MOJ, the Secretary of State's letter continued:-

> "In light of the reasons given herein, it is considered that there are no significant obstacles to your re-integration in Somalia. You are an adult male in reasonable health. You have demonstrated an ability to assimilate into a foreign culture, including learning a new language, following your entry to the UK in 2002 and therefore you will be able to re-assimilate to Somali culture. It is considered you have sufficient ties to your home country, including language, cultural background and social network, to be able to re-adapt to life in Somalia and form an adequate private life in that country.
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> Moreover, further to ***MOJ & Others*** (paragraph 351), it is considered that by virtue of being a returnee from overseas, you are considered likely to have an enhanced prospect of gaining employment upon return as it was noted that returnees would be considered to be better educated and more resourceful and therefore more attractive to employers, especially where the employer him or herself has returned to invest in a new business in Mogadishu. Furthermore, as noted within the letter of 22 March 2017 it is for your relatives in the UK to decide if they choose to support you in re-establishing yourself in Somalia with financial assistance.
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> In light of the above, whilst you may face challenges in re-adapting to life in Somalia, it is not accepted that your return there would occasion treatment contrary to Article 3 of the ECHR as it is not accepted that you will face the prospect of living in circumstances falling below that which is acceptable in humanitarian protection terms.
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> Further to the above, the conclusion is the same as that reached within the letter of 22 March 2017 that the country guidance case law of ***MOJ & Ors*** remains applicable and that in the intervening years since your grant of refugee status, the security landscape of Somalia has improved fundamentally and durably and therefore your circumstances upon return to Somalia in respect of your protection concerns would not be such as to place you in need of humanitarian protection or engage your rights under the 1951

Refugee Convention or Articles 2 and 3 of the ECHR or Article 15c of the Qualification Directive.

The House of Lords has stated in case of ***Sivakumaran***, that in order for fear to be well founded, there must be a reasonable likelihood of the fear being realised, were the applicant to return to his or her home country.

Further to the reasons given within the letter of 22 March 2017 and herein, the Home Office is satisfied that, subsequent to obtaining refugee status in the UK in 2002, you can no longer, because the circumstances in connection with which you were recognised as a refugee have ceased to exist, continue to refuse to avail yourself of the protection of the country of nationality.

In light of the above, Paragraph 338A of the Immigration Rules applies which states "*A person's grant of refugee status under paragraph 334 shall be revoked or not renewed if any of paragraphs 339A to 339AB apply*." In your particular case, after consideration of Article 1C(5) of the 1951 Refugee Convention, Paragraph 339A(v) of the Immigration Rules, has now been applied. This decision has been recorded as determined on the date of this letter.

As you are no longer a refugee, you must now surrender your original refugee documents, specifically your grant of refugee status letter dated 9 May 2002 and the Home Office Travel Document issued to you on 12 September 2011. If you are unable to provide these documents, you must tell us why immediately.

Should you wish to travel in the future, it will be open to you to approach the Embassy of Somalia in London for the issue of a national passport."

9. Having dealt with the issue of humanitarian protection, the decision letter considered the claimant's position by reference to Article 8 of the ECHR. In so far as the claimant's son was concerned, the Secretary of State did not consider it would be unduly harsh for him to remain in the United Kingdom even though the claimant had been deported. The claimant's step-children were all adults and the Secretary of State did not consider that any protected family life between them and the claimant have been shown to exist. It was not considered that the existence in the United Kingdom of the claimant's ex-partner would render the claimant's deportation disproportionate.

10. The claimant appealed to the First-tier Tribunal. His appeal was heard at Harmondsworth on 28 September 2018 by First-tier Tribunal Judge Gibbs. She concluded that the claimant's appeal should be allowed by reference to Article 8 of the ECHR, having regard to the effect that his removal would have upon his son, notwithstanding the claimant's criminality. That part of her decision is not challenged by the Secretary of State.

11. Notwithstanding what the decision letter had said about the claimant's ability to go to Kismayo, the First-tier Tribunal Judge found that return to that city would not be "a reasonable or safe option for the" claimant (paragraph 46). As we shall see, that aspect of her decision was sought to be challenged by the Secretary of State.

12. Before turning to what the First-tier Tribunal Judge had to say about the alternative of the claimant returning to Mogadishu, it is necessary to refer to the decision of the

Upper Tribunal in MS (Art 1C(5) – Mogadishu) Somalia [2018] UKUT 00196 (IAC). In that case, Upper Tribunal Kopieczek considered the case of an individual, who, like the present claimant, hailed from Kismayo but who, according to the Secretary of State, could now be returned to Mogadishu, owing to the change in conditions in that part of Somalia, compared with when the individual in question was granted refugee status.

13. In summary, Upper Tribunal Judge Kopieczek held that revocation of refugee status is not possible on the ground that, since the time when the individual was recognised as a refugee, the situation pertaining in a *part* of the country from which the individual came has changed such that he or she could now live there without a well-founded fear of persecution.

14. In our case, the First-tier Tribunal Judge decided to follow the decision in MS:-

> "47. Notwithstanding any consideration of the security situation in Mogadishu I am satisfied that the Upper Tribunal case of ***MS (Art 1C(4) – Mogadishu) [2018] UKUT 196 (IAC) (22 March 2018)*** is authority that:
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> > *"The Secretary of State is not entitled to cease a person's refugee status pursuant to Article 1C(5) of the Refugee Convention solely on the basis of a change in circumstances in one part of the country of proposed return."*
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> 48. I am therefore satisfied that the respondent cannot rely on paragraph 339A(v) of the Immigration Rules. The Refugee Convention does not cease to apply to apply [sic] to the appellant."

15. At paragraph 49 of her decision, the First-tier Tribunal Judge held that "in any event, I am satisfied that Mogadishu does not offer the appellant a safe or reasonable internal relocation option". In so finding, she had regard to the letter about the claimant's case that had been produced by the UNHCR and to the expert report that had been prepared in respect of the case by Mr Ali. She also had regard to the findings in MOJ.

16. The First-tier Tribunal Judge continued:

> "50. Ms Afzal did not dispute the appellant's assertion that he no longer has any family members in Somalia, that he left Somalia in 1991 or that he has never lived in Mogadishu. I am therefore satisfied that the appellant would not have a support network of family or friends to whom he could turn in Mogadishu, which is a city with which he is wholly unfamiliar, in a country from which he has been absent for twenty seven years. In addition the appellant is from a minority clan which, despite the [headnote in MOJ regarding the changed significance of clan membership in Mogadishu] will nonetheless place the appellant at a disadvantage in accordance with Mr Ali's report:
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> > *"38. In Mogadishu, the Bajuni have a very small presence …. I would not expect the numbers to be more than a few hundred …. Mogadishu's population is estimated to be around 2.5 million people therefore a population of a few hundred people constitute a very small presence in the city.*

> 39. *If [the claimant] managed to find any members of the Bajuni community in Mogadishu and connect with his clan, he may still be cut off from accessing accommodation, but just economic reasons, but due to high levels of mistrust in Somali society. There used to be a culture of hospitality in Somalia. Prior to 2006 before the rise of terrorist groups like Al-Shabaab, and there were even foster care, families, the travellers are new arrivals, however, that culture is now gone. In the current climate, the trust level between strangers is almost at zero, and nobody would take the risk of taking a stranger in ….*
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> 40. *One must also have someone to act as a guarantor for them in order to get accommodation anywhere in Mogadishu…*
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> 41. *All services including water and electricity are private services in Somalia, even in areas over which the government exercises control. Even if [the claimant] could find a Bajuni family who would be willing to accommodate him in the Hamar Weyne district, the Bajuni are economically deprived so he would likely be living without running water or without 24 access to electricity…*
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> 45. *As a result, [the claimant] would find it extremely difficult to access any private lodging in Mogadishu, regardless of the cost, putting him at risk of living in an IDP camp and of homelessness."*

17. The judge concluded that the claimant remained entitled to refugee status and that his deportation would breach Articles 2, 3 and 8 of the ECHR.

18. The Secretary of State sought permission to appeal. The grounds of application to the Upper Tribunal need to be set out in some length:-

> "2. It is respectfully submitted that the FTTJ made a material error in law in relying on the authority of **MS** [47 and 48], it is contended that the correct approach is that adopted in **MA EWCA Civ 994** with reference to **MOJ Somalia CG 2014 UKUT 00442** and applying this ration the FTTJ was bound to find that the Appellant would not be entitled to a grant of refugee status as there is no risk of persecution for a convention reason if returned to Mogadishu.
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> 3. In **MA EWCA Civ 994** the Court of Appeal held:
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> > 2.(1) A cessation decision is the mirror image of a decision determining refugee status. By that I mean that the grounds for cessation do not go beyond verifying whether the grounds for recognition of refugee status continue to exist. Thus, the relevant question is whether there has been a significant and non-temporary change in circumstances so that the circumstances which caused the person to be a refugee have ceased to apply and there is no other basis on which he would be held to be a refugee.
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> > 47. I accept that it would be inconsistent with the purposes of refugee status, whether under the Refugee Convention or the QD, if protection could be too easily ceased while a person was still in need of international protection or it was not reasonably clear that the need for it had gone. That would hardly solve the problem of persecution and displacement which those instruments are intended to address.

Equally, as it seems to me, there is no necessary reason why refugee status should be continued beyond the time when the refugee is subject to the persecution which entitled him to refugee status or any other persecution which would result in him being a refugee, or why he should be entitled to further protection. There should simply be a requirement for symmetry between the grant and cessation of refugee status.

49. Another way of putting the point is that the Refugee Convention and the QD are not measures for ensuring political and judicial reform in the countries of origin of refugees. The risks which entitle individuals to protection are risks which affect them personally and individually. It is an *individualised* approach. Just as it is no answer to an asylum claim that there is a legal system which might in theory be able to protect them, so conversely the absence of such a system is not an answer to a cessation decision if it is shown that the refugee has sufficient, lasting protection in other ways or that the fear which gave rise to the need for protection has in any event been superseded and disappeared.

4. As per **MA EWCA Civ 994**, the SHHD [sic] maintains that the test for cessation of refugee status mirrors that relating to a grant and is forward looking. Whilst Article 1C(5) must be interpreted in ordinary language (sic). In this appeal, the risk previously identified for the Appellant (persecution as a member of a minority clan Bujani) no longer exists and as such there is no need for international protection for a convention reason, with the Appellant being able to internally relocate to Mogadishu, this being addressed at paragraphs 337-343 of **MOJ Somalia CF 2014 UKUT 00442**.

5. It is respectfully submitted that the correct approach would be for the FTTJ to find that the Appellant is no longer a refugee should then consider Article 3 and the possible risk of destitution. In so far as Article 3 is in issue, the Court of Appeal in **MA** held that **Said v SSHD [2016] EWCA Civ 442** should be preferred over **FY [2017] EWCA Civ 1853** and that the FTTJ should have been aware of this should have directed himself to **Said 2016 [2016] EWCA Civ 442**.

6. In **Said 2016 [2016] EWCA Civ 442**, the Court found that there is no violation of Article 3 by reason only of a person being returned to a country which for economic reasons cannot provide him with a basic living standards.

> "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 falling 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."

7. It is also respectfully submitted that the FTTJ failed to apply the correct approach **MOJ & Ors Somalia CG 2014 UKUT 00442** in that the relevant question is would the Appellant have a realistic prospect of securing a livelihood on return to Mogadishu, that is not based solely on the availability of support and remittances.

8. Therefore even if the Appellant could show that he would not have access to personal or broader clan support, the burden is still with the Appellant to demonstrate why he could not find work, as the evidence from MOJ refers to a presumption of access to employment.

9. It is further evidence from the Country Evidence case of **MOJ & Ors Somalia CG 2014 UKUT 00442** that those from the West who have none or limited experiences of living in Mogadishu are not disadvantaged, the FTTJ has failed to address this in the determination with reliance placed on the following paragraphs of MOJ:

> 351. Further, there is evidence before the Tribunal, identified by Dr Mullen, to the effect that returnees from the West may have an advantage in seeking employment in Mogadishu over citizens who have remained in the city throughout. This is said to be because such returnees are likely to be better educated and considered more resourceful and therefore more attractive as potential employees, especially where the employer himself or herself has returned from the diaspora to invest in a new business.
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> 352. For those reasons we do not accept Dr Hoehne's evidence that it is only a tiny elite that derives any benefit from the "economic boom". Inevitably, jobs have been created and the evidence discloses no reason why a returnee would face discriminatory obstacles to competing for such employment. It may be that, like other residents of Mogadishu, he would be more likely to succeed in accessing a livelihood with the support of a clan or nuclear family.
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> 477. Having said that, a long period of absence from the city and the fact of having had no adult experience of living within it cannot be factors sufficient in themselves to make the prospect of return unreasonable or unacceptable because we have found that it may represent a suitable destination for relocation for Somali citizens who have had no previous connection with the city at all.

10. Although the appellant appears to be unskilled, the FTTJ has failed to consider the prospect of unskilled or self employment, and that the Appellant could seek work in the low skilled sector as highlighted in both **MOJ & Ors Somalia CG 2014 UJUT 00442** (MOJ and SSM) and **AAW (expert evidence – weight) Somalia [2015] UKUT 00673** (paragraph 59).

11. It is of note that the Appellants in **MOJ & Ors Somalia CG 2014 00442** (MOJ and SSM) had both been out of Somalia for in excess of ten years it was found that

both had not shown good reason as to why they could not obtain at a low level employment with an enhanced status of being a returnee from the West with potential access to the Facilitated Returns Scheme that can provide up to £1,500, also being considered at paragraph 423 of **MOJ & Ors Somalia CG 2014 UKUT 00442** it is respectfully submitted that this should be sufficient to provide support whilst the appellant establishes himself.

12. This failure to address the findings in the Country Guidance case of in **MOJ & Ors Somalia CG 2014 UKUT 00442** as to why the Appellant would not have a genuine prospect of obtaining employment is a material error in law."

19. Permission to appeal was granted by the Upper Tribunal on 16 January 2019. In granting permission, the Deputy Judge said that the "burden will be upon the [claimant] to show why he cannot relocate to Mogadishu".

DISCUSSION

(a) Can refugee status be revoked on the basis that the refugee now has the ability to relocate internally within the country of nationality/former habitual residence?

20. Before dealing with this first question, it is necessary to address the submissions made in respect of whether the claimant could return to Kismayo, which was his home area in Somalia. At paragraph 45, the First-tier Tribunal Judge was categoric that the Secretary of State "does not assert that the [claimant] can return to Kismayo which I find is consistent with the unchallenged country expert report of Abdifatah Hassan Ali". At the hearing before us, Mr Jarvis submitted that the Secretary of State was, in fact, challenging that aspect of the decision. We find, however, that Mr Jarvis has not made good that challenge. There is no suggestion, so far as we are aware, that the Presenting Officer before the First-tier Tribunal Judge advanced a submission that return to Kismayo was part of the Secretary of State's case. References to the city feature only lightly in the Secretary of State's documentation. In any event, we agree with Mr Toal that the Secretary of State's grounds of application for permission to the Upper Tribunal do not raise the issue.

21. The first question, then, is whether the First-tier Tribunal Judge was wrong in law to rely upon MS and to hold that, even if the claimant could now reasonably be expected to go to live in Mogadishu, that would not entitle the Secretary of State to revoke the claimant's refugee status.

22. Both Mr Jarvis and Mr Toal made very detailed written and oral submissions on this issue. After the hearing, however, the Court of Appeal gave judgment in the Secretary of State's appeal against the decision of the Upper Tribunal in MS: [2019] EWCA Civ 1345. Mr Jarvis and Mr Toal then made brief written submissions in the light of the Court of Appeal's judgment.

23. In circumstances, it is unnecessary for us to consider the written and oral submissions, made prior to the Court of Appeal's judgment, except to the extent that they might touch upon the issue of how the First-tier Tribunal and the Upper Tribunal should proceed in the light of it in cases of this kind.

24. Hamblen LJ gave the leading judgment. Having set out the relevant international and domestic materials, including the UNHCR Guidelines, Hamblen LJ set out the relevant authorities:-

> "36. Mr John-Paul Waite for the SSHD submitted that the approach of the FTT and the UT is wrong in principle and contrary to recent Court of Appeal authority.
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> 37. It is wrong in principle because the absence of a suitable place of internal relocation is an integral part of the test for establishing refugee status and logically the availability of such a place should equally be a basis upon which refugee status can be ceased.
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> 38. It is contrary to authority because in the recent case of *SSHD v MA (Somalia)* [2019] 1 WLR 241, this Court held at [2] (Arden LJ) that:
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> > "…A cessation decision is the mirror image of a decision determining refugee status. By that I mean that the grounds for cessation do not go beyond verifying whether the grounds for recognition of refugee status continue to exist. Thus, the relevant question is whether there has been a significant and non-temporary change in circumstances so that the circumstances which caused the person to be a refugee have ceased to apply and there is no other basis on which he would be held to be a refugee…."
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> 39. As Arden LJ further stated at [47]:
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> > "….there is no necessary reason why refugee status should be continued beyond the time when the refugee is subject to the persecution which entitled him to refugee status or any other persecution which would result in him being a refugee, or why he should be entitled to further protection. There should simply be a requirement of symmetry between the grant and cessation of refugee status".
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> 40. The Court also held that such a requirement of symmetry was consistent with the CJEU decision on the Qualification Directive in *Abdulla v Bundesrepublik Deutschland (Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08)* [2011] QB 46. As the CJEU observed in that case at [89]:
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> > "At both of those stages of the examination, the assessment relates to the same question of whether or not the established circumstances constitute such a threat that the person concerned may reasonably fear, in the light of his individual situation, that he will in fact be subjected to acts of persecution."
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> 41. Although *MA (Somalia)* was not concerned with internal relocation, it was submitted that the mirror image approach applies where, as in this case, the lack of a place of internal relocation was an integral ground of the decision to recognise refugee status. The SSHD contended that that circumstance has ceased to apply on a durable basis and the cessation decision was accordingly lawfully made.
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> 42. The status of the UT decision in the present case in the light of *MA (Somalia)* was considered by UT Judge Plimmer in *SSHD v AMA* [2019] UKUT 00011, an

internal relocation case. As reflected in the headnote, she held that: "Changes in a refugee's country of origin affecting only part of the country may, in principle, lead to cessation of refugee status, albeit it is difficult to see how in practice protection could be said to be sufficiently fundamental and durable in such circumstances".

43. In relation to the issue of principle, UT Judge Plimmer stated:

> "45. All the ingredients in article 1A(2) of the Refugee Convention must therefore be met at both stages of the examination: when determining status and whether to cease that status. This commonly requires the following: (i) a well-founded fear of persecution; (ii) for reasons relating to a Convention Reason; (iii) making the person unable or unwilling to avail himself of the protection of the country. The final ingredient is based upon the principle of surrogacy and necessarily includes an enquiry as to whether the person can be expected to seek protection in another part of his country of origin. The widely accepted test is whether the person can be reasonably expected to internally relocate – see Januzi v SSHD [2006] UKHL 5 at [7-8] and [48-49].
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> 46. The wording of article 1C(5) also supports this symmetrical approach. It clearly refers not just to "*the circumstances in connection with which he has been recognised as a refugee*" having "*ceased to exist*" but also to the person not being able to avail himself "*of the protection of the country of his nationality*". The principle of surrogacy is therefore found in both article 1C(5) and article 1A(2) of the Refugee Convention. There is therefore a prima facie argument that if a person is able to avail himself of protection in one part of the country then (unless that protection lacks the positive qualities required of it, including being effective / durable / fundamental / significant / non-temporary), they do not meet the refugee definition, and if they are being considered for cessation they are no longer a refugee. In other words, if effective protection is available then a person does not meet the definition of a refugee."

44. In relation to the evidential difficulty of establishing cessation on the basis of internal relocation, UT Judge Plimmer stated:

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

material consideration when applying article 1C(5) of the Refugee Convention or article 11 of the QD.

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

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

45. At the hearing of the appeal Mr Stephen Vokes for MS accepted that the approach of the UT in *AMA* was correct. He accordingly conceded that it was wrong to hold that internal relocation could not in principle lead to cessation. However, he emphasised and relied upon the practical difficulties of showing that there had been a sufficiently fundamental and durable change in circumstances where the change only affects a part of the country, as explained by the UT in *AMA*. In this connection he also relied upon Article 7 of the Qualification Directive and the requirement there set out for actors of protection to control "the State or a substantial part of the State".

46. Mr Vokes also relied upon the need for a "strict" and "restrictive" approach to cessation clauses for the reasons set out by the House of Lords in *Hoxha & Anr v*

Secretary of State for the Home Department [2005] UKHL 19, and, in particular, in the judgment of Lord Brown at [63]-[65]:

> "63. This provision [Article 1C(5)], it shall be borne in mind, is one calculated, if invoked, to redound to the refugee's disadvantage, not his benefit. Small wonder, therefore, that all the emphasis in paras 112 and 135 of the Handbook is upon the importance of ensuring that his recognised refugee status will not be taken from him save upon a fundamental change of circumstances in his home country. As the Lisbon Conference put it in para 27 of their conclusions: "… the asylum authorities should bear the burden of proof that such changes are indeed fundamental and durable".
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> 64. Many other UNHCR publications are to similar effect. A single further instance will suffice, taken from the April 1999 Guidelines on the application of the cessation clauses:
>
> > "2. The cessation clauses set out the only situations in which refugee status properly and legitimately granted comes to an end. This means that once an individual is determined to be a refugee, his/her status is maintained until he/she falls within the terms of one of the cessation clauses. This strict approach is important since refugees should not be subjected to constant review of their refugee status. In addition, since the application of the cessation clauses in effect operates as a formal loss of refugee status, a restrictive and well-balanced approach should be adopted in their interpretation."
>
> 65. The reason for applying a "strict" and "restrictive" approach to the cessation clauses in general and 1C (5) in particular is surely plain. Once an asylum application has been formally determined and refugee status officially granted, with all the benefits both under the Convention and under national law which that carries with it, the refugee has the assurance of a secure future in the host country and a legitimate expectation that he will not henceforth be stripped of this save for demonstrably good and sufficient reason. That assurance and expectation simply does not arise in the earlier period whilst the refugee's claim for asylum is under consideration and before it is granted. Logically, therefore, the approach to the grant of refugee status under 1A (2) does not precisely mirror the approach to its prospective subsequent withdrawal under 1C (5)."

25. Having considered these authorities, in particular MA (Somalia), Hamblen LJ was categoric in his conclusions:-

> "47. In my judgment, this Court should follow the mirror image approach endorsed in *MA (Somalia)*, if and in so far as it is not bound so to do. It should do so for the reasons set out in *MA (Somalia)* and, in particular, because it reflects the language of Article 1C(5) of the Convention and Article 11 of the Qualification Directive, which link cessation with the continued existence of the circumstances which led to the recognition of refugee status. It is also consistent with the approach of the CJEU in *Abdulla.*

48. As the House of Lords made clear in *Hoxha,* the mirror image approach is subject to the qualification that the requisite "strict" and "restrictive" approach to cessation clauses means that it must be shown that the change in circumstances is fundamental and durable - in the equivalent wording of the Qualification Directive, "significant" and "non-temporary". In addition, the burden of proof on all issues will be on the SSHD.

49. In summary, in a case in which refugee status has been granted because the person cannot reasonably be expected to relocate, a cessation decision may be made if circumstances change, so as to mean that that person could reasonably be expected to relocate, provided that the change in circumstances is, in the language of the Qualification Directive, "significant and non-temporary". Helpful guidance in relation to the assessment of the reasonableness of internal relocation is given in the recent decision of this Court in *AS (Afghanistan) v SSHD* [2019] EWCA Civ 873.

50. The size of the area of relocation will be relevant to the reasonableness of being expected to relocate there and also to whether the change in circumstances is significant and non-temporary. I do not, however, accept that there is any requirement that it be a substantial part of the country. Article 7, which is relied upon by Mr Vokes, is concerned with the different issue of the circumstances in which non-State parties or organisations may be regarded as actors of protection. In that context it is understandable that they should be required to be in control of a substantial part of the State.

51. I also have reservations about the generalised statements made by UT Judge Plimmer in *AMA* that it will be difficult in practice for a change in circumstances in a place of relocation to be sufficiently fundamental and durable or "significant and non-temporary" for there to be cessation. That may be so in some cases, but it will all depend on the evidence in any particular case and one should not generalise.

52. I recognise that this involves differing from the approach set out in paragraph 17 of the UNCHR Guidelines in so far as that states that "changes in the refugee's country of origin affecting only part of the territory should not, in principle, lead to cessation of refugee status". I accept, however, as the Guidelines state, that "not being able to move or establish oneself freely in the country" is relevant to whether the change in circumstances is fundamental, or "significant" and "non-temporary".

53. It follows that the FTT and the UT erred in law in holding that the availability of internal relocation cannot in principle lead to a cessation of refugee status and the case will have to be remitted to consider whether or not it does so on the facts in this case."

26. For his part, Underhill LJ considered the "mirror image" approach to be "both fair and principled" (paragraph 82). According to him:-

"82. … the fact that the refugee has left their home country and found safety in the country of refuge, perhaps years previously, must be taken into account; but, so far as the Convention issues are concerned, the way that that is done is not by changing the basic criteria for protection but by the requirement for a specially strict approach to their application, with the burden on the Secretary of State, as

enjoined in *Hoxha* (see para. 48 of Hamblen LJ's judgment). It may also of course, separately, and depending on the particular facts, give the refugee grounds for arguing that his or her removal is in breach of their rights under article 8 of the ECHR."

27. At paragraph 83, Underhill LJ specifically rejected the submission of Mr Vokes (on behalf of MS) that the proposed safe area of the country in question had to be a "substantial" part of it. He noted that whilst, simply in terms of Mogadishu's land area, that was no doubt true "in other respects it is plainly not: on the contrary, it is the capital and the largest city in the country and the home to a substantial part of its population".

28. Newey LJ agreed with both judgments.

29. In his submissions to us, Mr Toal laid emphasis upon the opinions of the House of Lords in R (Hoxha) v Special Adjudicator and Another [2005] UKHL 19, as well as pointing out that MA (Somalia) had not, in fact, been concerned with internal relocation. So far as Hoxha was concerned, Mr Toal drew particular attention to the following passage on the opinion of Lord Brown:-

> "63. This provision, it shall be borne in mind, is one calculated, if invoked, to redound to the refugee's disadvantage, not his benefit. Small wonder, therefore, that all the emphasis in paras 112 and 135 of the Handbook is upon the importance of ensuring that his recognised refugee status will not be taken from him save upon a fundamental change of circumstances in his home country. As the Lisbon Conference put it in para 27 of their conclusions: " … the asylum authorities should bear the burden of proof that such changes are indeed fundamental and durable".
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> 64. Many other UNHCR publications are to similar effect. A single further instance will suffice, taken from the April 1999 Guidelines on the application of the cessation clauses:
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> > "2. The cessation clauses set out the only situations in which refugee status properly and legitimately granted comes to an end. This means that once an individual is determined to be a refugee, his/her status is maintained until he/she falls within the terms of one of the cessation clauses. This strict approach is important since refugees should not be subjected to constant review of their refugee status. In addition, since the application of the cessation clauses in effect operates as a formal loss of refugee status, a restrictive and well-balanced approach should be adopted in their interpretation."
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> 65. The reason for applying a "strict" and "restrictive" approach to the cessation clauses in general and 1C (5) in particular is surely plain. Once an asylum application has been formally determined and refugee status officially granted, with all the benefits both under the Convention and under national law which that carries with it, the refugee has the assurance of a secure future in the host country and a legitimate expectation that he will not henceforth be stripped of this save for demonstrably good and sufficient reason. That assurance and expectation simply does not arise in the earlier period whilst the refugee's claim for asylum is under consideration and before it is granted. Logically, therefore,

the approach to the grant of refugee status under 1A (2) does not precisely mirror the approach to its prospective subsequent withdrawal under 1C (5).

66. That said, however, it would seem to me appropriate that in the initial determination of an asylum claim under 1A (2) the decision-maker, in a case where plainly the applicant fled his home country as a genuine refugee from Convention persecution, should not too readily reach the view that he could now safely be returned to it. …"

30. This passage of the opinion is, however, plainly *obiter*. The issue to be decided by the House of Lords in Hoxha was whether Article 1C(5) of the Refugee Convention had any application until it was invoked by a state in order to withdraw refugee status. The House held that it did not and that, accordingly, the proviso to Article 1C(5) could not apply to an asylum seeker whose claim under Article 1A(2) had not been determined.

31. In no sense, therefore, can Hoxha be regarded as binding authority, which the Court of Appeal in MS (Somalia) should have followed, to the effect that the cessation provision of Article 1C(5) must be construed in the way set out in the UNHCR Guidelines.

32. In his post-hearing submissions of 8 August, on the issue of cessation/revocation, Mr Toal submitted that it:

"is important to note that no argument *against* internal relocation featuring in the cessation assessment was positively put forward in *MS (Somalia)*. Indeed, the point was conceded by the respondent to the appeal (see para 45 of *MS* where Counsel for the asylum seeker "conceded that it was wrong to hold that internal relocation could in principle lead to cessation")".

33. This leads Mr Toal to submit that MS "is not binding authority and provides this tribunal limited assistance in determining" the claimant's appeal.

34. The fact that a legal issue may be conceded before a court does not, in any sense, affect the fact that, if that issue is, or forms part of, the *ratio* of the resulting judgment of the court, the matter has been authoritatively decided by that court. If, applying ordinary principles of *stare decisis*, the judgment would be binding on a lower court or tribunal, the fact that the concession was made will be immaterial.

35. Any other consequence would, manifestly, be intensely problematic. If, for example, in accordance with his or her professional obligations, Counsel concedes a legal issue that in their view is unarguable, it would be bizarre if, by reason of that concession, the resulting judgment were to be deprived of the authority that it would otherwise have. A "bad" view of the law may otherwise be perpetuated.

36. We accept that the making of such a concession might in practice mean the court is not presented with the full range of authorities, including those that might be binding upon it, with the result that there is a risk of the resulting judgment being *per incuriam.* But that is not the position here. As we have explained, Hoxha was not such a binding authority.

37. In MS, the court did not, in any event, regard the concession as excusing it from the need to explain, in some detail, why the concession was rightly made. That emerges plainly from the judgments of Hamblen LJ and Underhill LJ.

38. It is also necessary to observe that the court in MS was well aware of the fact that the respondent in MA (Somalia) was not a person who was said to be able to avail himself of internal relocation. This is clear from paragraph 47, where Hamblen LJ said that "this court should follow the mirror image approach endorsed in *MA (Somalia*), **if and in so far as it is not bound to do so**" (our emphasis).

39. In conclusion, we are bound by the judgments in MS to hold that the First-tier Tribunal Judge in the present appeal was wrong in law to conclude that the Secretary of State could not revoke the claimant's refugee status by reason of the fact that there was a part of Somalia to which the claimant could now reasonably be expected to return. Although it is, of course, unnecessary to do so, we would merely add that this would have been our conclusion in any event.

(b) Is MOJ & Ors determinative of whether humanitarian conditions upon return to Mogadishu would breach the claimant's rights under Article 3 of the ECHR?

40. At the end of her decision, the First-tier Tribunal Judge held, as we have already seen, that the claimant's deportation would be in breach of, inter alia, Article 2 (right to life) and Article 3 (prohibition on torture/inhuman degrading treatment or punishment) of the ECHR. Neither of these Articles features expressly, however, in the First-tier Tribunal Judge's analysis.

41. We are, accordingly, forced to infer that, at least in so far as Article 3 is concerned, the First-tier Tribunal Judge made the finding that it would not be "a safe or reasonable internal relocation option" for the claimant to go to Mogadishu, on the basis that he would there face a real risk of Article 3 harm. In doing so, we further infer that the First-tier Tribunal Judge drew upon the following statement, contained in the country guidance decision of MOJ:-

> "(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 15C risk or facing a real risk of destitution. On the other hand, relocation to 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 possibility of having to live in conditions that will fall below acceptable humanitarian standards."

42. We reject Mr Toal's suggestion that the Secretary of State had not sought permission to appeal against the Article 3 conclusion of the First-tier Tribunal Judge. As can be seen from the grounds which we have set out above, the issue of Article 3 was at the forefront of the Secretary of State's criticisms of the decision of the First-tier Tribunal Judge. In particular, the grounds emphasised the judgments of the Court of Appeal in Secretary of State for the Home Department v Said [2016] EWCA Civ 442. The

grounds contended that the First-tier Tribunal Judge should have "directed" herself to this case.

43. The claimant in that case was a convicted rapist, whom the Secretary of State wished to deport as a foreign criminal. The Upper Tribunal concluded the claimant would be at risk of finding himself destitute, if returned to Mogadishu, and would therefore be likely to end up in a camp for internally displaced persons (an "IDP" camp), where, according to the country guidance in MOJ, conditions would be very poor. Having regard to the particular circumstances of the claimant, the Upper Tribunal found that his removal would violate Article 3.

44. In holding that the claimant's mental health condition was such that he faced a real risk of Article 3 harm, if returned to Somalia, the court found that the Upper Tribunal had erred. It had failed to apply the very high threshold that the Strasbourg Court had determined to be applicable in cases of this kind: D v United Kingdom (1997) 24 EHRR 43; N v United Kingdom (2008) 47 EHRR 39 (paragraphs 14, 18 and 19).

45. So far as concerned the country guidance in MOJ, Burnett LJ (as he then was) noted paragraph 407 of the Upper Tribunal's decision. In particular, the guidance stated that a person returning to Mogadishu after a period of absence would look to any nuclear family, as well as clan members, in seeking help with re-establishing themselves in that city. Amongst the factors to be considered were length of absence; family or clan association; financial resources; prospects of securing a livelihood; remittances from abroad; and means of support during time spent in the United Kingdom. As a general matter, the Upper Tribunal considered that it "will be for the person facing return to Mogadishu 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 had never been away".

46. The Upper Tribunal then said this:-

> "408. 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."

47. Burnett LJ held as follows:-

> "26. … The conclusion at the end of paragraph 408 raises the possibility of a person's circumstances falling 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.

27. The Luxembourg Court considered article 15 of the Qualification Directive in *Elgafaji v Staatssecretaris van Justitie* [2009] 1 WLR 2100 and in particular whether article 15(c) provided protection beyond that afforded by article 3 of the Convention. The answer was yes, but in passing it confirmed that article 15(b) was a restatement of article 3. At para [28] it said:

> "In that regard, while the fundamental right guaranteed under Article 3 of the ECHR forms part of the general principles of Community law, observance of which is ensured by the Court, and while the case-law of the European Court of Human Rights is taken into consideration in interpreting the scope of that right in the Community legal order, it is, however, Article 15(b) of the Directive which corresponds, in essence, to Article 3 of the ECHR. By contrast, Article 15(c) of the Directive is a provision, the content of which is different from that of Article 3 of the ECHR, and the interpretation of which must, therefore, be carried out independently, although with due regard for fundamental rights, as they are guaranteed under the ECHR."

28. In view of the reference in the paragraph immediately preceding para 407 to the UNHCR evidence, the factors in paras 407(h) and 408 are likely to have been introduced in connection with internal flight or internal relocation arguments, which was a factor identified in para 1 setting out the scope of the issues before UTIAC. Whilst they may have some relevance in a search for whether a removal to Somalia would give rise to a violation of article 3 of the Convention, they cannot be understood as a surrogate for an examination of the circumstances to determine whether such a breach would occur. I am unable to accept that if a Somali national were able to bring himself within the rubric of para 408, he would have established that his removal to Somalia would breach article 3 of the Convention. Such an approach would be inconsistent with the domestic and Convention jurisprudence which at para 34 UTIAC expressly understood itself to be following.

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

…

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 judgment 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.
>
> **Conclusion**
>
> 32. In para 19 above, I have expressed my conclusion that AS's circumstances are not such as could preclude his removal to Somalia on article 3 grounds. I should add that I also accept the submission advanced by Miss Anderson that the evidence could not, in any event, support a finding of fact that AS would find himself living in an IDP camp. The prospect of employment, some clan support and the availability of remittances suggests that, despite his depression and PTSD, AS would have the financial wherewithal to establish himself in Mogadishu."

48. Mr Toal submits Burnett LJ's conclusion that MOJ does not provide support for the proposition that living in an IDP camp would give rise to a generalised real risk to Article 3 harm, was, in fact, *obiter*. This is because, as we have just seen, at paragraph 32, Burnett LJ accepted the submission advanced by Counsel for the Secretary of State that, on the evidence, the claimant would not find himself living in such a camp.

49. Whilst, strictly speaking, Mr Toal may be right, the fact of the matter is that Burnett LJ (with whom the other members of the court agreed) went into considerable detail in explaining what, properly construed, the Upper Tribunal's findings in MOJ in fact were on the subject of conditions in IDP camps. His conclusion - that the Upper Tribunal in MOJ did not find, as country guidance, that a person who found himself in an IDP camp was thereby likely to face Article 3 harm (having regard to the high threshold established by D v United Kingdom and N v United Kingdom) - is, with respect, in any event correct. So much was made clear by Hamblen LJ at paragraphs 76 to 78 of MS (Somalia).

50. As with the previous issue, Mr Toal, in his post-hearing submissions, points out that Counsel in MS (Somalia) conceded the correctness of the findings in Said. Our response is the same as in paragraph 34 above.

51. It is, however, necessary to engage with Mr Toal's submission regarding the present state of the country guidance on Somalia. Mr Toal laid particular emphasis upon the findings of the Upper Tribunal in the country guidance case of AMM and Others (conflict; humanitarian crisis; returnees; FGM) Somalia CG [2011] UKUT 00445 (IAC).

52. For present purposes, the essence of the Upper Tribunal's country guidance findings in AMM can be summarised as follows. The Tribunal differed from the factual findings of the Strasbourg Court in Sufi and Elmi v the United Kingdom [2011]

ECHR 1045, which had held that the actions of the then warring parties had been the predominant course of the humanitarian crisis then pertaining in southern and central Somalia, which meant the high threshold of Article 3 harm as explained in D v United Kingdom and N v United Kingdom did not need to be met. The Upper Tribunal nevertheless held that there was, *at the time* with which it was dealing, a generalised Article 3 risk, which met that high threshold, primarily because of the drought and resulting famine which were then present in southern and central Somalia.

53. This is apparent from the following paragraphs:-

> "474. We have considered in Part H of this determination the judgment of the ECtHR at [278] to [283] of Sufi and Elmi and its use of MSS v Belgium and Greece. In essence, the use which the ECtHR made of that case was that because Greece was responsible for the Article 3 infringement on its own territory, (not least because it had detained the applicant but also because of the way of life to which it effectively condemned him after release), there was no need, when assessing whether Belgium had breached Article 3 by removing the applicant to Greece, to apply the "very exceptional" test or standard found in the case of N v United Kingdom.
>
> 475. At [282] of Sufi & Elmi, the Court found that if "the dire humanitarian conditions in Somalia were solely or even predominantly attributable to poverty or to the state's lack of resources to deal with a naturally occurring phenomenon, such as drought, the test in *N v United Kingdom* may well have been considered to be the appropriate one". The Court, however, found that the drought was only a contributory factor to the humanitarian crisis, which was "primarily due to the direct and indirect actions of the parties to the conflict".
>
> 476. As we have already held, whilst we consider it right to have close regard to the Court's findings of fact, to which it then applied its jurisprudence, we are in no sense bound by section 2 of the 1998 Act or its attendant domestic jurisprudence to make the same findings of fact.
>
> 477. On the evidence before us, we conclude that it is not the actions of the parties to the conflict which have caused the state of famine in southern and central Somalia and the present international humanitarian crisis but, rather, the worst drought there has been for 60 years. Although the effects of the drought have been noticeable for some time, and discussed in previous country guidance cases, the predominant factor behind the decision of families to leave their homes and trek long distances, in often appalling conditions, either to Mogadishu or to neighbouring countries, has been because their livestock have perished, and their subsistence farming is no longer sufficient to support them. It is impossible to accept the suggestion that the parties to the conflict have caused a breakdown in infrastructure, which has led these families to leave.
>
> …
>
> 480. This does not, however, mean that, because they are not a predominant cause, the direct and indirect actions of the parties to the conflict fall to be left out of account in deciding whether the humanitarian conditions in southern and central Somalia are such as to bring Article 3 into play. On the contrary, as we have

already indicated, it seems to us that those actions have a very real role in the assessment of whether, in terms of the law as set out in N v United Kingdom, the present situation is one of those "very exceptional cases" in which humanitarian conditions trigger Article 3. Looking at the evidence in this holistic way, we find that the present situation in southern and central Somalia is, indeed, one of those "very exceptional cases".

…

486. Our conclusion on the humanitarian position in southern and central Somalia (excluding Mogadishu) is as follows. Like the ECtHR at [296] of Sufi & Elmi (but by a different route) we have concluded that as a general matter a returnee who would find themselves in an IDP camp, following a return to southern and central Somalia at the present time, would be at real risk of exposure to treatment contrary to Article 3 on account of the humanitarian conditions there.

…

490. Finally, it is necessary to make it clear that the generalised Article 3 risk, which exists by reason of the famine, is likely to be temporary in duration. The international effort seen in the past months has undoubtedly begun to make an impact; and it is to be hoped and expected that, once the dangers of the rainy season are passed, the humanitarian position will reach the point where the exceptional "N situation" is over. As we have said in relation to the conflict in Mogadishu, judicial fact-finders will need to have close regard to whether the evidence shows a sufficient change to depart from our findings on this particular issue. Even then, however, absent some more fundamental change in the picture, there are still likely to be Article 3 issues if, notwithstanding the end of the famine, the potential returnee is still reasonably likely to end up at the bottom of the socio-economic ladder in an IDP camp."

54. Although Mr Toal attempted, with his customary skill, to rely upon extracts from the country guidance decision in MOJ in order to show that that decision had not, in fact, superseded the above findings in AMM, it is, in our view, plain on any full reading of MOJ that the Upper Tribunal in that case was well aware that the drought conditions, which had led to a UN-recognised famine in rural areas and parts of Mogadishu in 2011, no longer pertained. The nature of the armed struggle was also markedly different.

55. We therefore agree with Mr Jarvis's submissions on this issue and respectfully decline to follow those of Mr Toal. The largely naturally-caused events that led the Upper Tribunal in AMM to find that the high threshold for Article 3 harm, as regards conditions in IDP camps, had been met, no longer applied at the time of MOJ. Given that there is nothing in MOJ or anywhere else that we have seen which suggests human agency is responsible for the generalised conditions faced in IDP camps (as opposed to instances of specific harm), that high threshold needs to be met. Insofar as MOJ might have been read to suggest otherwise, or insofar as it might otherwise be read as indicating a generalised risk of Article 3 harm, Burnett LJ's judgment cogently explains why that is wrong. Irrespective of whether his judgment is formally binding on us, it is fully-reasoned and compelling and should be followed. In our view, it will be an error of law for a judge to refuse to do so.

56. We are reinforced in this conclusion by MI (Palestine) v Secretary of State for the Home Department [2018] EWCA Civ 1782. In his judgment, Flaux LJ held that Burnett LJ in Said "evidently considered that the country guidance case [viz MOJ] showed that the conditions in Somalia, although harsh, could no longer be attributed to the direct and indirect actions of the parties to the former conflict so that the N Test applied to the applicant's case and he could not satisfy that test, hence the Secretary of State's appeal succeeded" (paragraph 18).

57. Mr Toal submitted that, in relation to paragraph 31 of Said, there was "no inconsistency between the requirement to conduct a properly individualised assessment of an applicant's particular circumstances and recognition that some predicaments shared by large groups of people violate the Article 3 rights of all the members of the group". In this regard, Mr Toal relied upon the judgment of the Strasbourg Court in Salah Sheekh v the Netherlands (2207) App 1948/04. In that case, the ECtHR held that a person who belonged to Asharaf clan would, as such, be at real risk of Article 3 ill-treatment and it was unnecessary for him or her to show any further reasons why, as an individual, he or she might be at risk.

58. Whilst this is, of course, correct, it does not carry the present claimant's case any further. As a person who may be in an IDP camp, the claimant would not, for the reasons we have given, be as such at real risk of Article 3 harm. In order to establish the risk of such harm he would, therefore, have to show that his personal circumstances meant he reached the requisite threshold.

59. Finally under this heading, for completeness we need to deal with the First-tier Tribunal Judge's decision to allow the appeal on Article 2 (right to life) grounds. Just as her reasoning on Article 3 has had to be heavily inferred, we consider that her conclusion on Article 2 has to be treated as an aspect of her (legally erroneous) reliance upon paragraph (xii) of the country guidance in MOJ, as set out in paragraph 49 of her decision. We therefore conclude that the Secretary of State's challenge properly encompasses the judge's decision on Article 2. Her decision to allow the appeal on Article 2 and Article 3 grounds is wrong in law, for the reasons we have set out above.

(c) Reasonableness of relocation to Mogadishu

60. On the issue of internal relocation, paragraph 49 of the First-tier Tribunal Judge's decision does not require the inferential approach we have had to apply in the case of Articles 2 and 3. It is plain on the face of the paragraph that, whatever else the First-tier Tribunal Judge may have been doing, she was considering, in terms, whether it would be "reasonable" for the claimant to relocate internally to Mogadishu.

61. Again, Mr Toal submits that the Secretary of State has not challenged this aspect of the First-tier Tribunal Judge's decision. On any proper reading of the Secretary of State's grounds, however, that must be wrong. The grounds point out, in some detail, how the First-tier Tribunal Judge is said to have ignored the question of whether the claimant would "have a realistic prospect of securing a livelihood on return to Mogadishu, that is not based solely on the availability of support and remittances". Although the claimant appeared to be unskilled, the grounds

submitted that the First-tier Tribunal Judge "has failed to consider the prospect of unskilled or self employment". Here, and elsewhere, reference was made to the country guidance findings in MOJ. It was pointed out that the appellants in MOJ had been out of Somalia for in excess of ten years but both were found not to have shown good reason as to why they could not obtain "low level employment with an enhanced status of being a returnee from the West with potential access to the Facilitate Return Scheme".

62. The fact that the First-tier Tribunal Judge's findings on reasonableness of internal relocation were under challenge is further made plain by the Deputy Upper Tribunal Judge's grant of permission, which, as previously noted, emphasised that the "burden will be upon the [claimant] to show why he cannot relocate to Mogadishu".

63. The position that, in a revocation of refugee status case, the burden lies on the Secretary of State to show that internal relocation would be unreasonable and not unduly harsh does not, we find, affect the fact that the judge's findings were properly challenged by the Secretary of State and that permission to bring that challenge has been granted by the Upper Tribunal. The question, accordingly, is whether the First-tier Tribunal Judge has erred in law on this matter.

64. We find that the First-tier Tribunal Judge has failed in law to undertake a proper analysis of the claimant's position in Mogadishu, so as to determine whether it would be unduly harsh and to be expected to live there.

65. Given that internal relocation to Mogadishu has, since MOJ, been a realistic possibility in general terms; and since - subject to the requirements of "significant" and "non-temporary" change - the possibility of internal relocation has now been authoritatively established as relevant in deciding whether an individual should continue to be treated as a refugee, it may be helpful to remind ourselves of the law on internal relocation.

66. In R v Secretary of State for the Home Department ex parte Robinson [1998] QB 929, the Court of Appeal said:-

> "In determining whether it would not be reasonable to expect the claimant to relocate internally, a decision-maker will have to consider all the circumstances of the case, against the backcloth that the issue is whether the claimant is entitled to the status of refugee. Various tests have been suggested. For example, (a) if as a practical matter (whether for financial, logistical or other good reason) the "safe" part of the country is not reasonably accessible; (b) if the claimant is required to encounter great physical danger in travelling there or staying there; (c) if he or she is required to undergo undue hardship in travelling there or staying there; (d) if the quality of the internal protection fails to meet basic norms of civil, political and socio-economic human rights. So far as the last of these considerations is concerned, the preamble to the Convention shows that the contracting parties were concerned to uphold the principle that human being should enjoy fundamental rights and freedoms without discrimination. In the *Thirunavukkarasu* case, 109D.L.R.(4th) 682, 687, Linden JA, giving the judgment of the Federal Court of Canada said:-

> "stated in another way for clarity … would it be unduly harsh to expect this person, who is being persecuted in one part of his country, to move to another less hostile part of the country before seeking refugee status abroad?"
>
> He went on to observe that while a claimant should not be compelled to cross battle lines or hideout n an isolated region of their country, like a cave in the mountains, a desert or a jungle, it would not be enough for them to say that they do not like the weather in a safe area, or that they have no friends or relatives there, or that they may not be able to find suitable work there."

67. In Januzi and Another v Secretary of State for the Home Department [2006] UKHL 5, the House of Lords held that this country's law and the interpretation of the Refugee Convention should not follow that of the New Zealand Court of Appeal which, in Butler v Attorney General [1999] NZAR 205, held that "meaningful national state protection which can be genuinely accessed requires provision of basic norms of civil, political and socio-economic rights" (paragraph 32). The House, instead, laid emphasis on the following passage from UNHCR Guidelines in International Protection of 23 July 2003:-

> "*Economic survival*
>
> The socio-economic conditions in the proposed area will be relevant in this part of the analysis. If the situation is such that the claimant will be unable to earn a living or to access accommodation, or where medical care cannot be provided or is clearly inadequate, the area may not be a reasonable alternative. It would be unreasonable, including, from a human rights prospective, to expect a person to relocate to face economic destitution or existence below at least an adequate level of subsistence. At the other end of the spectrum, a simple lowering of living standard or worsening of economic status may not be sufficient to reject the proposed area as unreasonable. …" (paragraph 20).

68. The House also approved a passage from H. Storey "The internal flight alternative test: the jurisprudence re-examined" (1998) 10 International Journal of Refugee Law, 499; in particular, the following:-

> "Bearing in mind the frequency with which decision-makers suspect certain asylum seekers to be simply economic migrants, it is useful to examine the relevance to IFA claims of socio-economic factors. Again, terminology differs widely, but there seems to be broad agreement that if life for the individual claimant in an IFA would involve economic annihilation, utter destitution or existence below a bare subsistence level (*existenzminimum*)" or denied "decent means of subsistence" that would be unreasonable. On the other end of the spectrum a simple lowering of living standards or worsening of economic status would not. What must be shown to be lacking is the real possibility to survive economically, given the particular circumstances of the individual concerned (language, knowledge, education, skills, previous stay or employment there, local ties, sex, civil status, age and life experience, family responsibilities, health; available or realisable assets, and so forth). Moreover, in the context of return, the possibility of avoidance of destitution by means of financial assistance from abroad, whether from relatives, friends or even governmental or non-governmental sources, cannot be excluded" (paragraph 20).

69. The test or reasonableness/undue harshness is not, however, to be equated with the test of whether the individual would be likely to face Article 3 harm in the place of proposed relocation. That important point was reiterated by the House of Lords in Secretary of State for the Home Department v AH (Sudan) and Others [2007] UKHL 49. Referring to his judgment in Januzi, Lord Bingham emphasised the fact that the task for the decision-maker is to decide on the available material, where on the spectrum a particular case falls. It would all depend on a "fair assessment of the relevant facts" (paragraph 5). Lord Bingham continued:-

> "It is, or should be, evident that the enquiry must be directed to the situation of a particular applicant, whose age, gender, experience, health, skills and family ties may all be very relevant. There is no warrant for excluding, or giving priority to, consideration of the applicant's way of life in the place of persecution. There is no warrant for excluding, or giving priority to, consideration of conditions generally prevailing in the home country. I do not underestimate the difficulty of making decisions in some cases. But the difficulty lies in applying the test, not in expressing it."

70. With all this in mind, it is, in our view, manifest that the First-tier Tribunal Judge's assessment was materially flawed. At paragraph 50, she made reference to the fact that the claimant left Somalia in 1991 and had never lived in Mogadishu. She expressed herself as therefore satisfied that he would not have a support network of family or friends to whom he could turn, in a city with which he would be wholly unfamiliar. The First-tier Tribunal Judge also made reference to Mr Ali's report regarding the position of the claimant, coming from a minority clan. As the grounds of challenge emphasised, however, what is particularly lacking from this analysis is any consideration of the claimant's ability to secure employment in Mogadishu and the fact that he would have the ability to call on up to £1,500 from the Facilitated Returns Scheme in order to assist in his return.

71. We have looked at Mr Ali's report in order to see whether, if the First-tier Tribunal Judge had made full reference to it, her conclusions would be bound to have been the same. We do not consider that they would. Under the heading "Employment" Mr Ali refers to the claimant as not being able to "speak Somali fluently" (our emphasis). It is, therefore, clear that the claimant can, according to Mr Ali, speak some Somali. Since it does not appear from his report that Mr Ali has ever met the claimant or conversed orally with him, it is difficult to see how Mr Ali could have opined that the claimant's actual ability to speak this language would "be a significant barrier" to the claimant accessing employment in Mogadishu, where the bare minimum requirement of any job is speaking Somali. Furthermore, Mr Ali appears to have discounted the usefulness to the claimant in Mogadishu of being able to speak English, confining that positive factor to those seeking a job within NGO or the United Nations "which [the claimant] does not have the skills for". Again, this matter needed to be explored by the First-tier Tribunal Judge.

72. Whilst considering there was a possibility that the claimant could connect with his clan in Mogadishu, Mr Ali described the kind of work that the Bajuni do, as a minority clan, as being "low-level informal jobs like digging, porter work, waste management, hairdressing, shoe shinning and blacksmithing", although he thought that, given the Bajuni are a fishing community "they might not even be able to assist

[the claimant] to get informal work of this kind". As a fisherman, Mr Ali considered that the claimant would "have a very limited earning capacity and live very hand-to-mouth".

73. As can readily be seen, this evidence needed to be analysed by reference to the law on internal relocation, as set out by the House of Lords and the Court of Appeal in the cases to which we have referred. From these, it is plain that having to take a low-paying or low-status job is in no sense determinative of whether relocation would be unreasonable.

(d) Conclusions

74. For the reasons we have given, the decision of the First-tier Tribunal Judge contains errors of law in respect of her conclusion on whether the claimant's refugee status should be revoked; and on whether the claimant's return to Somalia would violate Article 2 and/or 3 of the ECHR. Her decision on those matters is set aside.

75. In re-making the decision in relation to Article 3 and (if advanced by the claimant) Article 2 of the ECHR, the fact-finding tribunal will be required to have regard to the relevant country guidance, as described above and as authoritatively interpreted by the Court of Appeal in Said and MS (Somalia), in order to decide whether, if returned to Mogadishu, the claimant would face a real risk of Article 2/3 harm, having regard to the claimant's personal circumstances, but bearing in mind that (absent any significant change in the general situation in Mogadishu between now and then) an Article 3 claim advanced in respect of general living conditions (as opposed to risk as a "direct result of violent activities": paragraph 31 of Said) will need to meet the high test in D v United Kingdom and N v United Kingdom.

76. The decision on revocation of refugee status will need to be re-made on the basis that it will be for the Secretary of State to persuade the fact-finding tribunal that, on all the current evidence before it, there has been a "significant and non-temporary" change, such as to make it reasonable – having regard to all the relevant factors - the claimant could reasonably and without due harshness be expected to relocate to Mogadishu. As we have seen, a real risk of Article 2 or 3 harm in Mogadishu will make it unreasonable for the claimant to relocate there; but a negative finding on that issue will not be determinative of the issue of reasonableness/undue harshness, which must be addressed in the way described in Januzi and AH (Sudan).

77. The nature and extent of the fact-finding required are such that we are satisfied that the appropriate course is to remit these matters to be re-decided by the First-tier Tribunal.

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

Unless and until a Tribunal or court directs otherwise, the claimant 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 claimant and to the Secretary of State. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber