UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

AD (reporting criteria – unreported cases) Somalia [2011] UKUT 00189(IAC)

THE IMMIGRATION ACTS

Heard at: Field House
On 4 April 2011

Determination Promulgated

Before:

Senior Immigration Judge Jordan

Between:

A.D.

APPELLANT

and

The Secretary of State for the Home Department

RESPONDENT

For the Appellant: Mr R. Toal, Counsel, instructed by IAS (London)
For the Respondent: Mr A. Bramble, Home Office Presenting Officer

(1) The decision in AM (Somalia) [2011] UKUT 54 (IAC) decided that the evidence failed to establish the generalised or indiscriminate violence was at such a high level along the route from Mogadishu to Afgoye (which travels across the K4 junction) that an appellant would be a real risk. Although the Tribunal in the unreported case of Ahmed Farah Mohamed reached a different conclusion, it did not fully address the findings in relation to this issue in the earlier country guidance case of AM & AM [2008].
(2) Given the criteria for reporting cases and the process of preparing decisions for reporting, it is likely to be rare that an unreported decision will contain sufficient

material within it to offer significant assistance as guidance to decision-makers, practitioners or other judges in other cases.

DETERMINATION AND REASONS

Introduction and immigration history

1. The appellant, a citizen of Somalia, was born on 29 August 1977. He is now 33 years old. He arrived in Britain on 2 August 1997, then aged 20, and has remained here ever since, now some 13½ years, a significant period were it not for the fact that, during this time, he had been sentenced to periods of imprisonment totalling 11 years, although the time served is less.

2. The appellant claimed asylum on arrival. He was granted temporary admission, refused asylum on 13 April 1998 but granted exceptional leave to remain for one year. The appellant sought further leave to remain. No decision was made but, on 28 June 2004, he was served with a notice of intention to make a deportation order as a result of his offending. No further action was taken on that decision. On 1 March 2006, following a further conviction, he was asked for representations why he should not be the subject of a decision to deport. The appellant has an extensive criminal record beginning on 2 June 1998 and continuing until 18 November 2009.

3. On 19 June 2006, following his conviction on 4 May 2005 at Harrow Crown Court for an offence of burglary for which he was sentenced to 2½ years imprisonment, he was served with a notice of decision to make a deportation order. He appealed but the appeal and the decision were withdrawn. On 6 August 2007 a further decision was made refusing asylum and making a fresh decision to make a deportation order.

4. The appellant's appeal was heard by Immigration Judge Gillespie and Mr A. Smith on 24 January 2008 and dismissed (the first determination). On a renewed application for permission to appeal, Owen J granted permission on 22 April 2008. On 20 June 2008 Senior Immigration Judge Warr found a material error of law in the determination and the second stage hearing took place on 3 August 2008 before Immigration Judge Mayall and Mr M E A Innes, (resulting in the second determination).

5. The appeal was again dismissed. On appeal to the Court of Appeal, Sullivan LJ ordered by consent that the appeal be allowed "to the extent that it is remitted back to the Asylum and Immigration Tribunal for reconsideration limited to the issue of whether the appellant is

entitled to human rights protection under Article 3 of the ECHR". The order of Sullivan LJ, dated 12 January 2010, referred to the statement of reasons. The statement noted that the application to the Court of Appeal had been stayed by the Court of Appeal pending a ruling regarding Article 15(c) of the Qualification Directive in the cases of AH (Iraq) and QD (Iraq). The statement of reasons went on to say that:

> "4. …On 17 August 2009 the respondent made a proposal to the appellant that the parties ought to apply to the court by consent to have the matter allowed on terms. Those terms were that in light of AH and QD the appeal ought to be remitted to the AIT for reconsideration limited to the issue of whether the appellant is entitled to humanitarian protection under paragraph 339C of the Immigration Rules. The appellant and the respondent understand the response for proposals are based upon the court's decision to stay the proceedings.
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> 5. The appellant's grounds rely upon Article 3 of the ECHR not Article 15(c) of the Qualification Directive and thereby the appeal cannot be allowed and remitted to the AIT on humanitarian protection grounds. The appellant and the respondent agree that permission ought to be granted and the appeal allowed to the extent it is remitted back to the AIT for reconsideration of the appellant's appeal on the grounds advanced in the appellant's skeleton argument."

6. The grounds and the skeleton argument (a copy of which was supplied to me) refer to Article 3 of the ECHR.

7. On 5 March 2010 SIJ Latter gave directions following remittal by the Court of Appeal that the appeal be listed for hearing to reconsider the issue of Article 3 in accordance with the consent order. He ordered witness statements, a paginated bundle and a skeleton argument. He stated that the appeal should be listed on the first available date after 30 June 2010.

8. The appeal was listed for hearing on 5 July 2010. On 22 June 2010 the appellant's representatives, Refugee Migrant Justice, formerly the RLC, made an application stating that they had gone into administration from 16 June 2010 and therefore could not act for the appellant. The appeal was taken out of the list.

9. On 13 July 2010 the Immigration Advisory Service wrote to say that they were now instructed and asked that the hearing not be listed for four weeks to enable them to prepare for the hearing. The appeal was listed for, but adjourned on 13 December 2010 on application by the appellant. At the hearing before Senior Immigration Judge McGeachy, it was accepted that the appeal turned on the issue of appellant's

removal to Mogadishu. Mr Avery confirmed that this was how the appellant would be sent to Somalia.

10. The appellant has been in immigration detention since January 2010.

11. The appellant is a Marehan which is a sub-clan of the Darod clan. Whilst in Somalia, the appellant had lived in Mogadishu, although the Marehan's home area is Gedo. The principal challenge to the first determination was the improperly reasoned consideration of the expert evidence provided by Dr Hoehne and, in particular, that the appellant would be at risk immediately on his return to Mogadishu and *en route* to Gedo owing to the perception that as a person coming from abroad he would be perceived as wealthy.

12. In the skeleton argument, the second determination was challenged on four grounds. First, that the panel had improperly concluded that the appellant would be able to obtain adequate protection in Mogadishu as a Marehan returnee. Second, that the panel failed to determine whether there was a real risk that the appellant would be internally displaced and thereby at risk of treatment in violation of his Article 3 rights in accordance with the Tribunal's guidance in HH (Somalia) [2008] UKAIT 00022. Thirdly, that the generalised violence in and around Mogadishu had deteriorated to such an extent that there was then a real risk of a violation of his Article 2 and 3 rights simply by reason of the appellant's presence in that area, notwithstanding the finding in HH (Somalia) that there was no such risk in 2008. Finally, that the second Tribunal was wrong in requiring an appellant to show differential impact in Article 3 cases. It is possible for any potential member of the civilian population to be eligible for subsidiary protection, provided that the level of indiscriminate violence is high enough in the war zone to which he is to be returned. If there are any factors special to the applicant, either as an individual or as a member of a group, which increase the risk to him or her over that faced by the general population, the risk of serious harm must be assessed taking those factors into account, see HH (Somalia) and others v SSHD [2010] EWCA Civ 426, paragraph 31.

No Article 8 claim

13. The direction provided by the Court of Appeal, supported by the consent of the parties, limited the scope of the hearing before me to a consideration of the Article 3 issues. The appellant has a son, R, who was born 7 August 2005 whilst the appellant was in prison. The child's mother, Sara, suffered from problems associated with alcohol and cannabis abuse. The appellant told me she is no longer in the country but in Norway. The appellant's son is looked after by his aunt, Asha

Omar. Although she provided a statement, this is dated 18 January 2008 at a time when the appellant was imprisoned where he had remained ever since the birth of his son. The statement does not address R's interests save to say that she would be happy for the appellant to have custody. In the appellant's fourth statement, made on 30 March 2011 in anticipation of the hearing before me, the appellant spoke of wanting to rebuild his life, wishing to resume or rebuild his relationship with his son and of his having stopped taking drugs and alcohol. No formal care proceedings have been taken in relation to R although, the appellant told me, Southwark Social Services have been involved in his care. No material had been adduced from them. Realistically and properly, Mr Toal did not seek to advance an Article 8 claim given the sparsity of the information. The aunt's statement is now over three years old and no information is provided as to the current situation. The respondent had not been provided with any notice that the appellant sought to enlarge the scope of the appeal to include an Article 8 claim.

The claim

14. The appellant's father, a member of the Marehan clan, who worked as a customs officer, was killed in 1991 in the inter-clan violence. The appellant's mother was killed in a road traffic accident in 1993. The family lived in Mogadishu and was subjected to violence at the hands of the militia of the Hawiye clan. The appellant claimed he was detained and tortured and bears the scars of this ill-treatment. At some point, a car in which he was travelling was hit by a roadside bomb which caused an injury. Both he and his brother Mohammed fled Mogadishu in July 1997, travelling to the Kenyan border where his brother was detained. The appellant travelled alone to the United Kingdom. One of his brothers, a sister and the aunt who had brought him up following the death of his mother are also in the United Kingdom.

15. In his second statement, in response to the Home Office refusal letter, the appellant spoke of being unable to return to Mogadishu or to relocate to Gedo or to seek clan protection. He also spoke of being unable to follow the tenets of Islam and being at risk because of his tattoos. In a statement signed on 8 March 2007 he described the tattoos. One on his right arm is in Chinese script, and one has his name on it. He has other tattoos on his left arm. He also spoke of his family, including an uncle who arranged for the appellant's travel to the United Kingdom. He described him as a businessman.

The appellant's evidence before me

16. In the course of the hearing before me, the appellant confirmed that the contents of his short statement of 30 March 2011 were true. The substance of this statement is that the appellant has nobody to protect him in Somalia as he has lost contact with the country and those within it. He states that he does not know of any other relatives and that his aunt and cousins live in London and they themselves no longer have any contact with Somalia. He said that the uncle who had assisted him whilst in Somalia had passed away in 2001 and that he had found out about this in 2003 from his aunt. He accepted in cross examination that in neither of the two previous hearings had he mentioned that his uncle was dead and sought to explain this by reference to the fact that no one had asked him. Apart from a statement from Hudda Abukar, which does not advance the appellant's Article 3 claim, I have sufficiently summarised the evidence produced by the appellant and his aunt for the purposes of this appeal.

The reports of Dr Hoehne

17. Dr Hoehne has sufficiently established his expertise before the Tribunal. He has worked with Dr Virginia Lulling and Professor I.M. Lewis, both distinguished experts on the Horn of Africa. In his report of 12 December 2010, he speaks of how the situation in southern and central Somalia has changed radically since his earlier report of 21 August 2008. The Transitional Federal Government (the TFG) has been fighting with militant Islamic groups such as Al Shabbab and Hizbul Islam since May 2009. Somali government forces supported by troops of the African Union (AMISOM) have been involved in constant clashes in Mogadishu and the surrounding area. This has resulted in the deaths and displacement of many thousands of people, many of those displaced have fled to refugee camps in southern Somalia as IDPs. Civilians are often victims of the fighting. Al Shabbab occupies a considerable proportion of the territory in Somalia and enforces an extreme interpretation of Islamic Shari 'a law. The humanitarian problems caused by the conflict have resulted in almost 50% of the population, calculated in August 2009, requiring livelihood and humanitarian support. Both sides of the conflict commit serious human rights abuses.

18. Dr Hoehne describes how in southern Somalia much of the territory is under the control of Al Shabbab, an area stretching from Mogadishu up to Beletweyne and Gedo. Hizbul Islam has been in control of Afgoye since early 2010 although there is rivalry between the two groups.

19. Dealing with the specific risks faced by the appellant, Dr Hoehne describes the appellant as lacking first-hand information of current

Somali affairs as a result of his long absence in the United Kingdom and of becoming disorientated in the situation in southern and central Somalia and thereby unable to deal with the Al Shabbab militias, local gangsters or the TFG. Dr Hoehne considers that the tattoos on his arms are a major cause for concern as tattoos are forbidden by Islam. If news of the appellant's past were to become known, he would be perceived as one who has broken fundamental Islamic laws. As a returnee from the United Kingdom, he would be of interest to Al Shabbab, an assessment that is consistent with the evidence of a UNHCR Protection Officer, Mr Alex Tyler, who specifically identified returnees as at risk of serious harm. Indeed, Dr Hoehne suggests the risk may reach the level of being at risk of execution by stoning as an adulterer.

20. Dealing with relocation to the Gedo region, Dr Hoehne gives his opinion that the appellant could not avoid encountering Al Shabbab militias and checkpoints operated by TFG soldiers, Al Shabbab or criminals. Even TFG soldiers do not function in '*a benign way*'. There are examples of local aid workers being kidnapped for ransom. In February 2009, as a result of an armed clash at a checkpoint in Mogadishu, soldiers and civilian passengers were injured. As a person who does not demonstrate compliance with Al Shabbab rules and policies, Dr Hoehne considers that the appellant would be at risk. As a member of the Marehan clan, the appellant would be at risk in Mogadishu and its surroundings. Many members of Al Shabbab in Mogadishu are Hawiye. Clan protection would not be available to him on the way to Gedo.

21. I have considered an earlier report of Dr Hoehne dated 9 September 2007. Its contents are largely subsumed in the later report. In his assessment Dr Hoehne considered that the appellant's account of political developments was consistent with the objective evidence. Further, although the appellant's knowledge of the Marehan clan was very limited, this was consistent with the level of knowledge of a young man who, having fled Somalia 10 years before, had had little involvement with the Somali diaspora in the United Kingdom. He considered the appellant had limited religious knowledge. Along with his tattoos which would be revealed in the course of a ritual ablutions and his history of drug and alcohol abuse and criminal activity, this would result in a risk of harm. As a failed émigré who has dishonoured his family through misconduct, Dr Hoehne considered it unlikely that fellow clan members would offer him support or acceptance. Dr Hoehne concluded in paragraph 27 that the appellant would be facing an even higher risk of serious bodily harm as a result of these factors and would "most probably be persecuted" in Mogadishu and other regions of southern Somalia including the Gedo region.

22. For the hearing before the second panel which apparently took place on 30 August 2008, Dr Hoehne had provided a further report on 21 August 2008. The contents of this report are summarised in the second determination in paragraphs 20 to 37 and no suggestion was made to me that the detailed summary is anything but adequate and accurate. The report spoke of the deteriorating situation. The TFG government is seen largely as a Darod government. The TFG had been confronted by clan militias belonging to the Hawiye clan family who are still the majority of all inhabitants of Mogadishu. More than half a million people had been caused to flee Mogadishu in the last two years notwithstanding the presence of the African Union Mission to Somalia. The TFG's control of Mogadishu does not afford complete control. Whilst elements of the conflict were a pure clan war between Darod and Hawiye, it would be an oversimplification to see it only in these terms. A UN Security Council Report of November 2007 referred to the volatile situation in Mogadishu with daily attacks by insurgents and counter-attacks. Somalia was awash with arms and civilians were regularly caught up in the fighting. In the course of the conflict, human rights violations continued to be perpetrated by both sides. He would be at risk in Mogadishu as a member of the Darod clan family and, in this regard, his view contradicted statements in the Fact-Finding Mission of July 2007 which indicated there was no routine targeting of members of particular clans. It would not be safe to travel to Gedo and the Marehan would not provide assistance. He might even be at risk from other sub-clans of the Darod. He disputed the Tribunal's findings in HH and, in particular, the finding that the TFG had cleared away most militia checkpoints.

The medico-legal evidence

23. Dr Arnold provided a report on 15 September 2007, after an examination of the appellant's scarring. It is clear that the appellant has bullet wounds and scarring highly consistent with knife wounds and an explosion from an IED. He concluded:

> "Taken in the round as required by the Istanbul Protocol the 'overall evaluation' leads me to conclude that although individual scars may have been the result of events other than torture, there is a reasonable likelihood that he was indeed tortured."

24. There is a reference in paragraph 27 of the first determination to a report of Dr Kahtan to the effect that Dr Kahtan did not consider the appellant presenting a suicide risk in late 2007 or early 2008. Mr Toal did not advance the claim on this basis. There is no more recent medical evidence.

The first determination

25. In the first determination, the panel rejected significant parts of the appellant's account. It rejected his claim that his aunt paid a ransom following his abduction in 1996 because, by that time, she had left Somalia. In order to meet this objection, the appellant had altered the date on which he claimed his abduction had taken place. The Tribunal considered that the discrepancies could not legitimately be ascribed to loss of memory or an inability to recall dates. The Tribunal, however, accepted that the appellant should be regarded as a member of the Marehan sub-clan of the Darod.

26. In paragraph 24 of its determination, the panel considered that it was '*incontestable*' that the appellant, prior to his departure from Somalia, would have been able to access clan acceptance and protection and would not have remained in an area of Somalia where he would be vulnerable to violence and victimisation at the hands of the Hawiye without having recourse to this protection. The Tribunal accepted that the appellant's scars were the result of his having been wounded. The wounds could have been inflicted in the circumstances alleged by the appellant but, equally, they could have been inflicted in other circumstances. In view of the adverse credibility finding made in the first determination, the panel did not accept the appellant's account of the manner in which his injuries had been inflicted. On the basis of these findings of fact, it concluded in paragraph 26 of the first determination that whilst accepting the appellant was a member of a majority clan in Somalia, it rejected his allegations of past persecution or abuse.

27. In the course of the first hearing, the Secretary of State relied upon the appellant's dismal record of offending as excluding him from the protection of the Refugee Convention by the operation of Article 33(2). The Tribunal set out why it concluded that the appellant was, indeed, excluded by reason of his offending. It also gave its reasons why it considered the appellant constituted a danger to the community although, this appeal being confined to Article 3, that is entirely irrelevant. It explains, however, the importance that is now placed upon the operation of Articles 2 and 3. In the first determination, the panel concluded that the appellant was not at risk from any past persecution, past adverse exposure to the authorities or any interest in him shown by them. The sole basis of risk was identified as his status on return as a failed asylum seeker and a deported criminal. In parenthesis, this must have included the fact that, as he came to the United Kingdom in 1997, he could point to a significant period of time he has been here.

28. When dealing with Dr Hoehne's report, the panel did not accept that the evidence of the tattoos on his arms constituted a deviation from traditional or religious norms such as to place the appellant at risk. The photographs showed the tattoos on his right forearm to spell out his name 'Ahmed'. The tattoo on his left arm appeared to be on the inner aspect of the limb, faint and indistinct, and could not be read in the photograph. The photographs also demonstrated, as the medical report described, that the tattoos were partially obscured by scars. It did not therefore consider that the tattoos in themselves would be considered objectionable in Somalia or that they would place the appellant at risk.

29. The panel went on to consider the situation in Mogadishu. It found that the TFG was in essence a Darod institution and would not present the appellant with a hostile environment. It did not accept that the appellant's history of alcohol and substance abuse or his criminal offences would become known as there would be no reason for the appellant to reveal it and it could circulate by no other means. It recorded that it was Dr Hoehne's view that the appellant would be able to avail himself of protection by the Marehan if he were able to relocate in Gedo, the Marehan centre. It did not accept the appellant would be at risk while travelling from Mogadishu to Gedo. Finally, it did not accept the appellant was without family members in Somalia. Recalling the appellant's evidence that his uncle was a successful businessman in Mogadishu in 1997, the panel hearing the appellant's appeal in January 2008 could not have been told his uncle had died. The appellant's subsequent evidence was that his uncle died in 2001 and the appellant became aware of it in 2003 in which event it would have been likely to have featured in the evidence at the earlier hearings.

The error of law

30. The appellant sought reconsideration of the first determination on the basis that the panel failed to have regard to the relevant expert evidence to the effect that the appellant would be unable to relocate to the Gedo region in safety. It challenged the panel's assessment that the appellant had failed to establish he would be at risk while travelling from Mogadishu to Gedo. In Ground 3, the appellant criticised the panel for finding that his presence in Mogadishu was consistent with his having recourse to protection. In Ground 4 it was said that the panel failed to provide adequate reasons for rejecting the expert evidence to the effect that members of the Marehan clan would not accept the appellant given, his history of substance abuse, the tattoos on his arms and the likelihood that his past deviant behaviour would have become known in the diaspora and thence to clan members in Somalia.

31. In finding that the first determination was flawed by legal error, Senior Immigration Judge Warr noted that the Presenting Officer before him accepted that the analysis of the risks for the appellant *en route* to Gedo was not sufficiently analysed. He continued:

> "… The panel refers to the expert's opinion that the appellant would be in danger in Mogadishu and en route to Gedo. Going to and through Mogadishu was part of the relocation process. If the panel were finding that the appellant was not at risk in Mogadishu then why go on to consider the issue of internal relocation? If the panel were making a finding in the alternative, then the panel should have made the position clearer.
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> Accordingly, it being conceded that the risks *en route* to the potentially safe haven were insufficiently analysed and it not being established that the panel's findings were not necessary or material to its determination the error is a material one. It is to be noted that in between the panel's hearing and the signing of the determination the case of HH [2008] is UKAIT 00022 CG was published (on 29 January 2008) and this case may have a bearing on the risks in Mogadishu and *en route*.
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> …[The appellant's counsel] indicated that it was unlikely to be disputed that Gedo was a safe haven. The Tribunal will need to see if the further evidence establishes the risk to the appellant in Mogadishu or *en route* to the safe haven. If the evidence indicates the appellant is not at risk in Mogadishu then the question of relocation does not arise."

32. It was on the basis of these directions that the appeal came before the second panel and on which the second determination came to be made.

The second determination

33. The appeal was heard on 3 August 2008 and the determination promulgated on 30 September 2008. For the purpose of the hearing, Dr Hoehne had provided his further up-dated report on 21 August 2008, see paragraph 22 above.

34. It was accepted by the appellant's counsel (see paragraph 52 of the second determination) that the Tribunal in HH had concluded that in general people were safe in Mogadishu, subject to the proviso that the position might be otherwise where there was a real risk that a person would encounter a non-TFG checkpoint.

35. It was also common ground that the Tribunal should first consider whether the appellant would be at risk of a violation of his Article 3 right of return to Mogadishu and that only if such a risk was

established that the Tribunal should go on to consider the appellant travelling to Gedo. It does not appear to have been suggested that Gedo would not provide a safe haven to the appellant. The issue was confined to that of a risk to the appellant in Mogadishu or *en route* to Gedo.

36. In paragraph 63 of the second determination, the Tribunal decided that the original panel's findings in relation to the risk as a result of the tattoos on him and other associated matters could not be said to be affected by any error of law. This was accepted by counsel for the appellant. Accordingly, the second determination, correctly in my judgment, did not disturb those findings of fact. It was, of course, accepted that the burden lay upon the appellant to the lower standard.

37. The panel's assessment of the evidence and of risk faced by the appellant is found in paragraphs 65 to 78 of the second determination. Adopting the decision of the Tribunal in HH as its starting point, it referred to paragraph 301 that there was no evidence that persons arriving at the airport near Mogadishu would have any difficulty travelling into Mogadishu and that they would not need an escort. In general, a person was not at real risk of serious harm by reason only of his presence in Mogadishu. It did not consider that the updated report of Dr Hoehne established that the appellant would be at risk if returned to Mogadishu notwithstanding a general deterioration in the situation there. The second determination concluded in paragraph 77:

> "Thus we do not accept that the Marehan are not generally present in Mogadishu. In any event we do not consider that this would mean that he would be [un]able to access protection from the main Darod clan. There is no evidence whatsoever to suggest that the Darod would not give protection to one of the Marehan sub-clan. The evidence is, if anything, the other way. The previous panel found, which is incontestable, that he must have had protection before he left. There is nothing to suggest that in the intervening years the protection of the Darod clan has suddenly become unavailable to the members of the Marehan sub-clan. In these circumstances we conclude that the appellant is a member of a majority clan, as a member of the majority clan that largely backs the TFG forces, and as a person who has enjoyed protection in the past would be able to access adequate clan protection in Mogadishu. We do not consider that there is any real risk of the circumstances set out in the proviso contained in paragraph 302 of HH arising."

38. As I have set out above, the grounds of appeal to the Court of Appeal were limited by the Court to a reliance upon Article 3 and the parties' consent that the appeal should be allowed on the grounds advanced in

the appellant's skeleton argument which I have summarised in paragraph 12 above.

39. I make no excuses for this lengthy outline of the stages through which this appeal has advanced. Like geological strata, sedimentary deposits leave traces in the form of findings which had to be incorporated or omitted (as the case may be) from the current assessment; incorporated where they have been found to sustainable and omitted when found to have been unsustainable.

Case law

40. In HH & others (Mogadishu: armed conflict: risk) Somalia CG [2008] UKAIT 00022, the Tribunal summarised its findings in relation to the matters which concern me in these terms:

(5) Neither the TFG/Ethiopians nor the Union of Islamic Courts and its associates are targeting clans or groups for serious harm. Whilst both sides in the conflict have acted from time to time in such a way as to cause harm to civilians, they are not in general engaging in indiscriminate violence.

(6) Clan support networks in Mogadishu, though strained, have not collapsed. A person from a majority clan or whose background discloses a significant degree of assimilation with or acceptance by a majority clan will in general be able to rely on that clan for support and assistance, including at times of displacement as a result of security operations, etc. Majority clans continue to have access to arms, albeit that their militias no longer control the city.

(10) Subject to sub-paragraph (9) above, outside Mogadishu and its immediate environs, the position in southern Somalia is not significantly different from that analysed in NM and Others (Lone women-Ashraf) Somalia CG [2005] UKIAT 00076

(11) Air travel to and from Mogadishu has not been significantly interrupted; nor has the mobile telephone network in southern Somalia.

In its determination, the Tribunal in HH and others made specific reference to the position of clans and groups in Mogadishu and the attitudes and behaviour of the combatants:

Majority clans

294. Although the Hawiye clan were dominant in Mogadishu and its environs until 2006, the emergence of the UIC in that year effectively negated the power of the Hawiye warlords and their militias. Despite what might superficially seem to be the import of the evidence noted in paragraphs 239 and 240 above, the fall of the UIC has not led to a return of the previous state of affairs, since the entry into the city of the TFG and the Ethiopian forces has significantly changed the dynamics of the situation. We agree with Dr Luling's view that the

Hawiye militias no longer control Mogadishu (paragraph 120 above). That is not to say, however, that both the UIC, in its present, insurgent form, and the TFG do not have a "strong clan character" (paragraph 149 above); but that character is, we find, more complex than that suggested in parts of Professor Lewis's evidence, in that, whilst the TFG is Darod-dominated, there are plainly Hawiye elements supporting it.

295. …The background evidence shows that those ranged against the TFG/Ethiopians primarily conduct their operations against specific targets, although, particularly where these attacks involved bombs or mortars, nearby civilians are put at risk (paragraphs 76 and 189 above). By the same token, whilst there have plainly been instances of overreaction and insufficiently focused retaliation by the TFG/Ethiopians, the evidence read as a whole indicates that the objects of retaliation are those attacking the TFG/Ethiopian forces. Thus, despite the one source referred to in paragraph 4.03 of the Fact Finding Mission report of July 2007 (paragraph 76 above), a journalist from an international news agency was quoted at paragraph 4.09 as considering that the TFG had "managed to effect some level of peace and security", whilst paragraph 4.17 recorded the efforts of the TFG to effect disarmament in the city. At paragraph 4.28, it was said to be "rare for an ordinary Somali to be randomly targeted in the shooting" and that despite the "often over-zealous retaliatory action on the part of [the TFG] forces", the level of violence in Mogadishu as at mid-2007 was "fairly low" and that, notwithstanding high levels of crime, people could and did move around, although on the whole they intended to stay in their home areas (paragraph 78 above). It is also significant that the mass movement of people over the weekend of 27/28 October 2007 from Mogadishu was in response to "an announcement advising those living in districts surrounding Bakhara Market to vacate the area due to security operations" (paragraph 81 above)…

296. For their part, the UIC and their allies or associates are, the evidence shows, targeting TFG/Ethiopian military and political personnel. The evidence does not indicate that members of the Darod clan or the Abgal sub-clan of the Hawiye are, in either case, as such at real risk of persecution or serious harm at the hands of the UIC and others fighting against the TFG/Ethiopians. In this regard, it is also worth observing that, during the time of their dominance in Mogadishu, the UIC were widely perceived as establishing a system of law and order in the city that benefited all of the clans and other groups residing there (and more widely throughout southern Somalia). The more extreme religious elements of the UIC took action against those engaged in what were perceived as un-Islamic activities such as the consumption of alcohol and khat but this was not pursued by reference to a person's clan or group.

The general security position in Mogadishu and the relevance of clan areas and support networks

299. Whatever misgivings one might have about the rule of the UIC, it is manifestly the case that life in Mogadishu for the vast majority of its citizens was considerably better under the UIC than that which pertained before or, it must be said, has pertained since. So far as 2007 is concerned, the mass migrations evidenced in the background materials disclose a very serious state of affairs. A person who has been displaced from his or her home in Mogadishu, without being able to find a place elsewhere (including in another part of that city) with clan members or friends, and who as a result, is likely to have to spend any significant period of time in a makeshift shelter alongside the road to Afgoye, for example, or in an IDP camp, may well experience treatment that would be proscribed by article 3 of ECHR.

300. That said, the position in 2007 has been characterised by significant movements of civilians, not only out of Mogadishu, but also back again, as soon as the security position in the city has allowed (see e.g. paragraph 165 above). Thus, one security source was able to say in April 2007, that the position in Mogadishu was "Mogadishu quiet", whilst the government "gave broadly accurate warnings to civilians to leave certain areas of the city to avoid the violence, although the source was in no doubt that bombardment within these areas was indiscriminate" (paragraph 73 above). A significant factor in the movement of people is Bakhara Market, which plays an important role in the provision of food for the inhabitants of Mogadishu. The UIC insurgents have on occasion targeted the market, eliciting a military response from the TFG/Ethiopians. Following a warning that a security operation was to take place in the market, there was a significant exodus in late October 2007, as we have already noted. However, closure of the market appears to have lasted only five days, and Dr Mullen accepted (paragraph 168 above) that it had re-opened, according to the information produced in early November 2007. The resilience of the market is, we consider, of some significance. We also note that several sources questioned by the Fact finding Mission of June 2007 stressed "a need to understand 'normal life' in the Mogadishu sense, where there is an acceptance of a mobile type of life created by displacement" (R2, page 600).

301. Notwithstanding the Tribunal's generally positive impression of the evidence of Dr Mullen, we have seen how, under cross-examination, he was unable to sustain the stance that clan support networks had completely broken down during 2007. Despite the fierce fighting in early 2007, the Danish Refugee Council and Danish Immigration Service, in their report published in 2007, noted the continuing ability of clans to protect their own, albeit that someone returning from abroad might receive assistance "in the long term" (paragraph 134 above). The same report, at paragraph 20.08 (paragraph 135 above), whilst noting the source's inability to be "certain" that someone would enjoy clan protection in Central and southern Somalia, nevertheless recorded his acknowledgement that in principle one could expect to be protected by one's own clan. The source quoted at

paragraph 4.31 of the July Fact Finding Mission report as saying that there is little protection from one's own clan (R2, page 612) appears to have based his view on an anecdote involving a friend who was for some reason shot at by a fellow clan member. Similarly, the source referred to at paragraph 4.32, who said returning Somalis who had left for economic reasons would be considered as traitors, based that view in part on the experience of someone she knew. The source's view is, in any event, out of step with the preponderance of the evidence. It appears to be the case that certain areas of Mogadishu (namely, the south) have remained better off than other areas, such as the north, during the disturbances of 2007 and that the educational NGO with whom Professor Lewis is in contact appears to have continued to function throughout the relevant time. As noted at paragraph 4.06 of the Fact Finding Mission report of July 2007 (paragraph 76 above) a relevant department of the UN is quoted as saying that "most clans had some network in operation in Mogadishu, though most people were now playing on personal rather than clan connections". We also observe that Professor Lewis's United Kingdom-based contacts were able to travel to and from Somalia and that Dr Mullen told us the airports outside Mogadishu were functioning at the date of the hearing.

[Having considered evidence given to the Fact Finding Missions of April and July 2007, the Tribunal in HH continued:]

Although this evidence is in some respects qualified or contradicted by other sources to whom the Mission spoke, its provenance is, in our view, such that it cannot lightly be discounted. It also chimes with the evidence regarding Somalis travelling back and forth between Somalia and the United Kingdom and with the UN source (R2, page 617), who said that passengers "arriving at MIA or K50 airports should generally not have any difficulty travelling into Mogadishu or anywhere else" and that a passenger bound for Mogadishu "would not need a protective escort".

302. Looking at the evidence as a whole, the Tribunal does not find that the current situation in Mogadishu is such that any person living there is at real risk of serious harm. (We shall deal later with the issue of armed conflict). In making this finding, the Tribunal has had regard to the issue of checkpoints. Within Mogadishu itself, we accept the information contained in the report of the Fact Finding Mission of June 2007, that there had been a "remarkable reduction in checkpoints", a finding with which Dr Luling said she had no reason to disagree (paragraph 129 above) and that as at mid-2007, the TFG had cleared away most militia checkpoints (paragraph 161 above). Although Dr Mullen demurred on this issue, his evidence was to the effect that non-TFG checkpoints were run by those whose purpose was to extort money, irrespective of clan, and that tariffs "would be adjusted according to capacity to pay". The Tribunal concludes that those moving around Mogadishu and its environs, including those

taking refuge with fellow clan members, will in general not be at risk of serious harm at checkpoints. The position may, however, be otherwise where there is a real risk that a person will encounter a non-TFG checkpoint alone, without friends, family or other clan members.

309. The significance of belonging to, or otherwise being able to secure the protection of, a majority clan was identified in NM as lying in the fact that majority clans had their own militias (paragraph 122 of the determination; paragraph 11 above).Whilst we find that the evidence shows that in Mogadishu majority clan militias are no longer in control (and have not been since the rise of the UIC), and that members of majority clans have on occasion been compelled to leave their home areas during 2007 as a result of fighting and other security operations, the evidence does not indicate that the majority clans have lost their militias or that they have otherwise become unprotected. As Dr Mullen's testimony shows, large numbers of guns of all kinds are being sold in Mogadishu and the written materials confirm both this and the very limited success of the TFG/Ethiopians in attempting to disarm the population. Accordingly, the distinction drawn in NM between majority clans and minority clans and groups continues to hold good, both in Mogadishu and the rest of southern Somalia.

The position outside Mogadishu

310. The security situation in Mogadishu is, we find, peculiar to that city and its immediate environs. The areas beyond remain much as before. According to Dr Mullen (paragraph 180 above), Middle and Lower Shebelle are more stable than Mogadishu. Although he considered that (internal) refugees in Afgoye had had an effect on stability there, we note at paragraph 8.07 of the report of the Fact Finding Mission of April 2007, one source said that "the provinces had been relatively unaffected by the main fighting, and that life there remained much the same as it had always been, with little impact from IDPs most of whom remained on the outskirts of Mogadishu," although he "thought that other areas would be increasingly affected if the war carried on". "Normal life" in those areas was, the source said, characterised by local disputes, usually about water rights, and that, although not comparable to western standards, the local administration and justice administered by local clans were "reasonably fair" (paragraph 237 above). In the South, Kismayo appears to be unstable. According to a UN security officer (R3, page 1130): "it was an area that was always likely to see instability: there were many clans there but none was dominant so it was inherently unstable and volatile."

311. Dr Mullen considered the Bay and Bakool regions to have some stability, albeit that two sub-clans of the Rahanweyn were in conflict. There was, in particular, stability in the town of Baidoa, which was being used by the Ethiopians as a supply base for Mogadishu.

Finally, according to Dr Mullen the "other area with a degree of stability was Hiran, which enjoyed a very good and enlightened local government" (paragraph 180 above).

41. In AM & AM (armed conflict: risk categories) Somalia CG [2008] UKAIT 00091, the Tribunal summarised its findings as follows:

1. When considering the question of whether a person is eligible for refugee protection on the basis of exposure to armed conflict, Adan [1998] 2 WLR 703 does not permit decision makers to reject their claims per se.

2. A person may be able to succeed in a claim to protection based on poor socio-economic or dire humanitarian living conditions under the Refugee Convention or Article 15 of the Qualification Directive or Article 3, although to succeed on this basis alone the circumstances would have to be extremely unusual.

5. Before the Tribunal will take seriously a challenge to the historic validity of a Tribunal country guidance case, it would need submissions which seek to adduce all relevant evidence, for or against, the proposed different view. The historic validity of the guidance given in HH is confirmed.

6. However, as regards the continuing validity of the guidance given in HH, the Tribunal considers that there have been significant changes in the situation in central and southern Somalia, such that the country guidance in that case is superseded to the following extent:

(i)There is now an internal armed conflict within the meaning of international humanitarian law (IHL) and Article 15(c) of the Refugee Qualification Directive throughout central and southern Somalia, not just in and around Mogadishu. The armed conflict taking place in Mogadishu currently amounts to indiscriminate violence at such a level of severity as to place the great majority of the population at risk of a consistent pattern of indiscriminate violence. On the present evidence Mogadishu is no longer safe as a place to live in for the great majority of returnees whose home area is Mogadishu;

(ii) Assessment of the extent to which internally displaced persons (IDPs) face greater or lesser hardships, at least outside Mogadishu (where security considerations are particularly grave,) will vary significantly depending on a number of factors;

(iii) For those whose home area is not Mogadishu, they will not in general be able to show a real risk of persecution or serious harm or ill treatment simply on the basis that they are a civilian or even a civilian internally displaced person (IDP) and from such and such a home area, albeit much will depend on the precise state of the background evidence relating to their home area at the date of decision or hearing;

(iv) As regards internal relocation, whether those whose home area is Mogadishu (or any other part of central and southern Somalia) will be able to relocate in safety and without undue hardship will depend on the evidence as to the general circumstances in the relevant parts of central and southern Somalia and the personal circumstances of the applicant. Whether or not it is

likely that relocation will mean that they have to live for a substantial period in an IDP camp, will be an important but not necessarily a decisive factor;

iv) As a result of the current conflict between the TFG/Ethiopians and the insurgents, the Sheikhal clan (including the Sheikhal Logobe), by virtue of the hostile attitude taken towards them by Al Shabbab, is less able to secure protection for its members than previously, although both as regards their risk of persecution and serious harm and their protection much will depend on the particular circumstances of any individual clan member's case.

42. The reasoning in AM and AM is detailed and instructive. In particular, the analysis provided in paragraphs 156 to 209 should be read as if incorporated into this determination. I can summarise some of the Tribunal's most significant findings but this is not intended as a substitute for a comprehensive consideration of the determination itself. The numbers in square brackets refer to the relevant paragraph in the determination.

43. The material outlined by the Tribunal did not persuade it that the situation in central and southern Somalia generally had reached the threshold where civilians per se or Somali civilian IDPs per se could be said to face a real risk of persecution or serious harm or treatment proscribed by Article 3 ECHR, [156]. The Tribunal placed weight on what was said by Mr Alex Tyler, the Protection Officer for UNHCR, Somalia, [159] in his 1 September 2008 interview:

> "…As mentioned above, there has been a dramatic increase in criminality in Mogadishu, and persons perceived as wealthy are attractive targets for robbery or abduction – returnees would certainly attract attention and be assumed to have money. If the individual has been outside of Somalia for a significant period of time, he or she will not possess the knowledge and experience necessary to be able to manage and avoid risk in the current situation. Al Shabbab cells are likely to investigate any newcomer to their areas to determine whether the individual is connected with the TFG or otherwise opposed to them…"

44. The Tribunal found the treatment of IDPs would vary significantly depending on a non-exhaustive list of factors identified in paragraph 160 to which I shall return later in this determination.

45. The Tribunal accepted that when compared with the early 1990s clan protection is no longer as effective as it was but it did not agree with Mr Toal's submission that the clan or sub-clan has somehow ceased to be the primary entity to which individuals turn for protection for the reasons it gave.

46. Dealing with Mogadishu, whose population was estimated by the International Crisis Group in January 2007 at 1.5 million, it recorded UN sources as having estimated (at various times) that 400,000, up to as many as 750,000 (or around one third to a half), of the population of Mogadishu have been displaced. An 8 April 2008 Voice of America report states that two thirds of Mogadishu has been turned into an urban battleground. Another source stated that Mogadishu is a "ghost town" and that only the most vulnerable remain there, [172]. In a situation many sources described as 'anarchical' it was difficult for the Tribunal to gain a precise picture of the spread of violence in Mogadishu but things had changed a great deal from mid-2007 when the BIA fact finding mission estimated it as being 'fairly low', [174]. The violence in Mogadishu had exhibited particularly dire features over a concerted period of time. Its nature has become increasingly indiscriminate, [175], reaching 'a new intensity' with the exchanges of fire in September 2008. The UN Secretary General in his July 2008 and October 2008 said [176] that:

> "The incessant level of harassment and intimidation by all militarised actors in the city is making living conditions for the civil population intolerable".

47. The Tribunal concluded:

> 178. In light of the above, we accept that since HH the situation in Mogadishu has changed significantly, both in terms of the extent of population displacement away from the city, the intensity of the fighting and of the security conditions there. On the present evidence we consider that Mogadishu is no longer safe as a place to live for the great majority of its citizens. We do not rule out that notwithstanding the above there may be certain individuals who on the facts may be considered to be able to live safely in the city, for example if they are likely to have close connections with powerful actors in Mogadishu, such as prominent businessmen or senior figures in the insurgency or in powerful criminal gangs. However, barring cases of this kind, we consider that in the case of persons found to come from Mogadishu who are returnees from the UK, they would face on return to live there a real risk of persecution or serious harm and it is reasonably likely, if they tried staying there, that they would soon be forced to leave or that they would decide not to try and live there in the first place.

48. This significant finding led the Tribunal to consider the prospect of those who would have returned to Mogadishu travelling to another part of the country. Whilst the Tribunal rejected the submission that the level of violence in all parts of the country was sufficient to engage the "by reason of" test within Article 15(c), it found that the

great majority of those from Mogadishu were indeed facing a serious and individual threat by reason of the indiscriminate violence in the armed conflict. Thus, such a person need only show that he had no viable internal relocation alternative in order to succeed.

49. Internal re-location is considered in paragraphs 186 onwards in AM and AM beginning with the recital that, although the test of 'reasonableness' was a stringent one, it was not to be equated with a real risk that the claimant would be subjected to in human or degrading treatment or punishment sufficient to engage Article 3. The Tribunal did not consider that all those relocating, even in respect of Mogadishu, faced a reasonable likelihood of becoming an IDP. Whilst many from Mogadishu have indeed become IDPs, equally sizeable numbers appear to have made their way to the areas of southern Somalia where they have traditional clan connections. Nor did the Tribunal accept that those who end up, after relocating, in an IDP camp face, in general, a real risk of an Article 3 violation, although this would depend on circumstances. These would include both general circumstances, such as the prevalence of ongoing fighting and personal circumstances such as whether the applicant is reasonably likely to be isolated or unprotected, has family connections and comes from a majority clan.

50. The Tribunal then went on to consider the safety of travel from Mogadishu International airport. In paragraph 191 of the determination, the Tribunal listed the attacks on the airport between January 2008 and October 2008. It then went on to consider checkpoints in and around Mogadishu. This led on to a general consideration of traffic movement to and from the airport. The Tribunal considered a Voice of America report dating from April 2008 that the 4 km road from the airport to the first main junction being clogged with people, cars and trucks and a significant level of activity that takes place in order to support the business community in Mogadishu. The Tribunal concluded in paragraph 195 that, whilst the situation was characterised by arbitrariness, travellers from the airport to Mogadishu did not face a real risk of persecution or serious harm.

51. One of the appellants in AM and AM was described as a young man in his early 20s, a member of the Sheikhal clan, able-bodied and in good health with family in Mogadishu and elsewhere. He had, however, left Somalia when he was still a minor, had been absent for over five years and would be less adept than persons living there currently at dealing with ongoing difficulties. It was

reasonably likely that it would become known he had been in the United Kingdom and perceived as someone with access to relative wealth. It concluded the appellant, in the circumstances of his case, did not have a viable internal relocation alternative and would face a violation of his Article 3 rights. It therefore allowed the appeal in his case.

52. In AM (Evidence – route of return) Somalia [2011] UKUT 54 (IAC), heard on 18 November 2010, the Tribunal (Lord Bannatyne and Senior Immigration Judge Latter) concluded that:

> *(i) In HH (Somalia) v Secretary of State [2010] EWCA Civ 426 at para 84 the Court of Appeal when referring to the Claimant raising a cogent argument that there might not be a safe route of return was not setting down a threshold requirement for cogent evidence before it was open to the Tribunal to consider the issue but making the point that the issue need only be considered if there was a proper evidential basis for doing so.*
> *(ii) In the light of the comprehensive rejection of the appellant's credibility, the issue of the safety of returning from Mogadishu to Afgoye had to be assessed in the light of the general background evidence on this issue: MA (Somalia) v Secretary of State [2010] UKSC 49 applied.*
> *(iii) The general evidence before the Upper Tribunal failed to establish that generalised or indiscriminate violence was at such a high level along this route that the appellant would face a real risk to his life or person entitling him to a grant of humanitarian protection.*

The appellant had not established that he was from the minority Benadiri clan or that he had ever encountered Al Shabbab, been questioned by them or subjected to an attempt to recruit him. Even if he were from a minority clan, he would be able to access protection on his return from a majority clan. He and his wife both had close relatives living in Afgoye who were apparently able to live there without having encountered security problems and he would be able to secure the protection of members of a majority clan. It was accepted that he had been returned from Saudi Arabia in early 2009 and had then been able to travel from Mogadishu to his home area of Afgoye. He had returned safely from Afgoye back to Mogadishu in the company of an agent paid for by his uncle.

53. Reliance was placed on a report of Dr Hoehne. It was submitted by the appellant that even within Mogadishu, the appellant risked having to cross checkpoints with the attendant risk from undisciplined soldiers. He would then have to go through Al Shabbab checkpoints where he would be at risk if he was seen to be behaving in an un-Islamic way. Dealing with the route from Mogadishu to Afgoye, Dr Hoehne said that there were many checkpoints which are places of heightened

risk as armed guards are often not responsible to any over-arching authorities and they prey on passengers by looting and raping. Even the checkpoints operated by TFG soldiers do not function in any 'benign way'.

54. The Upper Tribunal also considered the Fact-Finding Mission to Nairobi of October 2010. At paragraph 1.14, the report says that the Afgoye corridor is not under the control of TFG; Al Shabbab is in control of the access, and the whole of the area surrounding it. Hizbul Islam normally controls the Afgoye corridor, although in recent months there had been localised skirmishes between the two militias. There were a total of around 15-18 flights arriving in Mogadishu Airport per day and it was reported that returning Somalis can make arrangements with family to ensure they have someone to meet them at the airport and somewhere to stay on arrival. Somalis returning to Mogadishu would need a lot of preparation and would need to ensure they have contacts in Mogadishu but the Somali diaspora travel back to Somalia frequently.

55. The report then went on to deal with travel from Mogadishu Airport to the city where the road is controlled by the TFG with an AMISOM presence. One report is to the effect that Somali citizens do not need or use armed escorts. Ordinary Somalis would not be able to afford this and, even if they could, such guards would draw attention to their importance and wealth and make them more attractive targets for robbing and kidnapping.

56. So far as travelling outside Mogadishu was concerned it is reported that many people travel within the areas under the influence or control of Al Shabbab. There are checkpoints where travellers will be asked where they are travelling to and why but so long as they obey Al Shabbab's rules, they are generally allowed to continue with their journey. There are buses and lorries that will carry passengers between towns. It is said that Al Shabbab have reduced the number of checkpoints in the area they control and have made travelling by road more secure against criminals but they commit their own abuses including the recruitment of young men from buses stopped at checkpoints.

57. Another source stated that it is possible to travel anywhere in Somalia as long as you have money and contacts. There are numerous checkpoints operating that seek to establish who is travelling where and why but the Somali population can generally pass through these checkpoints safely. Another report says that the old clan system still functions as a protection mechanism for Somalis wishing to travel and

that it is generally safe to travel through areas controlled by Al Shabbab.

58. The Upper Tribunal approached the appellant as someone who had been found not to have told the truth about his clan membership and contacts with Al Shabbab. When assessing the risks arising from the route of return, the Tribunal proceeded on the basis that the appellant was a Southern Somali and that his home area is Afgoye. On his account he was returned to Somalia by the Saudi Arabian authorities in 2009 and was able to travel to his home area in Afgoye. The Upper Tribunal accepted, in the light of the evidence in the report of the Fact-Finding Mission to Somalia, that travel was not only possible but takes place with some degree of frequency from Mogadishu Airport into the city of Mogadishu and into other areas in Somalia. It accepted that there are regular, even if limited, flights into Mogadishu, some fifteen to eighteen a day, the report referring to their being just over 12,000 passengers in eight months. Buses and taxis operate between the airport and the city and travel is possible to other cities and through the Afgoye corridor.

59. It was argued that there would be a real risk to AM as he had to pass through TFG and Al Shabbab checkpoints. The Tribunal found the Al Shabbab checkpoints were generally well disciplined and their concern was whether travellers comply with the rules and norms of behaviour required. The Tribunal was not satisfied that there was any substance in the argument that the appellant would be at real risk. (He had lived in Yemen and Saudi Arabia.) So far as the TFG checkpoints were concerned, there was nothing about the appellant to put him at any particular risk and the Upper Tribunal was not satisfied that the evidence supported a finding that all those who travel through the checkpoints can be regarded as being at real risk or that AM would be so simply because he was being returned from the United Kingdom. For similar reasons the Tribunal were not satisfied that there is a real risk of enforced recruitment by Al Shabbab: the general evidence does not support a finding that all men or young men are at such risk and in the light of the credibility findings made by the First-tier Tribunal the appellant was unable to show that there was anything in his particular circumstances or profile which would put him at risk.

The Tribunal's decision in Ahmed Farah Mohamed

60. Turning to the case before me, Mr Toal applied to cite a determination which has not been reported and, in support of his application, produced a copy of the determination of Senior Immigration Judge Latter in Ahmed Farah Mohamed (Appeal Number: IA/16568/2007), heard on 17 June 2010. I note that, had this been reported, it would

have been the fourth Somali case cited to me and bearing the 'identifying' title "AM".

61. In deciding Mr Toal's application, I have had regard to the Immigration and Asylum Chambers' Practice Direction 11. Insofar as this decision is relevant and comes from the same Senior Immigration Judge who decided AM [2011] (above), I feel that I am materially assisted by its citation. As it is not a reported decision, I have appended it to this determination as an annex. Senior Immigration Judge Latter stated:

> 18. I am not satisfied on the evidence before me that internal relocation is a viable option in this appeal in the light of the detailed evidence produced about the location of Mogadishu Airport in relation to Mogadishu and the fact that the only apparent way by road through and from the airport out of Mogadishu is to go through parts of Mogadishu which are in a state of internal armed conflict. The evidence satisfies me that the Hodan area continues to be the subject of indiscriminate violence and there is also evidence of mortar attacks on the airport. No other route of return other than by way of Mogadishu Airport has been proposed. On this basis I am satisfied that the appeal should succeed on humanitarian protection grounds.

It should also be pointed out that the appellant in Ahmed Farah Mohamed was not a person whose claim had been believed. Although the Immigration Judge did not deal specifically with the appellant's evidence about what had happened to him and his family, it was clear that he rejected the central core of the appellant's account. There was no evidence of the appellant or his family being specifically targeted on the basis of their clan membership.

The Fact Finding Mission of September 2010

62. I was referred to the Fact Finding Mission to Nairobi report (8 October 2010) conducted between 8 and 15 September 2010. As Mr Toal points out, the informants are not identified and it is not therefore possible to assess their expertise. Nevertheless, I am prepared to accept that this was a genuine study which was intended to provide an accurate assessment of the position gained from the views of those who are likely to have been selected because they were able to speak on these matters. I am not prepared to approach the document as if it were a propaganda exercise aimed at supporting a pre-conceived view of the situation. Like much of the background material, the precise weight that can properly be attached to it cannot be gauged mathematically but that is no reason, in my judgment, why it should be disregarded altogether.

63. The Executive Summary states that most of southern and central Somalia was controlled by Al Shabbab, with only the Galmudug region, small pockets around the Ethiopian border and key strategic locations in Mogadishu controlled by the Transitional Federal Government (TFG) or elements sympathetic to it. There were some areas that were nominally under the control of Hizbul Islam, most notably Haradheere and part of the Afgoye corridor, however, Al Shabbab influence in these areas was such that they hold most of the power.

64. There were regular flights into Somalia, most notably to Mogadishu International Airport which was under the control of the TFG and the African Union Mission in Somalia (AMISOM) troops. Over 1,000 people travel into the country every month. From the airport Somali civilians can use taxis to travel to the city; the road from the airport was controlled by the TFG (supported by AMISOM troops). Views differed on the scope for individuals to travel within Mogadishu however most sources stated that Somali civilians could move around the city without much difficulty. [Executive Summary]

65. Travel within Al Shabbab-controlled areas of southern and central Somalia was common and considered relatively safe. There were checkpoints operated by the organisation and these were used to monitor the movement of people. For Somali civilians with no affiliation to the TFG there were usually no problems passing through checkpoints as long as Al Shabbab's rules were followed. There were buses that will take civilians between towns. Travel between Belet Weyne, Mogadishu and Kismayo is popular. [Executive Summary]

66. Civilians were at risk of being caught in the cross fire of the conflict rather than being targeted. Outside Mogadishu all of southern and central Somalia has seen conflict since 2007 although the level of conflict is now much reduced and most areas were described as stable. Only Beletweyne was specifically mentioned as an area of ongoing conflict (for control of the town).[Executive Summary]

67. The situation in Mogadishu is fluid with AMISOM identified as responsible for the majority of civilian deaths, mostly as a result of shelling residential areas such as Bakara Market. Al Shabbab's military tactics and attacks have become more sophisticated as the influence of foreign elements in the organisation has increased. They have targeted TFG and AMISOM interests, for instance Mogadishu airport. Day to day life continues in Mogadishu and the economy is functioning. [Executive Summary]

68. Dealing with the road between Mogadishu and the Airport, the following material emerges:

> "The road between the airport and Villa Somalia (the presidential compound) is kept open but there has been some fighting and the road is dangerous for TFG-connected people. For ordinary Somali civilians it should not be particularly dangerous apart from being in the wrong place at the wrong time. Somalis of excessively western appearance would be noticed as members of the Somali diaspora but this does not mean they would be necessarily targeted by AS. Ordinary Somalis could not afford armed escorts but they are not needed in general. They are likely to use minibuses and the drivers may have to buy their way through checkpoints." [A diplomatic source]

> "The organisation uses armed escorts to travel from the airport to the city. However, the organisation sees the route between the airport and city as safe ('surprisingly OK') for Somalis to travel." [An international NGO]

69. In relation to Mogadishu, it is said that sources had differing views on the ease of movement within Mogadishu. Most sources stated that Somalis were able to travel around the city without much restriction.

> "There are four main roads in Mogadishu and three are controlled by AS. There are no checkpoints on the AS main road, and the TFG does not carry out checks on vehicles on the one road it controls. People move freely in Mogadishu but can be hit by stray bullets, and they tend to make sure they travel before fighting begins in the afternoon, if possible. There are no limitations on travel based on prayer times." [An international NGO]

Outside Mogadishu, it is said that many people travelled within areas controlled by Al Shabbab. In these areas there were checkpoints, mostly operated by Al Shabbab, where travellers were asked where they were travelling to and why. However, as long as they obey Al Shabbab's rules they were generally allowed to continue with their journey. Road travel between Mogadishu and Beletweyne, and Mogadishu and Kismayo was frequently used; there were buses and lorries that carry passengers between towns.

The security situation in Mogadishu was changeable. The African Union Mission in Somalia (AMISOM) was named as being responsible for most of the civilian deaths in the city as a result of shelling of areas with high numbers of civilians, particularly Bakara Market. Al Shabbab's tactics were increasingly to focus on Transitional Federal Government (TFG) and AMISOM targets. The attacks were becoming more sophisticated, as seen in the Muna Hotel attack [24 August 2010] and the failed attack on the airport.

> "AS carries out targeted attacks against Ugandan and Burundian troops, as well as TFG ministers and MPs, but they also carry out random killings of civilians in Mogadishu to create disorder and chaos. It is not even safe to be in Medina hospital. Civilians are particularly in danger in Bakara market and in areas close to those controlled by AMISOM. However, apart from some areas, you can see normal life in Mogadishu, like children playing in the street. Most of the city is traversable but it depends who you are. Everybody who is not Somali is at risk, including AMISOM and NGOs. For ordinary Somalis who go about their day-to-day life Mogadishu is reasonably safe. They can go shopping and to the market, children go to school. There is public transport, minibuses and taxis are available. The Mogadishu economy is booming and thriving on the lack of regulations. Quite a lot of people have left Mogadishu but there is still evidence of a normal life. It is difficult to establish how many civilians have left the city but estimates indicate up to 500,000 might have left." [A security advisor]

70. Outside Mogadishu it is said that areas controlled by Al Shabbab were considered to be stable. There was some fighting in Beletweyne and occasional clan conflicts in other areas. The human rights situation was described in these terms:

> "The AS interpretation of Sharia law is not in accordance with the beliefs of ordinary Somalis, however the harsh punishments inflicted by them are not carried out on a regular basis – i.e. they are not daily or weekly. Petty thieves and adulterers in particular have been targeted. Men have been attacked for not having the correct style of beard.
>
> "Al Shabbab in the Gedo region are not as harsh as in other regions as they are run by a local administration."

The Operational Guidance Note (OGN)

71. The Secretary of State relied upon the contents of the Operational Guidance Note. It is necessary to exercise some caution here. An OGN is not to be considered as Country Guidance emanating from the RDS unit and prepared under the direction of academics. Rather, it is policy developed by decision-makers. Whilst this is no indication of bad faith, it should be viewed critically with no implied hall-mark of objectivity. Insofar as it is properly sourced from background material, it is as accurate as the background material to which it refers, no more and no less. If it is comment, it should be treated in the same way as if it were a submission made on behalf of the Secretary of State: it has to be evaluated on its merits. It is not subject to the same quality control as COIS reports in that it does not fall under the scrutiny of the Independent Advisory Group on Country Information. I was referred to the following passages in the OGN by Mr Bramble:

3.6.2…However, a fall in clashes between government troops and insurgents has led to a substantial drop in the numbers of civilians killed in fighting in Mogadishu in 2009. Rebels have focused more on attacking government targets and African Union (AU) peacekeepers with suicide bombs and mortar shells. The Mogadishu-based Elman Peace and Human Rights Organisation states that 1,739 civilians were killed in fighting in 2009, down from 7,574 in 2008 and 8,636 in 2007. At least 4,911 civilians were wounded and 3,900 families displaced by clashes in 2009. *[Although this passage is sourced, it cannot possibly be accurate that only 3,900 families have been displaced. Whilst Mr Toal, with some justification, described this as 'grossly inaccurate and unreliable', it does not require me to disregard the entire passage or, for that matter, the entire OGN. It merely requires that I exercise due caution.]*

3.6.5 Al-Shabbab governs with local administrations: region-by-region and city-by-city. It reportedly raises money by taxing international aid organisations, collecting *zakat* from citizens, levies on the international *khat* trade, receiving remittances from abroad and financial support from Eritrea. It provides government services to its constituents, enforces a strict interpretation of shari'a law, and maintains its grip on power by using violence and intimidation. The group also conducts terror operations, including suicide bombings, against its perceived enemies and views itself as part of the global jihad movement. Human Rights Watch reported in April 2010 that al-Shabbab has brought greater stability than many parts of Somalia have known for years. Even critics have credited the group with bringing peace and order to communities that had been plagued by crime and insecurity since the collapse of the Somali state. The group are said to have wiped out banditry and freelance militias but that stability had often come at a high cost to the local population, especially women.

3.6.6 Al-Shabbab currently controls much of southern and central Somalia, including large portions of Mogadishu. The TFG has maintained control of a few areas in the south east of the city, government installations, the Presidential palace and strategic locations such as the airport and seaport. Al-Shabbab controls large portions of Mogadishu including the north and north-east parts of the city, the main stadium and the main market. It controls nearly all of Middle and Lower Jubba regions, Gedo region, Bay region, Bakool region, and parts of Lower Shabelle region. In some parts of the country (i.e. Mogadishu), it works closely with Hizbul Islam, and in other parts of the country (i.e. Kismayo and Diif) it has battled Hizbul Islam for territory. Hizbul Islam controls Beledweyne and administers Hiraan region as well as Afgoi district near Mogadishu.

3.6.9 The TFG's respect for human rights improved in 2009 and it was not responsible for politically motivated killings, executions or disappearances. Incremental improvements in human rights awareness were taking place in some areas of the country. Allegations against TFG security forces decreased and its police and prison personnel were generally responsive on human rights problems.

3.6.17 Throughout 2009, al-Shabbab has continued to consolidate its control in large parts of central and southern Somalia. There are many parts of central and southern Somalia where there is no ongoing fighting because territorial control has been established. In the areas now fully under al-Shabbab control, the human rights situation is poor but there are low levels of generalised violence. In areas controlled by the TFG, the human rights position is less problematic but there are likely to be high levels of generalised violence due to continued challenges by insurgents.

3.6.18 Checkpoints operated by the TFG have decreased and there were no reports of armed clan factions operating checkpoints in 2009. Al-Shabbab has established checkpoints at the exit/entry routes of the towns under its control for security reasons. It checks goods, searches people and ensures that its strict Islamic codes are enforced, but does not collect money. There were no reports of checkpoints between towns or within towns, as was common in previous years with the exception of Mogadishu where there are checkpoints in the city.

3.6.19 There are several checkpoints on the route from Mogadishu towards the Central Regions and some precautions may be necessary particularly during militia fightings. During overland trips clan protection is not required unless ongoing animosities between two rival clans are involved. The transporter is most of the time the guarantor of the safety of the passengers because he is familiar with the route, militias and all the checkpoints. Within south central and Puntland, people mostly travel on buses and minibuses.

3.6.20 Restrictions on movement have reduced significantly as compared to the situation considered by the AIT in *AM* where illegal checkpoints had proliferated to excessive levels. Al-Shabbab has reportedly eradicated extortion, robbery and murder from bandits in areas it controls. There is no evidence that those not of adverse interest to the TFG, al-Shabbab or groups such as Hizbul Islam or ASWJ who have a presence in particular areas, would be unable to pass through checkpoints safely. There may be some security incidents whilst travelling in Somalia and, although individuals will not generally need an escort, if they consider an escort necessary, it is feasible for them to arrange one either before or after arrival.

> **3.6.22** Given the generally lower levels of fighting and the relative ease of travel within many areas of Somalia, the risks of travel are likely to be less problematic than those considered by the AIT. It will be feasible for many to return to their home areas from Mogadishu airport as most areas are more accessible than previously. Mogadishu airport continues to function normally. There are scheduled air services to a number of destinations in Somalia –Mogadishu, Bosasso, Hargeisa, Berbera, Burao and Galcaiyo.

Additional background material

72. I was referred to additional background material in part C of the appellant's bundle. This was principally directed to the appellant's likely direction of travel having arrived at Mogadishu International Airport, the place to which the respondent says the appellant will be returned. The airport road, at kilometre 4, (K4), reaches a T-Junction in the Hodan district; in one direction the road travelling to central Mogadishu and in the other to the Afgoye corridor. The journey to the Gedo region involves travel to Baydhaba and then on in the direction of Baardheere.

73. The junction at K4 is described in an AP report of 25 November 2009 [p.C49] as 'a strategic roundabout where snipers or mortar fire targets Ugandan soldiers in a bullet-pocked building three or four times a week.' The same location was the site of a suicide bombing and a subsequent fire-fight on 24 January 2009 in which 22 civilians were killed. K4 is in the Hodan district of Mogadishu in which there was fighting reported on 24 and 25 February 2009 [p.C101], 17 September 2009 [p.C112], 24 December 2009 [p.C37], 29 January 2010 [p.C32] and 15 February 2010 [p.C29]. Reuters reported a further 14 were killed [p.C103] in March 2009 in the capital on the road linking K4 with the presidential palace. There was a further report of fighting in Hodan in August 2009, [p.C112].

74. Mogadishu International Airport was attacked on 14 April 2009 [p.C68] according to the Washington Post in an incident in which insurgents had fired mortar rounds at an aircraft carrying a US congressman as he left Mogadishu Airport killing 5 civilians on the ground. There were further attacks on the airport on 17 September 2009 [p.C115], 22 October 2009 [p.C52] and 26 January 2010 [p.C30]. In all of these instances civilians were killed. There is further evidence of fighting in this general area in March and April 2010 [p.C4 and 6].

75. An Amnesty International report of March 2010 entitled *'No end in sight: the ongoing suffering of Somalia's civilians'* [p. C8] refers to the civilian deaths in Mogadishu and other cities and the attacks in

September and October 2009 including one at the AMISON base in Mogadishu and another at the Martini hospital. There are further references to the September 2009 suicide attacks on pages C112 and C115. In January and February 2010, there was intense fighting in Dhusamareb and Beletweyne involving large numbers of displaced persons and the deaths of civilians. Section D of the appellant's bundle, summarised in paragraph 10 of the appellant's skeleton argument of 4 April 2011 provides further examples of violent clashes between TFG and insurgents in which civilians are also casualties. Most of these incidents took place in Mogadishu between July and October 2010.

The formulation of the appellant's case before me

76. On the basis of this evidence, the appellant argues that he would be exposed to real risk of serious harm upon arrival at Mogadishu airport and whilst travelling to any other place. It is claimed that he does not have an internal relocation alternative. Reliance is placed upon what are said to be the inconsistent findings in AM (Evidence – route of return) Somalia [2011] UKUT 54 and Ahmed Farah Mohamed. In particular, it is said that I should not place greater weight on a reported decision, albeit not designated as country guidance, than on an unreported decision for that reason alone.

77. As Practice Direction 11 makes clear, there is a difference between a case that has been selected for reporting and one that has not. Further light as to the difference is shed by the published criteria for reporting decisions:

CRITERIA FOR REPORTING (15 February 2010)

1. In deciding whether a decision should be reported the Reporting Committee will apply the criteria set out below.

2. A decision will be reported where the Reporting Committee considers that it has general significance and utility in the development of the Upper Tribunal's case law, is sufficiently well reasoned and is consistent with binding statutory provisions or precedent of the senior courts.

3. Decisions selected for reporting will have at least one, and normally more than one, of the following features:-
   a. the Tribunal has considered previous decisions on the issue or issues and has had sufficient argument on them;
   b. the decision considers a novel point of law, construction, procedure or practice, or develops previous decisions in the same area;
   c. the decision gives guidance likely to be of general assistance to other judges, the parties or practitioners;

d. the decision contains an assessment of facts of a kind that others ought to be aware of, because it is likely to be of assistance in other cases;
e. there is some other compelling reason why the decision ought to be reported.

78. Senior Immigration Judges are aware of these criteria and can be taken to weigh them carefully when deciding whether or not to submit for reporting and, in turn, the decision by the Tribunal's reporting committee on whether to report a case will be based on the same criteria. Given the process of preparing decisions for reporting, it is likely to be rare that an unreported decision will contain sufficient material within it to offer significant assistance as guidance to decision-makers, practitioners or judges in other cases.

79. Country Guidance cases are, of course, governed by Practice Direction 11. In relation to cases that are not reported as country guidance, however, the principle that like cases should be decided alike should also apply, but it must be borne in mind that fact-finders are often not faced with wholly or even essentially similar material. This seems particularly likely in a jurisdiction which is faced with great difficulty in the collection, and analysis, of often scanty and inconsistent background material from a variety of sources of varying weight: I have a pretty fair idea of what is happening now along Oxford Street and, if I did not, a surveillance camera would soon provide the detail; I have much less of an idea, in spite of COI, of what is happening along the principal street in Mogadishu.

80. In deciding this case, however, it is unnecessary for me to rely on the fact of there being a difference between reported and unreported decisions. For the purposes of this appeal, I am prepared to proceed on the basis urged by Mr Toal that I take into account both decisions but it remains in the final analysis a matter for me in the context of all the material that I have attempted to summarise above to decide whether and how much they assist. My approach is to assess the overall merits of the decisions which I have agreed should be considered by me.

81. It seems to me that the decisions in AM (Evidence – route of return) [2011] and Ahmed Farah Mohamed are distinguishable in a number of ways. First, AM (Evidence – route of return) [2011] is the later case. Second, this case had the benefit of a new Fact Finding Mission report which I have summarised above and contains significant fresh material that was not before the Tribunal in Ahmed Farah Mohamed. In addition, there are also factual differences. Both decisions have to be examined in the light of existing Tribunal country guidance, in particular, AM and AM.

The analysis

82. In paragraph 160 of AM & AM, the Tribunal found the treatment of IDPs would vary significantly depending on a non-exhaustive list of factors:

    (a) IDPs from more influential clans or sub-clans appear to have a better chance of being tolerated in the area to which they have fled;
    (b) IDPs who have a traditional clan area they can travel to, especially if in that area they have family, or friends, or close clan or sub-clan affiliations, appear to have better prospects of finding safety and support, although not if the area concerned is already saturated with fellow – IDPs;
    (c) those who lack recent experience of living in Somalia appear more likely to have difficulty dealing with the changed environment in which clan loyalties have to some extent fractured;
    (d) persons returning to their home area from the UK may be perceived as having relative wealth and be more susceptible to extortion, abduction and the like as a result;
    (e) those who live in areas not particularly affected by the fighting and which are seen as not important strategically to any of the main parties to the conflict would appear less subject to security problems;
    (f) gender;
    (g) age and health;
    (h) economic conditions.

83. In the context of this appeal there are additional risk factors which have been raised:

    (i) The appellant returns from the United Kingdom lacking current information of, and disoriented by, the situation in southern and central Somalia.
    (j) He faces a specific risk in Mogadishu.
    (k)He is a man with tattoos.
    (l)He is a man said to be an 'adulterer' with a criminal record and a person with a history of drug and alcohol abuse.
    (m)He will be required to travel through checkpoints.
    (n)He is a Marehan/Darod at risk from the Hawiye or even sub-clans of the Darod.
    (o)He will be required to travel to Gedo.
    (p)He has been in the United Kingdom since August 1997.
    (q)He is unable to follow the tenets of Islam.
    (r)He has no uncle or family support in Somalia.

Specific risk factors

84. Common to my consideration of whether the appellant is at risk in Mogadishu or in the Marehan homeland of Gedo or upon his journey to Gedo from Mogadishu Airport is an assessment of the specific factors mentioned in the preceding paragraph and relied on by the appellant in the particular circumstances of his case. My decisions on these matters will inform my thinking upon the wider examination of risk.

85. First I shall assess the additional risk faced by the appellant by reason of his having tattoos. In his statement of 8 March 2007 he described a tattoo on his right arm as in Chinese script and photographs showed one tattoo on his right forearm to spell out his name 'Ahmed'. The tattoo on his left arm appeared to be on the inner aspect of the limb, faint and indistinct. The photographs demonstrated, as the medical report described, that the tattoos were partially obscured by scars. Dr Hoehne considered that the tattoos on his arms amounted to a major cause for concern as tattoos are forbidden by Islam. The panel, however, did not accept that the evidence of the tattoos on his arms constituted a deviation from traditional or religious norms such as to place the appellant at risk. It did not therefore consider that the tattoos in themselves would be considered objectionable in Somalia or that they would place the appellant at risk. On the grounds of appeal asserted that the panel failed to provide adequate reasons for rejecting the expert evidence to the effect (amongst other matters) that his tattoos placed him at risk. That was rejected on appeal.

86. I see no reason to depart from those findings. Were I required to re-make the assessment, I am not satisfied on the material before me that it is sufficient to establish a risk. First, there is a distinction between societal disapproval of tattoos in general and such disapproval resulting in harm. No background material was provided that demonstrated those carrying tattoos have been subjected to punishment by Islamists who disapprove. Second, the well-known rejection of representational art in Islam is of a different character to a tattoo, all the more so if the tattoo is non-representational. Third, I am unable to discern from Dr Hoehne precisely the scope of the objection to tattoos. If it is because a tattoo may be figurative, this would suggest anything figurative or representational is prohibited in an Islamic country but this would appear to go too far. If it is because no decoration is permitted on the human body, then this would suggest that no make-up, hair-dyes or nail varnish is permitted. This, too, would appear to go too far. Fourth, there is little evidence that the appellant's tattoos are of such a character as to attract attention. Some are indistinct and all may be covered over by a shirt. If, in the course of ritual ablutions, some may be visible, the mechanism by which this will

lead to harm is not obvious to me. For these reasons, I am not satisfied that Dr Hoehne's reference to tattoos being un-Islamic is a risk factor in the particular circumstances of the appellant's case or enhances the risk the appellant faces for other reasons.

87. It is also suggested that the appellant will be perceived as an adulterer and a man with a criminal record. In this context, I do not consider that any assistance is provided by the thinking developed by the Supreme Court in HJ (Iran) [2010] UKSC 31. A person should not be expected to lie in order to avoid harm. It is one thing to conceal one's identity in circumstances where the concealment is an infringement; quite another, where the concealment is the natural desire of anybody who has a past that they would prefer not to reveal. There is no real likelihood of the appellant revealing his past unless he chooses to do so.

88. Further, the appellant has failed to establish how information as to his past behaviour will filter back to Somalia. Whilst, there is well-documented evidence of the Somali diaspora being in contact with those remaining in Somalia, that does not suggest there is a means by which the appellant's conduct (either good or ill) will become known to the persons with whom the appellant will come into contact on return.

89. Even if it is known that the appellant has offended, and this results in his being shunned by those who disapprove of his past conduct, that is a far cry from his being persecuted as a result of it. It is not suggested that there is the likelihood of his being re-tried for the offences he has committed in the United Kingdom. I am not satisfied that his past conduct will become known on return or that, were it to do so, this would put him at risk or enhance the risk he might otherwise face.

90. It was Dr Hoehne's view that the appellant was at risk in Gedo because the appellant would return as a failed émigré who had dishonoured his family through misconduct. For the reasons I have given, I would not categorise the appellant's return in this way and so I do not consider it likely that fellow clan members would refuse to support or accept him for that reason.

91. The appellant claims that he is unfamiliar with the practice of his religion and that this would put him at risk. He does not put his case on the basis that he is an agnostic or atheist and is otherwise unable to participate in any religious activity. He has put it that he 'does not know how to pray'. The appellant was born in 1977 and arrived in the United Kingdom in 1997, having spent the first 20 years in Somalia. It is unnecessary for me to determine the depth and nature of the

appellant's participation in the religious life of Somalia when he left it but he does not suggest that the level at which he participated caused him to be at risk of harm whilst he lived there. He cannot have forgotten the basic tenets of Islam. In broad terms, he will return to whatever level of knowledge and commitment he once had. If it was sufficient for him in 1997 I see no reason why it should be insufficient on return. Even if he has ceased to practice his faith since his arrival in the United Kingdom, I would not regard that as surprising given the different circumstances in the United Kingdom. Not would I regard it as exceptional for members of the diaspora to be less familiar with religious practice since their departure. There is no evidence that those remaining in Somalia are hostile to returning Muslims because they have been less committed in the practice of Islam during their absence and every reason to think that their co-religionists would welcome their return to the practice of their faith.

92. I am not satisfied that the appellant was telling the truth when he said that the uncle, a businessman, who had helped him come to the United Kingdom, died in 2001 and that the appellant received the news of his death in 2003. It seems to me that the appellant would have immediately appreciated the significance of this as a factor in deciding what support he might encounter on return. It was obvious this was material and he did not require a lawyer to extract this information from him by asking direct questions to that effect. It was as obvious as his volunteering the information that his father was killed in clan violence and could not, by implication, protect him. However, he did not reveal this information in the first or second hearings. He explained this by reference to his not having been asked about it. I reject that explanation. This was not an abstruse legal issue about which he would not be expected to attach any significance but part of his account of past events which had obvious significance.

93. This leaves me in the position where the appellant has failed to offer credible evidence of at least one family member who remains in Somalia. Furthermore, this was not an oversight because his volunteering the information before me demonstrated that he was well aware of its significance as materially affecting his claim that he cannot return to Somalia because no such support mechanisms exist.

94. Thus, the appellant will return as a 33 year-old man, apparently in good health, who has been in the United Kingdom since August 1997 and lacks recent experience of living in Somalia and is therefore more likely to have difficulty dealing with the changed environment. He will also be returning in circumstances where he may be perceived to be relatively wealthy. That said, the appellant has failed to satisfy me that he has no relatives to whom he could turn for support although I

do not regard this factor as decisive. Indeed, my decision would be the same were he to have satisfied me he has no relative in Somalia.

The risk in Mogadishu

95. The starting point for my consideration is whether the appellant is at risk of serious harm on return to Mogadishu. Mr Toal rightly relies upon paragraph 178 of the decision in AM & AM to the effect that since the Tribunal made its decision in HH, the situation in Mogadishu has changed significantly, both in terms of the extent of population displacement away from the city, the intensity of the fighting and of the security conditions there. In AM & AM the Tribunal concluded that Mogadishu was no longer safe as a place to live for the great majority of its citizens. It did not rule out the possibility that there would be exceptions in the form of persons who may be considered to be able to live safely in the city, perhaps through having close connections with those wielding power in Mogadishu, such as prominent businessmen, senior figures in the insurgency or those in powerful criminal gangs. Save for such cases as these, identified on a case-by-case basis upon the facts, all those found to have come from Mogadishu who are returnees from the United Kingdom would face on return to live there a real risk of persecution or serious harm.

96. For the reasons I have given in paragraphs 92 and 93 above, the appellant has failed to offer credible evidence of at least one family member who remains in Somalia. As I find the appellant has not been frank as to this element of his appeal, I must go on to consider its consequences. Whilst I am satisfied that the appellant's uncle lived in Mogadishu and had sufficient surplus monies to pay for the appellant's travel to the United Kingdom (and the appellant has sought to hide this information), the evidence is not sufficient to satisfy me that this same uncle remains in Mogadishu and that exceptionally he is one of those wielding power in Mogadishu, in the sense of being a prominent businessmen, let alone a senior figure in the insurgency or a member of a powerful criminal gang.

97. For this reason, I find that Mogadishu is no longer safe as a place to live for this appellant. The current background material does little to undermine the approach adopted by the Tribunal in paragraph 178 of AM & AM; indeed, in some respects it strengthens it, whilst in others it may have the opposite effect. For example, whilst the Fact Finding Mission speaks of being able to get around, its tone is cautionary and balances conflicting opinion. Suffice it to say that the evidence does not yet show that the nature of the violence has sufficiently changed to merit the Tribunal adopting a different approach. As the appellant comes from Mogadishu, the enquiry moves on to consider internal re-

location. In the circumstances of this appeal, re-location is identified in terms of re-location to Gedo.

The risk in the Gedo area

98. After the first hearing, Immigration Judge Warr noted that the Presenting Officer's concession that the first determination's analysis of the risks for the appellant *en route* to Gedo were not sufficiently analysed, not his conclusion that Gedo was safe. The appellant's counsel then conceded 'that it was unlikely to be disputed that Gedo was a safe haven.'

99. Although Dr Hoehne gave his opinion that the appellant was at risk in Gedo, he did so on the basis that the appellant was returning as a failed émigré who had dishonoured his family through misconduct and, as a result of this, Dr Hoehne considered it unlikely that fellow clan members would offer him support or acceptance. For the reasons I have given, this is not the approach I have adopted. I have concluded the appellant has failed to establish his misbehaviour will be known about in Gedo or *en route* there.

100. Whilst the decision in AM and AM speaks of the additional risk faced by those living in areas particularly affected by the fighting and of strategic importance, I would not regard the Gedo region as falling into either of these classifications.

101. It is noteworthy that the background material included in the appellant's bundle and referred to in the skeleton argument is principally concerned with the risk in Mogadishu and the roads leading from Mogadishu International Airport. It is not directed to arguing there is no internal relocation in Gedo or that it would be unreasonable for the appellant to settle there if there were no other factors preventing it.

102. For these reasons, I have concluded that Gedo is a potentially safe area for members of the Marehan clan. In paragraph 82 of this determination, I set out some relevant factors, derived from my analysis of AM and AM when considering the treatment that IDPs are likely to encounter. My conclusion is consistent with the background material that IDPs from more influential clans or sub-clans such as the appellant's own clan, the Marehan, appear to have a better chance of being tolerated in the area to which they have fled; all the more so when Gedo is the traditional clan area of the Marehan. As I have already found, the appellant has not been frank in his evidence of the support he continues to have in Somalia. Even if I am wrong on this and his uncle is dead or his whereabouts unknown, I consider that the

clan or sub-clan affiliations would better his prospects of finding safety and support. Further, the evidence does not establish that the numbers of refugees in Gedo are so great as to provide the appellant with an additional difficulty. Mr Bramble helpfully supplied information about the level of IDPs in the various parts of Somalia. This does not establish that the Gedo area is saturated with IDPs.

103. The principal issue, therefore, is whether the appellant can arrive at Mogadishu International Airport and travel to Gedo without being at real risk of a violation of his Article 3 rights. In approaching this issue, the ability of the appellant to travel is an integral part of the Article 3 assessment, HH and others [2010] EWCA Civ 426.

The airport and the route to K4 and the Hodan district of Mogadishu

104. I have summarised in paragraphs 72 and 73 above the reports of incidents in the K4 area: the three or four times weekly sniper or mortar fire at the Ugandan soldiers at the K4 roundabout, the attacks of 24 January 2009, 24 and 25 February 2009, March 2009 in the capital on the road linking K4 with the presidential palace, the fighting in Hodan in August 2009, the attacks on 17 September 2009, 24 December 2009, 29 January 2010 and 15 February 2010. There are also reported attacks specifically on Mogadishu International Airport: 14 April 2009 (the incident in which insurgents had fired mortar rounds at an aircraft carrying a US congressman), 17 September 2009, 22 October 2009 and 26 January 2010. Apart from the regular sniper and mortar fire on the soldiers, there are at least 14 separate incidents over a period that spans more than a year and they continue. It would be wrong to treat these as the only incidents in the area of Mogadishu and its outskirts.

105. My assessment of risk also takes into account the decision in Ahmed Farah Mohamed. Mr Mohamed was accepted as being a Tunni Digil. In paragraph 13 of the determination, Senior Immigration Judge Latter referred to the background material that Mogadishu International Airport was in the Waaberi district and those leaving it had to travel by road through the district of Hodan which remained a conflict area. Mr Toal had submitted that it must follow that no one could be returned to Mogadishu Airport. Paragraph 18 of that determination was based upon the Senior Immigration Judge's perception that the only road from the airport was to travel through parts of Mogadishu which were in a state of internal armed conflict. The evidence satisfied him that the Hodan area continued to be subjected to indiscriminate violence. There was also evidence of mortar attacks on the airport. On that basis, Senior Immigration Judge Latter was satisfied that the appeal should succeed on humanitarian protection grounds.

106. I am satisfied on the basis of significantly greater evidence than was before Senior Immigration Judge Latter in Ahmed Farah Mohamed that the area that was described to me as the K4 square (a reference to an inset in the map of Mogadishu produced by UNHCR) has been the location of a series of violent gun battles between the opposing forces. This is the only route available from the airport. When such an attack is taking place, I have no doubt at all that the passage of all civilians attempting to use the junction between the airport and the centre of Mogadishu will stop. However, there is no credible evidence that the fighting is continuous by day or by night. Indeed the reverse is quite obviously established. This leads me to conclude that the road is open for civilian traffic. The preponderance of the evidence indicates that during 2010 to the present significant numbers of people pass and re-pass along these routes in the course of daily business. There is incontrovertible evidence that buses and taxis ply the route.

107. It is simple logic that the airport would not operate, at least as far as civilian flights are concerned, if those landed at the airport are unable to move away from it. Every person who arrives at Mogadishu International Airport leaves it at some time or another, just as those on departing flights from it make the journey from Mogadishu and elsewhere. There is no evidence that those arriving remain at the airport for any significant period of time. I have no doubt that the background material would refer to conditions at the airport if large numbers of passengers were unable to leave. As the only available route from the airport is via the K4 junction, it follows that for all the many thousands of people travelling to Mogadishu airport in the course of a year, every one of them will pass through this transit point.

108. This is not to say, of course, that it is as safe as an average European airport. However, the airport would simply not operate for civilian flights if willing passengers from the diaspora were to vote, as it were, by their boarding cards and refuse to travel. It simply cannot be right that all those civilian volunteers to Mogadishu airport have failed to assess the risk and have overlooked that their journey will involve becoming embroiled in a gun battle with the obvious risk to their lives. If civilian passengers voluntarily return, it is perverse to treat those who return involuntarily as being as at greater risk from the level of violence that applies indiscriminately to all returnees. Mr Toal was simply wrong in submitting in June 2010 that no-one could be returned to Mogadishu airport.

109. I agree with Senior Immigration Judge Latter when he said in Ahmed Farah Mohamed that the Hodan area continued to be the

subject of indiscriminate violence and this included evidence that there had been mortar attacks on the airport. I respectfully reach a different conclusion when it comes to the assessment of the level of risk that such violence engenders. In my judgment if the level of violence were such as to render Mr Mohamed's return so risky as to be impossible, it would also render this appellant's return impossible; but more importantly, it would render impossible the return of any civilians. Yet the uncontested evidence is that they can and they do.

110. This was, in essence, the decision reached by the Tribunal the country guidance case of AM & AM (armed conflict: risk categories) Somalia CG [2008] UKAIT 00091 (see paragraph 41 above) as well as in AM (Somalia) [2011] UKUT 54 (IAC) which decided that the general evidence before the Upper Tribunal failed to establish the generalised or indiscriminate violence was at such a high level along the route from Mogadishu to Afgoye (which travels across the K4 junction) that AM would be a real risk. Although the Tribunal in Ahmed Farah Mohamed reached a different conclusion, it did not fully address the findings in relation to this issue in the earlier country guidance case of AM & AM [2008]. In particular, if the Tribunal intended to depart from the earlier guidance about safety of travel on the roads leading from the airport (summarised in paragraph 50, above), it was required to identify the evidence that supported such a departure. The Tribunal spoke of a deteriorating humanitarian situation in paragraph 22 but it did not address evidence as to increasing levels of violence which, if found, might have justified the outcome.

111. This does not, of course, mean that I disregard the evidence that civilians are sometimes caught up in the violence with fatal consequences. 'Caught in the cross-fire' and 'being in the wrong place at the wrong time' (see paragraphs 65 and 67 above) are apt descriptions of what ordinary citizens may face. However, the fact that this occurs has to be assessed against the overall background evidence that these incidents do not prevent ordinary citizens going about their business and this is, for my part, a more solid indicator of risk than the statistical data provided in a list of incidents. I am satisfied that central Mogadishu remains unsafe. This was the decision of AM and AM in 2008 and this remains the best assessment available to decision makers at present.

112. Adopting as his starting-point paragraph 178 of AM and AM to the effect that the Tribunal considered that Mogadishu is no longer safe as a place to live for the great majority of its citizens, Mr Toal argues in paragraphs 1 to 9 of his skeleton argument that other Tribunals have failed to understand that Mogadishu International Airport is in the Waaberi district of Mogadishu and that the K4 square is in the Hodan

district of Mogadishu. Accordingly, the Tribunal's determination in AM and AM at paragraph 178 extends, by implication, to prohibiting anybody returning to Mogadishu International Airport or the K4 square en route to other parts of Somalia because both are situated within Mogadishu. I am quite satisfied that this is a mis-reading of what the Tribunal was saying. Both the airport and Hodan are on the outskirts of Mogadishu. Had the Tribunal intended to include the airport and the road leading from it within the area of Mogadishu that they considered unsafe, they would have said so and concluded no-one can return to Somalia via the route proposed by the Secretary of State. Instead, the Tribunal did the reverse, concluding (as I have done) that the level of violence en route from Mogadishu to Afgoye is not at such a level to entitle a person to international protection.

113. Accordingly, I do not accept Mr Toal's principle argument that the fact that the appellant is to be returned to Mogadishu Airport is sufficient to entitle him to succeed in accordance with what was said in HH and others. Indeed, Sedley LJ recorded in paragraph 49 of the Court's judgment that all current returnees arrived at Mogadishu airport and that passengers could get from the airport into the city without undue risk. That reflects my conclusion based on an analysis of the background material of past events in relation to the airport, the K4 square and the road leading to it from the airport.

The Afgoye corridor

114. In assessing the question of safety along the Afgoye corridor, I take into account the reported decision in AM although that has to be viewed in the light of the further background evidence now before me. The junction at K4 is the place where the road from the airport meets one of the principal routes from Mogadishu as it travels north-west into the interior of Somalia. Many of those wishing to avoid Mogadishu must travel to Afgoye where the road continues on eventually into the Gedo region. This section of the road is known as the Afgoye corridor. I accept that the evidence of fighting between the TFG and Al Shabbab or fighting between Al Shabbab and Hizbul Islam is not restricted to the area around Mogadishu, although the level of violence may be greater around Mogadishu than elsewhere. The fact, however, that there are well-recorded incidents of violence between the opposing forces, does not establish that travel is prevented as would be the case if those embarking on the journey believed it unsafe to do so. In particular, given the evidence that travel is effected by buses, taxis and trucks, the drivers of these vehicles would not engage in regular passages across Somalia if it were too dangerous to do so. Hence, the conclusion that I have reached is that travel is possible and, more importantly, takes place on a day to day basis. Doubtless, there

will be occasions when the local situation prevents continued passage but, where this occurs, it will be a temporary cessation and the journey is likely to continue when the localised fighting is past. This approach is similar to the consideration I have given to the assessment of risk along the road from the airport of K4.

115. The evidence suggests that there are many thousands of IDPs who have settled in the Afgoye corridor, probably having fled the violence in Mogadishu. I would not regard the appellant as likely to relocate in an IDP camp in the Afgoye corridor but, were he to do so, the background material does not establish that the situation for IDPs in these camps amounts to treatment sufficiently serious to involve a violation of his Article 3 rights. Instead, I consider that as a Marehan, there is the safer and better prospect of continuing his journey to Gedo. His route does not involve passing through Beletwayne where I have recorded there have been specific difficulties in the past.

Conclusion

116. As a Darod, sub-clan Marehan, the appellant might properly be classed as from one of the more influential clans or sub-clans and more likely to have a better chance of being tolerated in the Gedo area which is a traditional clan area to which it possible he can travel without serious difficulties. Whilst the appellant's evidence as to family, or friends is not clear, I have found the reason for this is because his evidence on this aspect has not been entirely frank. He has, therefore, failed to establish there is no one in Somalia to whom he could turn for assistance. The background material does not establish that Gedo is already saturated with IDPs. The Gedo region appears to be relatively less affected by the fighting and to be of no particular strategic importance, with the corollary that it appears to suffer fewer security problems. He is a fit young man who has shown himself to have adapted to life in the United Kingdom and to have shown resilience to the challenges of life here, although not always in a way that British society has found acceptable. These factors weigh in his favour and against the evident reality that the appellant lacks recent experience of living in Somalia and may, therefore be more likely to have difficulty dealing with the changed environment there. Whilst as a returnee from the United Kingdom he may be perceived as having greater relative wealth, there is little evidence as to how, in the appellant's case, this will result in harm. If as he claims, he is not wealthy and has no-one in Somalia who can affect his release and this is readily apparent, the increased risk of abduction and extortion have an air of unreality about them. I do not discount them entirely but I do not regard them as decisive in his favour. If he is able to draw upon family

or clan support then such support will operate in his favour, not against him.

117. Thus, on my examination of the factors outlined in AM & AM, taken together with the further evidence before me, does not support the appellant's claim that his return is likely to result in a violation of his Article 3 rights.

The appellant's skeleton argument

118. Mr Toal submits that the appellant's body is covered with scars [A46 and following] which were accepted as being 'associated with gunshot wounds; lacerations; sutures; cigarette burns and the like'. [B33] It followed that the medical evidence made it sufficiently plain that the appellant had been the victim of violence whilst in Somalia. Mr Toal did not develop this argument before me. The fact that an individual has received injuries likely to have been the result of violence in a country that is known to be violent does not, for that reason alone, increase the risk of further harm. Assuming that the injuries are readily discernible on examination, they do not establish that the injuries were reasonably likely to have been caused by the appellant's participation with the forces that were opposed to the person who is now examining him. Neither the case law nor the background material establish that there is a separate risk category for those who have been scarred by the violence in Somalia or that it is even a risk factor. I would not readily infer that the evidence in relation to Sri Lanka (where it has been established by evidence that scarring may be a relevant factor) should be imported into the assessment of risk in other countries unless there is good reason to do so. I am not, therefore, persuaded that the medical evidence submitted by the appellant to the effect that he has bodily scarring will create in those who become aware of his scars a perception that will ultimately cause him harm.

119. Insofar as Mr Toal submits that there is continuing violence in Mogadishu and this is established if by no other means by the cogent and reliable figures of the numbers who have fled Mogadishu in 2007 and 2008 and that the exodus continued in 2010, the evidence is entirely consistent with the conclusion I have reached elsewhere that it is unsafe for the appellant to return to Mogadishu but in saying this I make a distinction between central Mogadishu and the route from the airport to other parts of Somalia. I therefore reject his principal contention that the case law establishes this section of the route falls into the wider classification that it is unsafe to return to Mogadishu. For the reasons I have given I do not consider that the conclusion in the unreported case of Ahmed Farah Mohamed supports the proposition

that anyone travelling to or from the airport is of risk of harm and I prefer the more recent, reported decision of the Upper Tribunal in AM Somalia [2011] UKUT 54 (IAC) in which SIJ Latter also participated that the background evidence does not establish that it is too dangerous to travel this route.

120. I reach this conclusion without having to draw upon any jurisprudential distinctions between reported and unreported cases but simply drawing upon my analysis of the underlying background material. In the circumstances of this case, I consider the decisions in AM and AM [2008] and AM (Somalia) [2011] more properly, (as well as more recently in the later case), address the risk on return for the reasons I have provided above.

121. Mr Toal submits that evidence showing individuals voluntarily returning to Mogadishu is not evidence of want of real risk of serious harm to those present in Mogadishu, any more than the fact that millions of young men voluntarily journeyed to the western front during the Great War is evidence that there was no real risk of serious harm there. The analogy is not a useful one, as historical comparisons rarely are: the extraordinary feature of those who signed up for service in the Great War is not that they were in the most parts volunteers but that many did so in the knowledge of the risk they faced. There is no evidence to suggest that those currently travelling to Mogadishu do so in the knowledge that there are putting their lives at real risk.

122. Mr Toal also submits that the reporting of AM (Somalia) but not Ahmed Farah Mohamed, creates a real appearance of bias both on the part of the reporting body and on the part of the Tribunal. However, I know of no reason to suppose the author of that determination ever suggested it should be reported, and there is no reason at all to think that, at any stage, a decision was taken that it should not be reported. Inevitably, a decision of the Tribunal made by a panel that includes a Judge of the Outer Court of Session is more likely to come forward as suitable for reporting. It is to dispel the charge of bias that I have decided to annex the decision in Ahmed Farah Mohamed to this determination. Whilst Mr Toal argues that the differences of outcome between AM (Somalia) and Ahmed Farah Mohamed show that there is a real issue in relation to Article 3 in cases such as these, my decision is an attempt to resolve those differences by an examination of the underlying facts upon which those decisions have been made.

123. It is anticipated that later this summer the Tribunal will consider a number of linked appeals dealing with the current situation in Somalia. It is hoped that these will provide country guidance of general application. Nothing in this determination is intended to pre-

empt any country guidance that may emerge. This case is being reported in order to address the issues raised by the decision in AM (Evidence – route of return) Somalia [2011] UKUT 54 and Ahmed Farah Mohamed.

DECISION

I re-make the decision dismissing the appeal under Article 3.

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL
11 May 2011

Appendix

AI V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/16568/2007

THE IMMIGRATION ACTS

Heard at Field House
On 17 June 2010

Determination Promulgated

……

Before

SENIOR IMMIGRATION JUDGE LATTER

Between

AHMED FARAH MOHAMED

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Toal, Counsel, instructed by Wilson, Solicitors LLP

For the Respondent: Ms M Tanner, Home Office Presenting Officer

DETERMINATION AND REASONS

Background

1. The appellant is a citizen of Somalia born in June 1982. He arrived in this country on 18 June 2004 and claimed asylum on arrival. He had left Mogadishu by air the previous day travelling via Dubai. His application was refused and an appeal dismissed on 22 October 2004. He made two attempts to enter Ireland in 2005 and claim asylum but on both occasions

he was removed to the UK and then on 2 October 2005 repeated his claim for asylum here. He says that having heard nothing about this claim he made a further claim under a false name. In March 2007 he was arrested trying to leave the UK for Canada using a false passport. He was convicted and sentenced to fifteen months' imprisonment, the judge making a recommendation for deportation. On 9 October 2007 the respondent made a decision to deport him and his appeal against this decision was dismissed by a panel (Immigration Judge P John Brewer and Mrs E Hurst JP) in a determination issued on 24 May 2008.

2. At a hearing on 6 January 2009 I found that the Tribunal had materially erred in law for the following reasons:

> "1. This is the reconsideration of an appeal against the respondent's decision made on 9 October 2007 to make a deportation order against the appellant following a recommendation made by the Crown Court when sentencing him for offences of obtaining leave to enter or remain in the UK by deception and possession of a false identity document.
>
> Background
>
> 2. The appellant is a citizen of Somalia who claims to have arrived in the UK on 18 June 2004 at Heathrow Airport using a forged Dutch passport. He claimed asylum when this deception was discovered. His application was refused and an appeal dismissed in a determination issued on 22 October 2004. The appellant next came to the respondent's attention when he was returned by the Irish authorities on 2 September 2005 following a request that the UK Government accept responsibility for an asylum claim. He repeated his claim for asylum on 2 September 2005. This was refused and certified on 12 October 2005. It was discovered that the appellant's fingerprints matched those of a claimant who had identified himself as Khalid Sharif Hassan. The appellant made a further claim for asylum on 28 March 2006 asserting that he had arrived in the UK that day.
>
> 3. On 1 March 2007 the appellant was arrested by the Gatwick Immigration Prosecution Unit for possessing a forged passport and on 19 March 2007 convicted of offences at Lewes Crown Court and sentenced to fifteen months' imprisonment and recommended for deportation. The respondent decided to make a deportation order on 9 October 2007.
>
> The Hearing before the Tribunal
>
> 4. The Tribunal heard the appeal against this decision on 14 May 2008. The appellant relied on a witness statement dated 1 July 2007 and gave oral evidence. He said that he had been born in

Mogadishu and had spent his life there until leaving Somalia and that his two sisters and brother had been killed after he had left. He accepted that he had made three claims for asylum and on one occasion had used a false name. He had no alternative as otherwise he might suffer the fate of his siblings. He had been arrested in 2007 at Gatwick in possession of a Swedish passport with a ticket for Canada

5. The Tribunal found that the appellant had no outstanding claims under the Refugee Convention commenting that he had claimed asylum on three occasions. His appeal against his first claim, heard in 2004 by an Adjudicator, Professor Ritson, had been dismissed on both asylum and human rights grounds. Professor Ritson had found the appellant not to be credible and opportunistic in his decision to leave Somalia. The Tribunal said that the appellant's asylum claims had been lost and if required to do so it would reinforce that decision.

6. It went on to consider the appeal on humanitarian protection and human rights grounds. It referred to HH and others (Mogadishu – armed conflict: risk) Somalia CG [2008] UKAIT 00022. It noted that the appellant claimed that his home area was Mogadishu and said that there was little doubt that there had been fighting there. It referred to documents in the appellant's supplementary bundle but said that it was bound by the country guidance case of HH. It found that the appeals under articles 2 and 3 should be dismissed as should the deportation appeal in the light of the presumption in favour of deportation unless there were exceptional circumstances outweighing the public interest.

The Grounds and Submissions

7. In the grounds it is argued that the Tribunal materially erred in law in a number of ways. When directing itself it said that immigration and human rights issues (save for article 3) had to be considered as at the date of decision. It had failed to take into account post decision facts in accordance with s.85(4) of the 2002 Act. The appellant had sought to argue that he was entitled to humanitarian protection and had produced 180 pages of further evidence relating to the situation after HH. The Tribunal had failed to consider or make findings on this evidence. It had also erred in law by regarding itself as bound by HH. It had further erred by failing to consider whether the situation in Mogadishu was such that there would be a real risk of a breach of article 3 on return or how the appellant would be able to reach any area suggested as safe for his clan, the Digil Tunni, in Lower Shabelle, Bay or Bakool. It had failed to make any findings on the appellant's oral evidence or to regard Professor Ritson's determination as being the starting point rather as determinative of the appellant's claim.

The Material Error of Law

8. At the hearing before me Ms Isherwood conceded that the Tribunal had materially erred in law in the way it had dealt with the asylum and humanitarian protection appeals. It had not made findings on the evidence produced in support of the submission that the situation had deteriorated since HH was heard and had also failed to make findings of fact in relation to events after the dismissal of his claim for asylum.

9. Mr Toal submitted that this was a case where on the basis of the findings already made a decision could be substituted allowing the appeal on humanitarian protection grounds. In his determination Professor Ritson, whilst not regarding the appellant as credible, had accepted that he was from Mogadishu and was a Digil Tunni. Mr Toal referred to paras 178, 179 and 183 of AM and AM (Armed conflict: risk categories) Somalia CG [2008] UKAIT 00091 which had found that on the present evidence Mogadishu was no longer safe as a place to live for the great majority of its citizens. He submitted that there was no reason to believe that the appellant would fall within the exceptional categories who might be safe there such as those with close connections with powerful actors in Mogadishu such as prominent businessmen or senior figures in the insurgency or in powerful criminal gangs (see para 178 of AM) nor was there any basis on which it could be said there was a viable internal relocation alternative (para 183). In the alternative, he submitted that the appeal should be adjourned to a second stage so that proper findings of fact could be made on the appellant's background and in particular whether he was from Mogadishu.

10. Ms Isherwood submitted that the proper course would be for further evidence to be heard. She agreed that the appellant's evidence had been substantially rejected both by Professor Ritson and the Tribunal hearing the present appeal There was no adequate factual basis on which a decision could properly be made to allow the appeal on humanitarian protection grounds.

11. The concession that the original Tribunal materially erred in law is rightly made. The Tribunal failed to make findings of fact on the appellant's evidence about his background and on events which had taken place after the previous appeal. It also failed to make adequate findings on the evidence produced in support of the argument that the situation had deteriorated since the country guidance in HH. The issue for me is whether I can properly substitute my own decision on the basis of the findings of fact made by Professor Ritson when he heard the appeal in 2004. He said that he did not consider the appellant to be a credible witness and gave a number of reasons. He found that the appellant's emigration from Somalia appeared to have been opportunistic as opposed to being dictated by persecutory treatment. He rejected his evidence that he would be regarded as a Bravanese Tunni as opposed to a Digil Tunni. He also commented that there was no evidence that

the appellant's siblings or his father were at risk in Somalia at the time of the hearing. He said that in view of his conclusions that the appellant was a Digil Tunni, he did not consider that the objective evidence placed before him justified a conclusion that he would be at risk as such on return to Mogadishu.

12. I am not satisfied that I can safely infer either from Professor Ritson's determination or the Reasons for Refusal Letter of 30 July 2004 that the appellant is from Mogadishu; or even if I could, that this would be an adequate basis for substituting a decision allowing the appeal on humanitarian protection grounds. The Tribunal in AM made it clear firstly that there may be some individuals who could live safely in Mogadishu and secondly that the issue of internal relocation needed to be considered. In my judgment the guidance set out in AM can only properly be applied on the basis of clear findings of fact about the appellant's identity, background and personal history including any recent history relating to his family in Somalia. The findings of Professor Ritson in his determination form only the starting point of that enquiry. I am, therefore, satisfied that the proper course is for this reconsideration to be adjourned for further evidence and submissions on whether the appeal should be allowed or dismissed."

3. After some delay the appeal was listed for rehearing at Taylor House but then adjourned the request of the respondent. The matter was finally relisted for hearing before me. The reconsideration now proceeds as an appeal to the Upper Tribunal by virtue of transitional provisions.

4. The appellant's first claim for asylum was based on an argument that he would be at real risk of persecution as a Bravanese Tunni. The adjudicator, Professor Ritson, who heard his appeal on 11 October 2004 said that he did not find the appellant to be credible for reasons set out in four bullet points in para 6 of his determination. Firstly, he did not accept the appellant's explanation as to why he had not left Somalia sooner in the light of the account he gave of events between 1991 and 2003 about members of his family being killed, robbed or raped. He took the view that the appellant's emigration appeared to have been opportunistic as opposed to being dictated by persecutory treatment directed at him by majority clans. Secondly, although the judge appears to have accepted that the appellant was a member of the Tunni clan, in the light of the evidence before him, he found that only members of that clan perceived to be identified with the Bravanese clan would be at risk on return. He found that there was no adequate evidence that the appellant would be so regarded as opposed to a Tunni Digil. The adjudicator found there was no evidence of the appellant and his family being specifically targeted on the basis of their clan membership in the violence that characterised the civil war in Somalia. He was not satisfied that the appellant would be at risk simply as a Tunni Digil. Thirdly, the

adjudicator specifically rejected the appellant's evidence about the fact that he was able to pursue his studies in English due to the intervention of his teacher who himself was a member of a minority clan and fourthly he referred to further objective evidence and concluded that the appellant would not be at risk as a Tunni Digil.

5. At the hearing of this appeal, the Tribunal noted Professor Ritson's determination and the fact that the appellant had claimed asylum on three separate occasions under a false name and on a false basis. It said that this appellant's asylum claims had been lost and, if required to do so, the Tribunal reinforced that decision. However, the Tribunal did go on to consider Articles 2 and 3 and the issue of humanitarian protection. It found that it was bound by the country guidance determination in HH (Mogadishu; armed conflict; risk) Somalia [2008] UKAIT 00022 and the appeal was dismissed on this basis.

6. At the hearing before me on whether there was a material error of law it was submitted that I could properly substitute my own decision but I was not satisfied that I could properly infer from the previous findings that the appellant was from Mogadishu or that this in itself would be an adequate basis for allowing the appeal on humanitarian protection grounds in the light of AM and AM (Armed conflict: risk categories) Somalia CG [2008] UKAIT 0091. In the light of findings in that determination that there might be some individuals who could live safely in Mogadishu and for those who could not, the issue of internal relocation would need to be considered, I was not satisfied that there was a sufficiently clear factual basis to make a decision without the parties having the opportunity of giving further evidence and making further submissions.

7. However, the position has moved on in a number of respects since January 2009. Firstly the respondent accepts or at least does not contest the appellant's assertion that he is from Mogadishu and does not seek to reopen the issue of whether he is a Tunni Digil. The respondent maintains his assertion that the appellant is an unreliable witness and that it is implicit in the previous determinations that his account of events in Somalia has been rejected whereas Mr Toal argues that previous findings relating to credibility do not necessarily impinge upon the appellant's evidence about what happened to him in Somalia and that there were no clear findings about his own personal history.

8. The appellant seeks to pursue his claim on asylum or humanitarian protection grounds whereas the respondent argues that difficult though the situation is in Somalia and in particular Mogadishu, the appellant would be able to look to the Tunni Digil clan for protection. Whilst it is accepted that on present evidence Mogadishu is no longer a safe place to

live for the great majority of its citizens, the respondent's case is that the appellant in the light of the lack of credibility of his evidence has failed to show that he would be unable to relocate in safety with relatives elsewhere. He would be able to travel to an area outside Mogadishu where, as an intermediate clan member, he could find protection. The evidence showed that those who relocated to an IDP camp did not in general face a real risk of persecution or serious harm.

Evidence

9. I heard oral evidence from the appellant and his documentary evidence is set out in five separate bundles 1A-5A. The evidence relied on by the respondent is set out in a case law bundle and a supplementary bundle.

The Appellant's Evidence

10. The appellant adopted his witness statements of 4 April 2008 (1A39-58) and 28 January 2010 (3A398-400). He said that after he was refused asylum in this country he was scared of being sent back to Somalia and this was the reason he attempted to travel to Canada. His family had been killed in Somalia and he was scared that he also would be killed and he wanted to be safe. He had no information about the whereabouts of his wife and surviving brother. When he last heard of them they were in Mogadishu where he had lived in Hamair Jad Wardhigle in Hamar, a district of Mogadishu. He had never lived in any other part of Somalia. Originally his family had come from Brava but he did not know anyone from there.

11. In cross-examination he said that he had not had the cash himself to fund his journey but it had been arranged by a maternal uncle in Saudi Arabia who contacted an agent. He had travelled with this agent to Dubai. He had married in 2004 but his uncle had not been able to finance his wife's departure from Somalia and for the sake of the family it was decided that he was the one who would be sent abroad.

Submissions

12. Ms Tanner submitted that the substantive issue in this appeal was whether the appellant could be expected to relocate on return to Mogadishu. She accepted that he could not reasonably be expected to stay there in the light of the current evidence but she argued that he could relocate in safety. In the light of the findings in the previous hearings no weight could be attached to what the appellant said about his past history and it could not be accepted as he asserted that his family and siblings had been killed. The likelihood was that he had family in Somalia. He had said that he did not know where his wife was

but that evidence should be treated with caution. The appellant would not be at risk simply as a Tunni Digil which the background evidence established was an intermediate clan between the majority and minority clans. In any event the situation about whether there was a risk arising from clan membership was now much more fluid than had originally been thought. She referred to the Somali Country Report for May 2010 and in particular those paragraphs dealing with clan membership at 18.01-18.31. So far as the humanitarian issues were concerned the respondent did not deny that there were many problems but the appellant failed to show that he had no relatives in Somalia. He had lied about his past and had failed to show that relocation was not a viable option.

13. Mr Toal submitted that the facts which were not in dispute, that he was a Tunni Digil from Mogadishu, established that he would be able to succeed on humanitarian protection grounds. He referred to the judgments of the Court of Appeal in HH (Somalia) [2010] EWCA Civ 426 and in particular to the finding that when the route and manner of return were known or could be implied, the First-tier Tribunal must consider whether the appellant would be at risk if returned by that route. He then referred to maps of Mogadishu to support his argument that the airport was in Waberi District and that the only way out by road would lead through the district of Hodan which remained a conflict area. He submitted that it must follow that no-one at this stage could be returned to Mogadishu Airport. He further argued that there was no basis for rejecting the appellant's account of what had happened to him and his family in Somalia. He was a person who was likely to be attacked with relative impunity and although on his account he had received some support from some majority clan neighbours, this did not alter the fact that he would be at real risk on return. His position should be treated as analogous to Town Tunnis, described in MN (Somalia) CG [2004] UKIAT 00224.

14. Mr Toal referred to para 183 of the Tribunal's determination in AM and AM where it said that returnees to Mogadishu would be at real risk of serious harm and in order to succeed they need only show they had no viable internal relocation alternative. He submitted that the proper approach was to consider whether it had been shown that there was a part of the country where there was no relevant risk and to which the appellant could reasonably be expected to go. This was the approach adopted by the Court of Appeal in Jasim v Secretary of State for the Home Department [2006] EWCA Civ 342 and in AA (Uganda) v Secretary of State for the Home Department [2008] EWCA Civ 579 where it was held that the Tribunal had erred in law by finding that there was an internal relocation alternative where an appellant had failed to show that it was unreasonable to expect her to relocate to Kampala. He

submitted that in any event the internal relocation option was not open because inevitably the appellant would have to pass through an area where there would be a real risk of persecution or serious harm. It was not reasonable to expect him to become an internally displaced person or to relocate in an IDP camp.

Assessment of the Issues

15. I shall deal firstly with the issue of humanitarian protection. In AM and AM the Tribunal said at paragraph 178:

> "178. In the light of the above, we accept that since HH the situation in Mogadishu has changed significantly, both in terms of the extent of population displacement away from the city, the intensity of the fighting and of the security conditions there. On the present evidence we consider that Mogadishu is no longer safe as a place to live for the great majority of its citizens. We do not rule out that notwithstanding the above there may be certain individuals who on the facts may be considered to be able to live safely in the city, for example if they are likely to have close connections with powerful actors in Mogadishu, such as prominent businessmen or senior figures in the insurgency or in powerful criminal gangs. However, barring cases of this kind, we consider that in the case of persons found to come from Mogadishu who are returnees from the UK, that they would face on return to live there a real risk of persecution or serious harm and it is reasonably likely, if they tried staying there, that they would soon be forced to leave or that they would decide not to try to live there in the first place."

16. In paragraph 183 the Tribunal said:

> "183. The question we have to decide, however, is how these findings assist applicants for international protection or article 3 protection who are in the UK presently. If they are from Mogadishu, then, on our earlier finding (that the great majority of persons facing return to Mogadishu would be at real risk of persecution or serious harm there, in order to succeed they need only show that they have no viable internal relocation alternative. We shall come back to this scenario in a moment."

17. Mr Toal takes issue with the way the Tribunal expressed itself on the basis that in substance it was imposing a burden on the appellant to prove a negative. I doubt if this is what the Tribunal intended but in any event I am satisfied that the proper approach is as summarised by Sedley LJ in Jasim where he said at paragraph 16:

> "16. The possibility of internal protection is relevant to refugee and human rights claims because it may demonstrate that a fear of persecution or harm, though warranted by the applicant's

> experience in his place of origin, is not well-founded in relation to other parts of the state whose duty it is to protect him. But rather two issues – fear and relocation – all go ultimately to the single question of safety, they cannot be decided in the same breath. Once the judge of fact is satisfied that the applicant has a justified fear of persecution or harm if returned to his home area, the claim will ordinarily be made out unless the judge is satisfied that he can nevertheless be returned safely to another part of his country or origin. Provided the second issue has been flagged up, there may be no formal burden of proof on the Home Secretary (see GH [2004] UKIAT 00248); but this does not mean that the judge of fact can reject an otherwise well-founded claim unless the evidence satisfies him that internal relocation is a safe and reasonable option.
>
> 17. It is necessary to stress both adjectives – safe and reasonable. It is well established that relocation to a safe area is not an answer to a claim if it is unreasonable to expect the applicant to settle there. There may be no work or housing. He may not speak the language. Similarly relocation to an area may be perfectly reasonable by these standards but unsafe, for example because of the risk of continued official harassment – or – as in this case – revenge seeking."

18. I am not satisfied on the evidence before me that internal relocation is a viable option in this appeal in the light of the detailed evidence produced about the location of Mogadishu Airport in relation to Mogadishu and the fact that the only apparent way by road through and from the airport out of Mogadishu is to go through parts of Mogadishu which are in a state of internal armed conflict. The evidence satisfies me that the Hodan area continues to be the subject of indiscriminate violence and there is also evidence of mortar attacks on the airport. No other route of return other than by way of Mogadishu Airport has been proposed. On this basis I am satisfied that the appeal should succeed on humanitarian protection grounds.

19. I now turn to the issue of asylum. Mr Toal sought to argue that the evidence supports a finding that there was at least a reasonable degree of likelihood that the appellant would be at a differential risk of harm as a Tunni and he should be treated as if a Town Tunni. I am satisfied that there are good reasons for treating the appellant's evidence about past events with considerable caution. Although in his determination in 2004 Professor Ritson did not deal specifically with the appellant's evidence about what had happened to him and his family, it is clear that he rejected the central core of the appellant's account and he did comment in paragraph 6.3 that there was no evidence of him or his family being specifically targeted on the basis of their clan membership in the violence that characterised the civil war in Somalia.

20. His findings on the circumstances in which the appellant had left Somalia and the fact that he had been able on his own account to remain to continue his studies in English clearly indicate that he did not find the appellant to be credible about evidence central to the way in which his claim was being put at that time. The appellant's credibility has been further undermined by the fact that in 2006 he made a new asylum claim under a false name, giving the explanation that this was because he had heard nothing about the claim he had made on his return from Ireland. The appellant then attempted to use false documents to leave the UK for Canada leading to his conviction for the possession of a false identity document. I am not satisfied that on the evidence before me that there is any basis for me to take a different view of the credibility of the appellant's account of events in Somalia.

21. However, I am satisfied that the general background situation in Somalia has significantly moved on (see in particular para 18.30 of the COI report Somalia May 2010) when assessing where there is a risk to the appellant from his clan membership, particularly in respect of a non-minority clan such as the Tunni Digil. There is no basis in the evidence for a finding that the appellant should be treated as a Town Tunni. I am not satisfied that the appellant's clan membership puts him at a differential risk of serious harm. His risk is of being a victim of the indiscriminate violence which now characterises Mogadishu. For these reasons I am not satisfied that the appellant faces a real risk of persecution as a result of his clan membership.

22. Finally, reverting to the issue of relocation I am not satisfied, even if contrary to my previous findings the appellant is able to return in safety to Mogadishu and then make a safe exit, that there is adequate evidence before me from which I can properly make a finding that it has been shown that he could relocate in safety elsewhere in Somalia. It is clear from the most recent COI Report that there is very little clear information about the Tunni and the Digil, about where they live or the kind of protection they might expect to receive. I am also not satisfied that it is reasonable to expect the appellant to relocate in an IDP camp. On the evidence produced at this hearing it is clear that the humanitarian situation has deteriorated since AM and AM was heard. There is evidence that the activities of the UN and humanitarian workers are being increasingly threatened by those involved in the conflict and there are threats to the supply of humanitarian assistance. There is no adequate evidence before me to support a conclusion that the appellant could relocate and then lead anything resembling a relatively normal life without facing undue hardship.

Decision

23. The previous Tribunal erred in law and I set aside that decision replacing it with a decision dismissing the appeal on asylum grounds but allowing it on humanitarian protection grounds.

24. I am satisfied that when the order for reconsideration was made the appeal had substantial prospects of success and assuming that it is necessary to make an order in a transitional case, I order that the costs of the application for reconsideration, the preparation for reconsideration and the hearing be paid from the relevant central fund.

Senior Immigration Judge Latter
(Judge of the Upper Tribunal)

Dated: 23 July 2010