Case Nos: C5/2008/1011
C5/2009/0968
C4/2009/1173
C5/2009/2017

Neutral Citation Number: [2010] EWCA Civ 426
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
1. IA/14092/2006 2. AA/13577/2007 & 4. AA/01476/2007
AND THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
3. CO/5844/2007

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/04/2010

Before :

LORD JUSTICE SEDLEY
LADY JUSTICE SMITH
and
LORD JUSTICE ELIAS

- -

Between :

1. HH (SOMALIA) **2. AM (SOMALIA)** **3. J (SOMALIA)** **4. MA (SOMALIA)**	**Appellants**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Mr Richard Drabble QC and Mr James Collins (instructed by Sheikh & Co) for the A**ppellant 1.**
Mr Ronan Toal (instructed by South Manchester Law Centre) for the **Appellant 2.**
Mr Rick Scannell and Mr Ronan Toal (instructed by Islington Law Centre) for the **Appellant 3.**
Mr Richard Drabble QC and Mr Graham Denholm (instructed by CLC Solicitors) for the **Appellant 4.**
Ms Elisabeth Laing QC and Ms Deok Joo Rhee (instructed by Treasury Solicitor) for the R**espondents 1, 2. &4.**
Mr Colin Thomann (instructed by Treasury Solicitor) for the **Respondent 3.**

Hearing dates: 13 January 2010, 1-3 March 2010

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Judgment

Lord Justice Sedley:

Introductory

1. This judgment, which is the work of all three members of the court, is being given in unitary form because the cases to which it relates were selected for hearing by a single court in the hope of giving some general guidance on a number of related issues. Inevitably some issues have dropped away and others have acquired unanticipated prominence. All, however, have the same backdrop: the enforced return of individuals with no independent right to be or remain in the United Kingdom to a war-torn country, Somalia, where their safety is or may be in serious doubt.

2. Two particular paradoxes affect these cases.

3. One is that the common sense of waiting until removal or deportation is imminent before deciding whether it is safe has to be set against the mandate to primary and appellate decision-makers to take into account the full humanitarian and human rights implications of the immigration decision which is before them.

4. The other is that, difficult as it is, it is necessary to put aside the fact that none of those now claiming humanitarian and human rights protection has any independent entitlement to be in the United Kingdom, and that at least one has committed a serious crime which makes it wholly undesirable that he should remain here. The lack of any prior right to be here is the necessary predicate of all cases concerning safety on an enforced return, but that does not mean that such people are not entitled to the due process and protection of the law.

5. In that context this judgment addresses the following issues:

    (a) How is danger arising from generalised or indiscriminate violence to be appraised?

    (b) On appeal against an adverse immigration decision, is the appellate tribunal's decision only whether an individual can in principle be returned to his home state (or part of it) or is the tribunal required to consider the appellant's safety at the point of return and on any journey that he or she must make from there to reach safety; or does this latter issue arise only when removal directions are given?

    (c) What is the nature of the burden of proof resting on a person who contends that deportation will put his or her life at risk?

The law

6. Removals of illegal entrants continue to be carried out under the powers contained in paragraphs 8 to 10 of Sch. 2 to the Immigration Act 1971. These permit directions to be given to a carrier to remove an illegal entrant to a country of which he is a national or a citizen; a country or territory in which he has obtained a passport or other document of identity or where he embarked for the United Kingdom; or a country or territory to which there is reason to believe he will be admitted. Safety at the point of

return or en route to a safe place is not a statutory factor: it arises as an adjectival human rights or humanitarian issue.

7. The European Convention on Human Rights by art. 2 guarantees the right to life and by art. 3 forbids inhuman or degrading treatment. The risk that one of these rights will be violated is measured by the actual and prospective situation of the individual seeking protection. The Qualification Directive (2004/83 EC) lays down "the minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted". In addition to laying down criteria in relation to refugee status and defining the minimum civil rights to be accorded to refugees, the Directive defines the concept of 'subsidiary protection' which may be available to those who do not qualify as refugees. So far as relevant for present purposes, a person eligible for subsidiary protection is defined in article 2(e) as:

> "A third country national … who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned if returned to his or her country of origin …. would face a real risk of suffering serious harm as defined in article 15, ….., and is unable or owing to such risk unwilling to avail himself or herself of the protection of that country."

Article 15 defines serious harm:

> "Serious harm consists of
>
> (a) death penalty or execution; or
>
> (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
>
> (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."

8. Member States were required to transpose the Directive into domestic law by October 2006. In so far as any new provisions were required in the domestic law of the United Kingdom, this was achieved by amendment of the Immigration Rules and the Refugee or Person in Need of International Protection (Qualification) Regulations 2006, SI 2006/2525. Entitlement to international humanitarian protection is set out, in accordance with the Directive, in paragraph 339C.

9. In February 2009 the ECJ gave its ruling in *Elgafaji* [2009] 1 WLR 2100. On the basis of it, this court in June 2009 decided *QD (Iraq)* [2009] EWCA Civ 620. The two decisions now afford a reasonable measure of certainty about the meaning and scope of art. 15(c) of the Qualification Directive.

10. In *Elgafaji*, the ECJ was asked whether the protection provided by article 15(c) was co-terminous with the protection provided by article 3 of the ECHR or was

supplementary to it. If the latter, what were the criteria for determining eligibility? The Court held that article 15(c) protection went beyond article 3 ECHR protection (which is covered by article 15(b) of the Qualification Directive). As to the criteria to be applied, at paragraph 43 the Court summarised the position thus:

> "…article 15(c) of the Directive, in conjunction with article 2(e) of the Directive, must be interpreted as meaning that the existence of a serious and individual threat to the life or person of an applicant for subsidiary protection is not subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances, and the existence of such a threat can exceptionally be considered to be established where the degree of indiscriminate violence characterising the armed conflict taking place …. reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to that threat."

11. Thus, for a person who claimed subsidiary protection merely on account of his presence in a particular war zone, the level of indiscriminate violence would have to be very high. But, earlier, in paragraph 39, the Court had explained that, where the applicant could show that he or she was specifically affected by reason of factors particular to his or her personal circumstances, a lower level of indiscriminate violence would be sufficient to show eligibility for subsidiary protection.

12. In *QD*, this court considered and applied *Elgafaji*, which, as it observed, left a number of potential problems outstanding. It sought to clarify the ECJ's use of the word 'exceptionally' in §43 (quoted above), holding, at §25, that the judgment of the ECJ had not introduced an additional test of exceptionality. It had simply stressed that "it is not every armed conflict or violent situation which will attract the protection of article 15(c) but only one where the level of violence is such that, without anything to render them a particular target, civilians face real risks to their life or personal safety." That observation is of course subject to the qualifications that, where specific personal or group factors apply which increase the risk to the particular applicant over and above that faced by the population at large, the level of indiscriminate violence will not need to be as high, and that where effective personal protection is accessible the risk may abate.

13. The following provisions of the Nationality, Immigration and Asylum Act 2002 have a bearing on these appeals:

> **82 Right of appeal: general**
>
> (1) Where an immigration decision is made in respect of a person he may appeal to the Tribunal.
>
> (2) In this Part "immigration decision" means—
>
> (a) refusal of leave to enter the United Kingdom,
>
> (b) refusal of entry clearance,
>
> (c) refusal of a certificate of entitlement under section 10 of this Act,

(d) refusal to vary a person's leave to enter or remain in the United Kingdom if the result of the refusal is that the person has no leave to enter or remain,

(e) variation of a person's leave to enter or remain in the United Kingdom if when the variation take
effect the person has no leave to enter or remain,

(I) revocation under section 76 of this Act of indefinite leave to enter or remain in the United Kingdom,

(g) a decision that a person is to be removed from the United Kingdom by way of directions under
[section 10(1)(a), (b), (ba) or (c)] of the Immigration and Asylum Act 1999 (c 33) (removal of person unlawfully in United Kingdom),

(h) a decision that an illegal entrant is to be removed from the United Kingdom by way of directions
under paragraphs 8 to 10 of Schedule 2 to the Immigration Act 1971 (c 77) (control of entry: removal),

(hal a decision that a person is to be removed from the United Kingdom by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006 (removal: persons with statutorily extended leave), .
(i) a decision that a person is to be removed from the United Kingdom by way of directions given by virtue of paragraph 10A of that Schedule (family),

(ia) a decision that a person is to be removed from the United Kingdom by way of directions under
paragraph 12(2) of Schedule 2 to the Immigration Act 1971 (c 77) (seamen and aircrews),

(ib) a decision to make an order under section 2A of that Act (deprivation of right of abode),

(J) a decision to make a deportation order under section 5(1) of that Act, and

(k) refusal to revoke a deportation order under section 5(2) of that Act.

(3) …

(3A) Subsection (2)0) does not apply to a decision to make a deportation order which states that it is made in accordance with section 32(5) of the UK Borders Act 2007; but—

(a) a decision that section 32(5) applies is an immigration decision for the purposes of this Part, and

(b) a reference in this Part to an appeal against an automatic deportation order is a reference to an
appeal against a decision of the Secretary of State that section 32(5) applies.

(4) The right of appeal under subsection (1) is subject to the exceptions and limitations specified in this Part.

84 Grounds of appeal

(1) An appeal under section 82(1) against an immigration decision must be brought on one or more of the following grounds—

(a) that the decision is not in accordance with immigration rules;

(b) that the decision is unlawful by *virtue* of section 19B of the Race Relations Act 1976 (c 74) or Article 20A of the Race Relations (Northern Ireland) Order 1997 (discrimination by public authorities);

(c) that the decision is unlawful under section 6 of the Human Rights Act 1998 (c 42) (public authority not to act contrary to Human Rights *Convention)* as being incompatible with the appellant's Convention rights;

(d) that the appellant is an EEA national or a member of the family of an EEA national and the
decision breaches the appellant's rights under the Community Treaties in respect of entry to or residence in the United Kingdom;

(e) that the decision is otherwise not in accordance with the law;

(f) that the person taking the decision should have exercised differently a discretion conferred by immigration rules;

(g) that removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee *Convention* or would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights.

(2) In subsection (1)(d) "EEA national" means a national of a State which is a contracting party to the Agreement on the European Economic Area signed at Oporto on 2nd May 1992 (as it has effect from time to time).

(3) An appeal under section 83 must be brought on the grounds that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention.

(4) An appeal under section 83A must be brought on the grounds that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention.

85 Matters to be considered

(1) An appeal under section 82(1) against a decision shall be treated by [the Tribunal] as including an appeal against any decision in respect of which the appellant has a right of appeal under section 82(1).

(2) If an appellant under section 82(1) makes a statement under section 120, [the Tribunal] shall consider any matter raised in the statement which constitutes a ground of appeal of a kind listed in section 84(1) against the decision appealed against.

(3) Subsection (2) applies to a statement made under section 120 whether the statement was made before or after the appeal was commenced.

(4) On an appeal under section 82(1)[, 83(2) or 83A(2)] against a decision [the Tribunal] may consider evidence about any matter which [it] thinks relevant to the substance of the decision, including evidence which concerns a matter arising after the date of the decision.

(5) But in relation to an appeal under section 82(1) *against refusal of entry clearance or refusal of* a *certificate of entitlement under section 10—*

(a) subsection (4) *shall not apply, and*

(b) the Tribunal may consider only the circumstances appertaining at the time of *the decision to refuse.*

The changing country guidance on Somalia

14. There are three relevant landmarks in the AIT's country guidance determinations affecting the safety of returns to Somalia. All revolve around the fact that, for the present and for a while past, the only feasible point of return is Mogadishu airport. This means that a returnee has either to be able to be sufficiently safe in Mogadishu itself or to be able to travel on to a place of safety.

15. In March 2005 the AIT promulgated its decision in *NM and others (Lone women – Ashraf) Somalia CG* [2005] UKAIT 00076. The AIT in that case found that conditions in southern Somalia and particularly in and around Mogadishu were such that both men and women from minority clans were in danger of article 3 mistreatment and should be regarded as refugees in the absence of evidence of a clan or personal patron which could protect them. Men and women from majority clans were not likely to be in need of international protection, although individual circumstances required separate consideration. Although women were at greater risk than men, 'they would not be able to show that, simply as lone female returnees from the United Kingdom, they have no place of clan safety'. Finally, the AIT held that the general conditions of life or circumstances in Somalia did not engage the obligations of the Refugee Convention or engage article 3 ECHR for all female returnees. A differential impact had to be shown. Being a single woman was not of itself a sufficient differentiator.

16. This decision constituted the current guidance in November 2007 when *HH and others* came before the AIT. Both, however, were superseded by the decision in *AM and AM*, promulgated in January 2009 following a hearing in the previous October. We will come in due course to its detail. As recounted above, that decision was followed, first by the ECJ's decision in *Elgfaji* and then by this court's decision in *QD (Iraq).*

17. Of the four appeals considered in this judgment:

• the first is that of HH, raising a question (which is case-specific and so not of general significance) of the materiality of an error of law in relation to the scope of the Qualification Directive

• the second, that of one of the two appellants in *AM*, and

• the third, *J*, decided by the Administrative Court in the wake of *AM and AM*, counterposes two radical arguments: that the point and route of return are excluded by law from an immigration decision that an individual is to be removed, and that they are required by law to be included in such a decision.

• the fourth is the appeal of a deportee, MA, also decided in the wake of *AM and AM* and turning on the onus and standard of proof concerning safety in Mogadishu.

HH's case: danger from indiscriminate violence

18. The appellant HH is a citizen of Somalia born in 1967. She is thought to have entered the United Kingdom in 2005. In May 2006, she was convicted of an immigration offence and sentenced to 9 months imprisonment. The Court recommended deportation and, in November 2006, the Secretary of State adopted that recommendation and ordered her deportation. The appellant appealed, contending that, as an Ashraf (that is a member of a minority clan), she would suffer persecution or other serious harm if returned to Somalia. The original tribunal, sitting in March 2007, found her not to be a credible witness. They rejected her claim to be an Ashraf and concluded that she came from Mogadishu and was from a majority clan. They dismissed her appeal. The AIT ordered reconsideration of her appeal on the ground that there was a material error of law in the manner in which the tribunal had assessed the risks facing HH as a woman if returned to Mogadishu as at March 2007.

19. At the second stage reconsideration, HH's appeal was heard together with the appeals of two other Somali women and was treated by the AIT as a country guidance case on the position of women if returned to Somalia. The hearing took place in November 2007. As is usual in country guidance cases, the AIT considered a great deal of written evidence and heard expert evidence about general conditions in Somalia, the position of women and the particular problems to be faced by the three appellants. HH contended that return to Somalia would infringe her article 3 ECHR rights. She also placed reliance on the provisions of article 15(c) of the Qualification Directive.

20. The AIT published its determination in January 2008. It dismissed HH's appeal on both article 3 ECHR and article 15(c) grounds. She now appeals to this court. Although four grounds of appeal were originally advanced, Richard Drabble QC appearing on her behalf narrowed the focus of the appeal shortly before the hearing began. He contended only that the AIT had erred in its application to HH's case of the provisions of article 15(c) of the Qualification Directive.

21. At the time when the AIT dismissed HH's appeal, there were no reported cases either in the European Court of Justice or in the higher courts of this country as to the way in which article 15(c) was to be construed and applied. Since November 2007, the position has been clarified first by the ECJ in *Elgafaji* and then by this court in *QD (Iraq)*.

22. It is conceded by Elisabeth Laing QC for the Secretary of State that the AIT did not construe and apply article 15(c) in accordance with *Elgafaji* and *QD*. She submits however, that the findings of fact were such that, if those decisions had been properly applied, the result would have been same; the statutory appeal would still have been dismissed. Therefore there was no material error of law and this appeal should fail.

23. To examine that contention it will be necessary to set out the findings of fact and to examine the way in which the AIT is now known to have erred. Before embarking on

that process, we should mention that, since this case was before the AIT in November 2007, conditions in Somalia have deteriorated to a significant extent and the country guidance decision *AM and AM (armed conflict: risk categories) Somalia* has been given. That case was heard in October 2008 and further evidence was submitted even after the end of the hearing. We have examined aspects of that decision in this group of appeals and are aware that the state of affairs in Somalia (and particularly in Mogadishu) as found in *AM and AM* is considerably worse than that found in the instant case. There is therefore a degree of artificiality about our consideration of the facts of the present appeal.

The AIT determination

24. The AIT took as its starting point (at paragraph 8) the findings of the AIT in *NM and others (Lone Women – Ashraf) Somalia CG* (see above; given on 31 March 2005). The AIT in the present determination considered the evidence of three experts, Professor I. M. Lewis, Dr Luling and Dr Mullen, all qualified to speak about current conditions in Somalia. Professor Lewis described a serious deterioration in conditions in Mogadishu in 2007. He recorded the displacement of a substantial proportion of the population of the city as a response to the chaotic and violent conditions. He spoke of the brutality of the Ethiopian forces then in the city and the prevalence of indiscriminate shooting and bombardment which caused many civilian casualties. He cited the opinion of the UN that at that time there was no state in existence in Mogadishu or Southern Somalia, only rival gangsters pursuing their private interests unchecked by any functional government structure. However, the tribunal did not entirely accept Professor Lewis's evidence. Instead, starting at paragraph 294, the AIT found that the fighting between the two main factions (the Transitional Federal Government (TFG) backed by the Ethiopians and the Islamic Courts Union (ICU)) was directed mainly against each other and was not clan based. Moreover, although there were times when civilians were killed or injured due to misfiring, civilians were not subject to indiscriminate violence. They also found that, although there had been a mass departure from the city in early 2007, a large number of people had returned later in the year when the security situation had settled down. In short, things were not as bad as Professor Lewis had suggested. Even so, the situation was serious. A person displaced from his or her home in Mogadishu who was unable to find an alternative place with clan members or friends might well experience treatment which would be proscribed by article 3 ECHR. However, the AIT did not find that the current situation was such that every person living there was at real risk of serious harm: see paragraph 302.

25. Starting at paragraph 303, the AIT considered the position of women. They reminded themselves of the AIT's conclusion in *NM* and held that there was nothing to indicate that the position in that regard had changed. There was nothing to suggest that women were being specifically targeted although they were at increased risk at checkpoints. In the light of their understanding of what this court had said in *AG (Somalia) v Home Secretary* [2006] EWCA Civ 1342, the AIT left out of account the dangers of passage through checkpoints on the way to the home area from the point of return. They considered only the possible need to pass through checkpoints in the event of the need to leave the home base. To that limited extent, they recognised that the increased security risks faced by unaccompanied women had to receive special consideration. But, they were of the view that the majority clans still retained the use

of their militias and it would be difficult for a woman who, *ex hypothesi*, could be returned to live in her home area with the protection of fellow clan or group members to be able to show that, in the event of having to move for security reasons, she would be at real risk of having to do so alone rather than in the company of others who would provide protection for her.

26. The AIT then considered whether what was happening in Mogadishu at that time amounted to a state of internal armed conflict within the meaning of that expression in article 15(c) of the Qualification Directive and concluded that it did. It followed that that provision was potentially available on HH's appeal.

27. Before reaching that conclusion, however, the AIT had expressed their views on the scope of article 15(c) in the event that there was a state of armed conflict in existence. In particular, they had considered what was meant by the expression 'serious and individual threat'. In paragraph 331 they said:

> "…it seems to us that those words point clearly to the intention to create a high threshold for succeeding under article 15(c), directly analogous to the well-established high threshold required to demonstrate a breach of article 2 or article 3 of the ECHR. Furthermore, at least on the basis of the submissions made to us, we consider that the concept of "an individual threat" requires there to be some form of "differential impact", of the kind recognised by the House of Lords for the purposes of the 1951 Geneva Convention in Adan [1997] 1 WLR 1107 and by the ECtHR for the purpose of article 3 in Vilvarajah v United Kingdom [1991] 14 EHRR 248. Whether an individual can show such a "differential impact" will depend on the facts. We shall later return to this matter in the context of the three appellants. It is, however, important to bear in mind in this regard Recital (26) [*of the Qualification Directive*] which states in terms that the risks to which a population of a country or a section of the population is generally exposed do not normally create in themselves an individual threat which would qualify as serious harm."

It is clear from that passage that the AIT had in mind that article 15(c) would benefit an appellant only if he or she could show some threat that was particular to him or her over and above that to which the whole population of the area was exposed.

28. That thread of argument was continued in paragraph 332 where, after considering what was meant by the words 'threat to a civilian's life or person', they concluded that:

> "…the significance of the words that the precede the word "threat" in article 15(c), and of the words "life or person", which follow, together with the requirement arising from article 2(e) for there to be "substantial grounds for believing" the person concerned to be at "real risk" if returned, mean in practice that there is likely to be very little scope for a person to succeed in a claim for humanitarian protection by reference solely to paragraph 339C(iv) or article 15(c); in other words, without showing a real risk of ECHR article 2 or article 3 harm (and thus serious harm within the meaning of paragraph 339C or the Qualification Directive".

In short, the AIT was saying that article 15(c) of the Qualification Directive did not add anything to the provisions of articles 2 and 3 of the ECHR. They reiterated that view in paragraph 334.

29. Finally, before turning to consider the individual appeals, the AIT made some observations about the application of article 15(c) to the situation of internal armed conflict in Mogadishu and its environs. They expressed the view that even a member of a minority clan (such as an Ashraf) would be unable to demonstrate a differential impact in Vilvarajah/Adan terms. They observed that an Ashraf's chance of being injured by shrapnel from a bomb intended for Ethiopian soldiers or of being struck by a bullet from such a soldier, intended for an insurgent, is in general no greater than the chances of a majority clan member being so harmed. They acknowledged, however, that "indiscriminate violence" is not limited to violence from the combatants in the armed conflict. It could arise where indiscriminate violence such as arson, robbery or rape arising from a breakdown in law and order is perpetrated by non-combatants. They concluded that a woman from a minority clan or group, with no home area in which she could call for protection from majority clan neighbours or who was forced to move for security purposes (thereby facing checkpoints outside the city) or having to live in a camp or roadside shelter would be reasonably likely to face a "differential threat" such as to satisfy the "serious and individual" requirement in article 15(c). They made the point however that in practice such a person would also satisfy the requirements of being a refugee and be able to show a violation of article 3 of the ECHR.

30. The AIT then determined HH's appeal. They treated her as a member of the majority Hawiye clan, originating from Mogadishu. They held that she had failed to show a reasonable likelihood that she was without a home area to go to in Somalia, where she would have a family and fellow clan members to protect her. Even if she lacked a family, clan members would not refuse to accept her; the clan system although under strain, had not collapsed. Moreover, she had failed to show a reasonable likelihood that, in the event of displacement due to the security situation, she would be forced to deal with checkpoints without the protection of clan members. On that basis, they held that HH was not entitled to refugee status. They added:

> "Her removal in pursuance of the decision to deport her would not give rise to a real risk of her suffering article 3 ill-treatment or serious harm within the meaning of the domestic legislation implementing the Qualification Directive. Notwithstanding the fact that she would return to a city which is in a situation of armed conflict, she has failed to show that there are substantial grounds for believing that she would face a serious and individual threat to her life or person by reason of indiscriminate violence in the situation of that armed conflict. On the evidence, being a woman, without more, is not a sufficient differentiator."

Discussion

31. As we have earlier said, this analysis of article 15(c) was made before publication of Elgafaji and QD. It can now readily be seen why Mr Drabble and Miss Laing agree that the AIT in HH's case approached its determination in respect of article 15(c) in

the wrong way. They had wrongly equated article 15(c) protection with that provided by article 3 ECHR. They also considered that it was necessary for an applicant to demonstrate 'differentiation' between her situation and that of the population at large. That too was wrong. 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.

32. Mr Drabble submitted that, once the errors of law were recognised, the case would have to go back to the AIT for reconsideration. Miss Laing submitted that, although there was an error on the face of the determination, the error was not material. On the facts found, there was only one possible conclusion that the AIT could have reached if it had applied the correct approach.

33. Mr Drabble had included in his grounds of appeal the contention that the AIT's findings of fact were irrational, as was the conclusion that a person in HH's position was not at risk of breach of her article 3 ECHR rights. The complaints included an attack on the AIT's approach to the expert evidence. That attack was expressly abandoned by Mr Drabble shortly before the hearing began. However, he did not abandon the allegation that the findings of fact were perverse. He sought to demonstrate this by reference to published and reputable descriptions of conditions in Mogadishu during 2007 to which, he said, the AIT had failed to give any or any sufficient weight. He relied in particular on the Human Rights Watch Report 'Shell Shocked Civilians Under Siege in Mogadishu' dated 13 April 2007. This described events and conditions in the first few months of 2007. To a large extent, this description was confirmed by the expert evidence, including that of Dr Mullen who was accepted by the tribunal. Nonetheless, the tribunal found that, by the second half of 2007, the security situation had settled down, there was less indiscriminate violence and many of the inhabitants who had fled in the early part of the year had later returned.

34. It is axiomatic that a tribunal has to make its findings of fact on the basis of the current situation and of what can reasonably be foreseen for the immediate future. The irony is that we now know, from *AM and AM*, that, even as the AIT was writing its judgment, conditions in Mogadishu were beginning to deteriorate and during 2008 became dramatically worse. There has been a huge exodus of the population due to the violence in the city. The country guidance relating to Mogadishu is now such that most potential returnees will be entitled to subsidiary protection. Yet we must leave that out of account. The tribunal's findings are to be considered in the light of the evidence then available to them and not with the benefit of hindsight.

35. This determination entailed a very careful and detailed examination of the evidence. Those parts of Professor Lewis's evidence which painted a picture of extreme indiscriminate violence and danger to civilians were rejected by the tribunal and we do not think, particularly in the light of Mr Drabble's abandonment of his criticism of that aspect of the decision, that we can properly say that the findings of fact were perverse or irrational. The fact that events have proved their validity to be short-lived gives this decision a strong air of unreality but in the end is not relevant.

36. On the basis of those findings of fact, is it inevitable that the AIT would have rejected HH's article 15(c) claim if properly approached? Mr Drabble submits that it is not. The tribunal not only failed to direct itself correctly as to the general approach but also failed to give any or any adequate consideration to the particular difficulties which would be faced by a lone woman such as HH if returned to Mogadishu.

37. Applying the correct approach to article 15(c) to the facts as found, it seems to us that it is inevitable that the AIT would have held that the population of Mogadishu as a whole was not subject to such a high level of indiscriminate violence as to justify the conclusion that merely to be there attracted entitlement to subsidiary protection. That is clear from paragraph 302, which although couched in article 3 ECHR terms, necessarily implies a finding that there was not a very high level of indiscriminate violence.

38. The only additional factor on which HH could rely is that she is a woman. She accepts that she cannot now claim to be other than from a majority clan which implies, in the tribunal's view, the availability of armed protection. It was accepted by the AIT and indeed by the Secretary of State that women were and are at an increased risk of harm on account of their gender and the prevalence of sexual violence and crime. It is true, as Mr Drabble says, that in the context of article 15(c) the AIT have not examined the effect of that additional factor on a woman in the position of HH. They have only stated that "on the evidence, being a woman, without more, is not a sufficient differentiator" to place her at risk of serious harm. The use of the expression 'a sufficient differentiator' is redolent of the language used in the refugee and article 3 ECHR cases where the applicant must show personalised or targeted risk factors. The expression may be inappropriate in the context of article 15(c). Yet, when one examines what is entailed in considering the increased risk of indiscriminate violence which flows from being a woman, it may still be said that the process is one of 'differentiation'. We do not think that the use of that expression of itself invalidates the tribunal's reasoning.

39. The finding that 'being a woman is not a sufficient differentiator' goes back to paragraph 303, where the tribunal had found that there was no evidence to show that the position outlined in *NM* had changed. The position found in *NM* was that women from minority clans without protection were at increased risk on account of their gender but that women from majority clans were sufficiently protected. Of course, one of the arguments advanced for HH was that the clan structure was breaking down and protection was no longer available as it used to be. That that is now so is clear from *AM and AM*. But this tribunal found that, although the clan structure was under strain, it had not broken down. The implied conclusion is that, at the time of this decision, women of a majority clan, as HH is taken to be, were not at particular risk. We have not been shown any evidence which demonstrates that it was not open to the tribunal to hold that, at that time, nothing had changed for majority clan women since *NM*. If the tribunal was entitled so to conclude, it is in our view inevitable that, if they had asked themselves whether, given that she was a woman, HH was at real risk of serious harm, the answer would have been that she was not.

40. It follows that, in our view, this appeal must fail because, although the AIT made an error of law, it was not, on analysis, a material error. We reach this conclusion reluctantly because the decision that it is safe to return HH in January 2008 is now obsolete. It seems to us that this matter will almost certainly have to be the subject of

a fresh application for protection, made in the light of the deterioration in conditions described in *AM and AM*.

AM's case: the justiciability of the route of return

41. We will come in some detail to the findings of the AIT on this appeal about the situation in Somalia in mid-to-late 2008 when we deal with MA's case. For the present our concern is with the conclusion of the AIT that, notwithstanding the dangerous situation which they found to obtain there, they were not empowered to take into account on AM's appeal the risks he faced in making the journey from Mogadishu to his home area of Jowhar, about 100 km to the north, where he could expect to be safe.

42. AM had not been found to be a dependable witness. By the time this appeal reached the AIT by way of reconsideration, the only accepted facts about him were that he was a Somali national and that he came from Jowhar. In consequence the AIT concluded:

> "207. As noted earlier, the only accepted fact regarding AM1 is that he is from Jowhar. On the latest evidence the population of the town is not in general exposed to serious harms and there is no longer any significant fighting there, as the insurgents have gained control of it (as they have of most of central and southern Somalia). Very recently, the UIC appears to have won the internal battle of control amongst the insurgents: see para 185 above. There is evidence that en route travel to Jowhar is hazardous, but, for reasons given earlier, that is not a matter which falls for our consideration in the context of Somalia appeals currently: it must be a matter for the respondent, as and when removal arrangements are being finalised, to satisfy herself that there would be safe en route travel for this appellant. Accordingly the appellant has failed to show that if removed he would face a real risk of persecution, serious harm or treatment contrary to Article 3 ECHR. The decision we substitute for that of the immigration judge (who materially erred in law), is to dismiss AM1's appeal."

43. The issue for us is whether this was a lawful approach. Ronan Toal, AM's counsel, submits that it was not. He submits that three simple facts found by the tribunal are enough to entitle AM to asylum or humanitarian protection: first, as confirmed by the Home Secretary at the hearing, any return will be to Mogadishu; secondly, as found by the tribunal, AM's home (where the AIT's finding is that he will be safe) is Jowhar; thirdly, the route from the airport to Jowhar "would not be safe for involuntary returnees presently".

44. The evidence for the last of these findings is worth setting out:

> "200. As regards Jowhar, it is stated in the Amnesty International May 2008 report, that "one of the most dangerous routes is the road between Jowhar and Beletweyne, the main road north out of Mogadishu." (COIS, 27.06). It would appear that AM2's route from the airport would be through or around the outskirts of Mogadishu and then onto this road. An international aid worker statement contained within the Nairobi evidence (p.15) states that travel to Jowhar from Mogadishu was "very very dangerous…To travel to Jowhar you would need to leave the area from Tafig and pass through an area controlled by Al Shabab and also freelance militias…" A COIS Reply dated 24 October 2008 cited Garow Online reporting that: "[l]ocals told Radio Garowe that freelance militiamen have robbed civilians travelling the 90 Km stretch of road linking Jowhar to the national capital, Mogadishu". On the basis of this evidence we consider that travel from MIA to Jowhar would not be safe for involuntary returnees presently."

45. The backdrop against which all these findings were made is the conclusion of the AIT that Mogadishu itself was currently too dangerous to return anyone to unless they had some special access to protection. They found:

> "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."

46. While the AIT describe their findings about route of return as obiter in view of their conclusion that they were in law extraneous to the material immigration decision, the entirety of the determination is a careful appraisal of extensive and up-to-date objective evidence and is correctly classified by the AIT itself as country guidance. It follows that, for so long as the situation continues to be that found in *AM and AM*, only those Somalis who can get without undue risk to a place of safety or who have access to protection against the endemic dangers can properly be deported or returned.

47. What is in issue in these appeals is when and how consideration is to be given to the two questions critical to any proposed return in such a situation: where the returnee is to be set down, and whether they can either be safe there or get without undue risk to a place of safety.

48. The issue is no less real for the fact that at the time of the AIT hearing returns to Mogadishu had been suspended: this was not because of the risk to returnees but because the airport itself was temporarily closed and the authorities were being difficult about undocumented returns. Moreover, it has a probable bearing on the UK cases, standing currently, we are told, at over 130, in which the European Court of Human Rights has placed a moratorium under Rule 39 on returns to Somalia.

49. It was accepted in AM's case - and is a fact, whether accepted or not, in all current Somali return cases - that the only airport where international flights can at present land is Mogadishu international airport when it is not closed. It is also apparently the case that passengers can get from the airport into the city without undue risk. From that point on, however, AM cannot for the present either be safe in Mogadishu or get safely back to his home town of Jowhar.

50. The Home Secretary's primary case, however, is that these facts have no place in any appeal against a decision that a person, not being entitled to asylum, is an illegal entrant. If so, it would seem, even the accepted fact that return will be to Mogadishu airport is irrelevant. This argument is described by Ms Laing QC on the Home Secretary's behalf as the "strong" version of his case. What she characterises as the "weak" version is that there is a limited class of cases in which the point and route of return are appealable issues, but that the AIT was right to hold that this was not such a case.

The "strong" case

51. The Nationality, Immigration and Asylum Act 2002 by s.82(1) gives a right of appeal to the Tribunal against any immigration decision. "Immigration decision" is defined in the next subsection so as to include both a refusal of leave to enter (which is the ordinary consequence of failure in an asylum or human rights or humanitarian protection claim) and "a decision that an illegal entrant is to be removed". But s.92(1) appears to exclude an in-country appeal against the latter. While Ms Laing accepts that removal directions are subject to judicial review and that a heightened standard of judicial review will be appropriate in such cases, the difficulties of lodging an application before removal is effected and the restricted scope of the challenge as compared with an appeal on the merits mean that the distinction now in issue reflects a real jurisprudential and substantive difference.

52. Ms Laing's "strong" case depends on the proposition that the only appeal afforded by s.82 is against "the decision in principle to remove the appellant from the United Kingdom". It is only when actual removal directions are set, she submits, that an issue can arise in law about the point or route of return, because it is only then that it is known where the appellant is to be returned to.

53. Before we turn to the authority from which Ms Laing draws support for this contention, it is relevant to set the argument in its functional context. The entitlement of appellants to remain in the United Kingdom, whether as a refugee or because, for human rights or humanitarian reasons, they cannot be removed, depends in a great many cases not on the general situation in their home country but on the particular situation either in their own part of the country or in a part of the country to which it is reasonable for them to relocate. In the latter category of claim it is impossible to decide whether return home is feasible or relocation is reasonable without knowing how the individual is going to get there. In such cases entitlement to protection can depend entirely on (a) where the point of return is to be and (b) how the returnee can get from there to an identified place of safety. This court has experience of a good many such cases; the Home Office and the AIT will have experience of considerably more of them, a large number concerning Sri Lanka and Zimbabwe. They are manageable, generally speaking, because the point of return is common ground and in-country evidence will assist in a conclusion as to (a) whether there is a safe final destination for the particular returnee and (b) whether they can safely reach it. All of this has for a long time been regarded on both sides as the AIT's normal business on an appeal against an immigration decision.

54. If Ms Laing is correct, these issues have in the past been decided without jurisdiction; the only question legitimately open to the AIT is whether the individual has any "right" to remain in the United Kingdom. But the "right" to remain here is often only the right not to be returned to the home country because return would be unsafe. In a case in which entitlement to remain in the United Kingdom depends upon whether the individual will be safe if returned to his or her home country (or part of it), the AIT has always accepted (without objection from the Secretary of State) that it has not only the power but the obligation to consider all relevant evidence and argument advanced on the issue and to reach a decision about it. The distinction which Ms Laing seeks to draw is between a case in which the issue relates to safety once the individual has arrived in a particular place and his or her safety while getting there. On her 'strong' case, there is jurisdiction in the AIT to determine safety after arrival but not safety during the journey.

55. This last issue came up, but on stark facts, in *GH (Iraq) v Home Secretary* [2005] EWCA 1182. Not only had no removal directions been set, but what they would be could not be predicted either for returnees generally or specifically for the appellant. This court held that in such a situation no right of appeal was engaged under s.82(1) of the 2002 Act. Ms Laing submits that this was the ratio decidendi, but she acknowledges that two members of the court went on, obiter, to accept that the situation might be different where (per Scott Baker LJ, §50) it was implicit that return would be by a particular route and method to which the Home Secretary was committed: in such a case the method and route might be part and parcel of the immigration decision. We accept that the court did not so hold; but we note that it took care to leave this door ajar.

56. Ms Laing's "strong" submission is that it is a door that we ought now to close, not least because it is inconsistent with the ratio in *GH (Iraq)* itself. We do not accept the latter proposition: in fact, the ratio is more consistent with Mr Toal's position, which is that once an appellant can point to a likely method or route of return which may place him or her in danger, the AIT is obliged to consider it as part and parcel of the

appeal. To have served Ms Laing's purpose *GH* would have had to decide – as it might have done – that nothing capable of featuring in removal directions could in law form part of an immigration decision, whether mentioned explicitly, implicitly or not at all. Signally, this court decided no such thing.

57. Nor do we consider that Ms Laing's "strong" position is assisted by the subsequent decision of this court in *AG (Somalia) v Home Secretary* [2006] EWCA Civ 1342, another case in which no removal directions had yet been set. There Hooper LJ, giving the single reasoned judgment, expressly rejected (at §29) the suggestion that the AIT was never required to consider the risk of persecution or inhuman treatment at the airport or on the way home. In the absence of removal directions or any other evidence of the method and route of return, the AIT, he held, must assume that return would be effected, if at all, in conformity with our international obligations.

58. We do not accept Ms Laing's "strong" argument. Dealing only with the arguments raised in this case and leaving aside those raised in the case of J, we consider that, in any case in which it can be shown either directly or by implication what route and method of return is envisaged, the AIT is required by law to consider and determine any challenge to the safety of that route or method. That conclusion is consistent with *AG* and *GH*; it is consistent with past established practice and, as we will later explain, it is consistent with the requirements of the Qualification and Procedures Directive.

The "weak" case

59. The "weak" argument on which Ms Laing falls back is that, assuming that there is jurisdiction in (and a duty upon) the AIT to determine questions of safety during return so far as they are directly or implicitly known, the AIT in paragraph 207 (set out above) reached a permissible conclusion. The reasons to which the AIT referred in that paragraph related back to those spelt out in their paragraphs 20 to 22 where they make a similar appraisal of the decisions in *GH* and *AG* to ours and then say:

> "24. Before we turn to what is known about the route and method of return in the two appeals before us, we need to say something more about the circumstances in which, when the route and method *are* implicit in the decision, en route risk can become a relevant dimension for assessing whether a person has a well-founded fear of persecution under the circumstances. More than one approach might be thought possible. On one approach consideration of en route risk is only valid in a case in which a person has established a well-founded fear of persecution in his home area. If a person has not established a well-founded fear of persecution in his own area, he is not a refugee. He is able (notionally) to live in his own area, even if he cannot get there. At least under the Refugee Convention, he is not entitled to the surrogate protection of the international community because at home he would be safe. On this approach it is to be presumed that the sending state can ensure a person gains access by some route to the safe home area, if there is found to be one.
>
> 25. The other approach is to consider that even in the case of a person who fails to establish risk of persecution on return to his home area, it

> can still , albeit in circumstances which will of their nature be highly unusual, be necessary sometimes to consider risk at the airport on arrival or en route risk homewards.
>
> 26. In our judgment, whilst the first approach will often serve to determine an appeal one way or the other, it cannot be assumed that en route risk is not capable in itself of giving rise to a well-founded fear of persecution. Consider the following sequence: (1) it has been decided that a person can live safely in his home area; (2) the immigration decision against him clearly identifies (or has implicit in it) the route and method of return to his home area; (3) but there is strong evidence that return via this route and by this method would expose him to a real risk of persecution. It seems to us that this sequence meets the requirement of Article 1A(2) (at least as regards persecution), since although the risk to him only arises in part of the country of nationality, it will necessarily (by virtue of the known en route and method of return) be *to* that part of the country to which he is returned (or has to travel through) and, *in* that part of the country that risk will arise. Such risk can be at the airport itself or en route from the airport. Such an approach can be seen in many decisions of the Tribunal dealing with risk on return to the airport: e.g. AA (Involuntary returnees to Zimbabwe) Zimbabwe CG [2005] UKIAT 000144, AA (Risk for involuntary returnees) Zimbabwe CG [2006] UKAIT 00061, HS (returned asylum seekers) Zimbabwe CG [2007] UKAIT 00094."

60. This, if we may say so, is a valuable account of the hands-on experience of the Tribunal. From here they go on to examine the respective meanings of "route" and "method", finding the latter less straightforward than the former but concluding that it has to do with documentation, escorts, reception, processing "and any considerations relating to safety of onward internal travel". "Route" they consider to include "the point of arrival … and then … any onward route proposed". If it mattered, there would be a problem of overlap here; but it does not matter, because neither method nor route is a term of legal art: both (like our dichotomy of point and route of return) are no more than a convenient shorthand for what lies between a returnee and safety once he or she has left these shores.

61. Next the AIT accept that, in contrast to *AG*, it is known that AM will be returned to Mogadishu international airport and that to get home to Jowhar he will have to either go through or round Mogadishu itself. But they go on:

> "31. The insuperable difficulty that besets Mr Toal's submission is that in the context of Somali cases there are more uncertainties surrounding method than are normally to be found in the context of removals to other countries. Even if he is right and there are nevertheless fewer "eventualities" uncertain now than was the case in the second half of 2006 when AG was decided, they are still very significant ones. There are uncertainties (at least currently) about what travel documents will be required and/or accepted; the timing of the return flights (so as to ensure parties to the conflict do not seek to fire at civilian aircraft) and,

> crucially, about what arrangements need to be in place to ensure safe en route travel. At the time of AG, as now, it cannot be ruled out that ensuring such safety may depend on returnees at least having had the opportunity to arrange an armed escort beforehand. All will depend on the situation at the actual time of any enforced removal."

It was for this reason that, at the end of their determination, they held that, because AM's route of return fell outside their remit, his claim failed.

62. Mr Toal submitted that the AIT erred in refusing to determine the case on the basis of as much as was known about the route of return at the present time. It was known that the return would be to Mogadishu airport and it was implicit that the journey to Jowhar would be by road. On the basis of that information alone, the AIT should have allowed the appeal. Return to Jowhar would be unsafe. It mattered not that some of the technical details of the journey had not been specified and were unknown. From what was known and found by the AIT it was clear that AM was entitled to protection. In this case, Mr Toal did not go so far as to submit that there was a duty on the Secretary of State to make plain what the route and method of return would be, so that the AIT could consider it. However, in the appeal of J, to which we will come in due course, it was submitted that, since the Qualification and Procedures Directives came into force, there is a positive duty on the Secretary of State to make clear what is proposed as to route of return so that all aspects of the applicant's entitlement to international protection can be determined.

63. We accept the main thrust of Mr Toal's submission. In our judgment, the AIT did fall into error. They took "method of return" as a necessary ingredient in any appraisal of risk and so, having no information about the details of documentation, escort and so forth, declined to consider AM's safety on return. In doing so, they did what Hooper LJ in *AG*, §29, said they must not do – throw up their hands and not deal with a relevant issue. This was not the right approach. The AIT knew the straightforward facts relied on by Mr Toal; whatever the details of "method" of return turned out to be, they would not affect those facts, though other things – the availability of armed escorts for example – might do so; and it was in our judgment their obligation to come to a conclusion about them in the light of the law they were administering.

The appellant's situation

64. We have considered whether the right course is simply to allow the appeal on the basis contended for by Mr Toal or whether we should remit the appeal to the AIT. We have concluded that we should take the latter course because we consider that the AIT should consider the question of the availability and efficacy of an armed escort as part of the question of safety of return.

65. There remains the admitted error of the AIT in its approach to art. 15(c) of the Qualification Directive. Ms Laing has submitted that the error was not material: the outcome would inevitably have been the same. In view of our conclusion on the principal issue in AM's case, and of the approach to art. 15(c) now set out in *Elgafaji* and *QD (Iraq)*, there is no need to decide more than that on remission the AIT should apply the law as it now stands.

J's case: the safety of the route of return

66. We heard this appeal from the decision of John Randall QC, sitting as a deputy judge of the Administrative Court, before the others, but reserved our judgment until we had heard them.

67. The appellant had claimed to be a member of a minority clan, but had been disbelieved. It followed, by the ad hoc logic that has to be deployed in this situation, that she fell to be treated as a member of one of the major clans and so possibly able to secure armed protection. But her substantive problem remains how to get back safely from Mogadishu international airport to her home town Jalalaqsi, some 150 km to the north. Factually, the case is very similar to that of AM in that Jalalaqsi is on the same road out of Mogadishu as is Jowhar, only further north.

68. The form in which the issue has come to be canvassed is by way of judicial review of the refusal of the Home Secretary to accept as a fresh claim J's submissions about the situation facing her if she is returned to Somalia. At the end of a carefully reasoned judgment, the deputy judge said that, had the Home Secretary set removal directions for return to Mogadishu international airport with an indication that J was expected to go by road from there to Jalalaqsi, the evidence would have given her a strongly arguable case for judicial review, though it would have brought into play the possibility of an armed escort. The evidence, he found, "suggests that transfer by road from Mogadishu International Airport to Jalalaqsi would place the claimant, or for that matter any other returnee, at risk of serious harm". But his other findings had made this immaterial. These were (a) that it was only where "the detail or method of return is clearly or necessarily implicit within the immigration decision and where the Secretary of State has committed herself to a detailed decision of like nature" that removal directions entered into humanitarian protection, and (b) that a point of return other than Mogadishu international airport was possible in the future.

69. For J, Rick Scannell has urged that the only question for the judge in relation to Rule 353 (which deals with applications for fresh claims) was whether an appeal against a Home Office finding that return would not put J at risk had a realistic prospect of success. This being so, it was enough if she could show a real possibility – which there plainly was – that she would be returned to Mogadishu. Her case, he submits, is factually distinguishable from *GH* and *AG* because in those cases no route of return was either explicit or implicit in the immigration decision. Here, on the judge's own findings, the overwhelming likelihood was that any return would be to Mogadishu airport, with the consequent risks which the judge accepted.

70. We have to decide whether the deputy judge was right, on the same basis as we have adopted in AM's case, to hold that the Home Secretary was justified in refusing to accept J's submission as a fresh claim. In our judgment he was not. Once it was known that any return would be to Mogadishu, the dangers now relied on and recognised by the judge came into focus. Were the Home Secretary to decide that those dangers did not warrant a grant of international protection, there was in our judgment a realistic prospect that the AIT would take a different view. We would therefore allow this appeal.

71. That disposes of this appeal. However, it by no means disposes of the important and difficult arguments which were raised by Mr Scannell. He submitted that, to be valid, an immigration decision must now specify either a safe point and route of return or at least a point of return from which safety of return can be assessed. If that is correct, it would follow that the kind of immigration decision which was before the court in *GH* or *AG* is today in law a bad decision.

72. The reason, it is submitted, is that, since *GH* was decided and since the decision of the tribunal in *AG* was promulgated, the Qualification and Procedures Directives, which played no role in either appeal, have come into force. It is the obligation of the national courts to read the domestic legislation conformably with those directives. If that is not possible, the courts may have to apply their provisions directly. A provision of United Kingdom law, Mr Scannell submitted, which denies immediate protected status to someone whose removal will place her at risk of serious harm will be a denial of rights to which the directives entitle her.

73. The importance of these submissions in practical terms is that there is a substantial difference between the rights of an individual who is entitled to international protection and one who is not so entitled and is awaiting removal. articles 20 to 34 provide for the minimum benefits which member states must provide for persons entitled to international protection. The requirements are more generous in the case of refugees than for those entitled to subsidiary protection. But, even the latter are entitled to work and to receive a wide range of social benefits. By contrast, a person who is not entitled to international protection but is simply awaiting removal is not entitled to work or to receive any benefits. In fact, in this country, such a person receives vouchers for the purchase of essentials and is entitled to emergency health care; that is all.

74. It should be noted that the Qualification Directive contains its own cessation provisions, in particular in Art. 11(1)(e) which removes refugee status as soon as the individual "can no longer … continue to refuse to avail himself or herself of the protection of the country of nationality", and Art. 16 which brings eligibility for subsidiary protection to an end when the risk of serious harm has abated. Those provisions plainly envisage that, until the cessation provisions apply and a fresh decision is made withdrawing entitlement to protection, the individual will be entitled to all the benefits of protection.

75. Mr Scannell submitted that if the decision on entitlement to international protection excludes issues of safety during return (so that protection can be refused simply on the basis that there exists a safe place, even though it cannot safely be reached), an individual for whom the route of return would be unsafe will have to remain in this country until such time as the Secretary of State considers that safe removal directions can be given. That may be a lengthy period of time, during which the individual will be in effect in a form of social 'limbo'. Moreover, the Secretary of State will effectively be postponing the making of the decision on entitlement until the cessation provisions have kicked in.

76. Mr Scannell submitted that the Secretary of State's practice, in some cases, of making his immigration decision without specifying the route of return was contrary to the directives, at least in spirit if not in express words. The implied underlying requirement of the Procedures Directive (which guarantees an effective remedy on

asylum decisions) is that there should be a decision on entitlement to protection within a reasonable period. To leave a decision on route and method of return open indefinitely would breach that requirement. If domestic law permits the Secretary of State to exclude issues of safety during return from the initial decision on entitlement, there will be some cases in which entitlement is not fully determined until after removal directions have been set. That would mean that the domestic law was not compatible with the directives.

77. This incompatibility could, submitted Mr Scannell, be avoided by (a) treating removal as imminent at the time of hearing, (b) reading "removal" in the grounds of appeal listed in s.84(1)(g) of the 2002 Act as requiring the immigration decision on which it is based to include any destination which it is anticipated will be named in the eventual removal directions, and (c) by reading "not in accordance with the law" as including removal directions which will expose the returnee to a real risk of serious harm. The last of these steps seems unproblematical. The first is already the practice. It is the second which gives rise to controversy although we do not think that it would give rise to any practical difficulty. If the Secretary of State is not in a position to specify a route and method of return, which is currently safe, there seems no injustice in requiring him to say so.

78. Colin Thomann, who appeared for the Secretary of State in J's appeal questioned whether the Qualification Directive does in fact require the safety of return to form part of the qualifying process. He drew attention to art. 8, to which argument has also been directed by Ms Laing. It reads:

Article 8

> "Internal protection
>
> 1. As part of the assessment of the application for international protection, Member States may determine that an applicant is not in need of international protection if in a part of the country of origin there is no well-founded fear of being persecuted or no real risk of suffering serious harm and the applicant can reasonably be expected to stay in that part of the country.
>
> 2. In examining whether a part of the country of origin is in accordance with paragraph 1, Member States shall at the time of taking the decision on the application have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant.
>
> 3. Paragraph 1 may apply notwithstanding technical obstacles to return to the country of origin."

79. We will respond to that submission below.

80. For the purposes of the present appeals, we do not need to determine the issues raised by Mr Scannell's submissions. What we will say is *obiter*. However, we do foresee

that these issues will have to be decided at some stage, probably in the near future and possibly by a reference to the ECJ: accordingly we propose to give a tentative view about them.

81. It appears to us that the intention of the Qualification and Procedures Directives is to require a member state to make a decision on entitlement within a reasonable time of the application and to allow the issues raised in it to be subject to an appeal. We do not consider that the fact that an appeal from removal directions is by way of judicial review rather than statutory appeal is, of itself, an insuperable objection. But we do think that, in a case in which the applicant raises a cogent argument within his statutory appeal that there may not be a safe route of return, the Secretary of State must address that question and the issue must be considered as part of the decision on entitlement. Postponement of such consideration until the Secretary of State is in a position to set safe removal directions would effectively be to postpone the decision until the cessation provisions have come into play.

82. We also consider that it is the intention of the Qualification Directive that all matters relating to safety on return should form part of the decision on entitlement. article 8 envisages that a person may properly be returned to his country of origin if only part of it is safe. It excludes 'technical obstacles to return' from the determination of entitlement. On its face, however, this provision has to do principally with internal relocation, which makes it difficult to derive any general proposition from it about the Directive as a whole or as to what the Directive envisages as to safety during return. It gives some modest support to the suggestion that what Mr Thomann calls 'the mechanics of return' are not intended to form part of the case for protection. But not much support – for it starts with the words "As part of the assessment of the application for international protection…." Nevertheless, its first paragraph treats the availability of internal relocation as a factor negating any need for protection, and its third paragraph excludes from this calculation any "technical obstacles to return to the country of origin".

83. Leaving aside the mysterious verb "stay" at the end of the first paragraph, suggesting as it does that the applicant is already there but probably meaning "go to and remain in", there remains a question about what constitute "technical obstacles" to return. In our view these are probably confined to administrative difficulties such as documentation; they may include physical difficulties such as the lack of return flights; but the phrase does not readily signify a requirement to ignore risks to life or limb once the returnee is back in the country of origin, not only because it does not say so – it speaks only of return *to* the country of origin – but because to do so would be to permit the very thing that the Directive is designed to prevent, refoulement to a situation of real danger. Our view is that the mere fact that technical obstacles are excluded from consideration suggests that issues of safety during return are to be considered.

84. In conclusion, our provisional view is that the Directives read together require that the issues of safety during return (as opposed to technical obstacles to return) should be considered as part of the decision on entitlement. Only technical obstacles of the kind we have sought to identify may legitimately be deferred to the point at which removal directions are being made or considered. We are aware that the entitlements which appear to follow may be considered an unintended consequence of the Directives; but this, as we have said, is an issue for another day. Our provisional view, in the light of

the Directive, is that if there is a real issue on safety on return the Secretary of State must engage with it in his decision on entitlement to protection, and his conclusion can be the subject of appeal. In any case in which the Home Secretary did not deal with safety during return (because he did not consider that any issue arose) but where the appellant raises a cogent argument that there might not be a safe route of return, the appeal tribunal would have to deal with that issue, possibly after calling for information from the Home Secretary as to his intentions. In any event, as it seems to us at present, the decision on entitlement must be taken within a reasonable time and cannot be left until the Home Secretary is in a position to set safe removal directions.

MA's case: safety in Mogadishu

85. The appellant in this case is a citizen of Somalia who was born on 8 December 1975. He arrived illegally in the United Kingdom in May 1995 and sought asylum on 24 May 1995. That was refused, but he was granted exceptional leave to remain initially until 14 February 1997, but later extended until 14 February 2000.

86. On 23 July 1998 he was convicted of rape and indecency with a child and sentenced to 8 years' imprisonment. It is pertinent to note that following the completion of his custodial sentence, the applicant was made subject to administrative detention pending deportation. Save for a short period, he has remained in detention since that time.

87. On 21 May 2002 he was served with notice of intention to make a deportation order. He appealed that decision, raising human rights grounds. The Secretary of State agreed to treat this as a fresh application for asylum, but it was rejected. The appellant lodged an appeal, which was rejected by an adjudicator in November 2003. A deportation order was signed on 5 April 2004. Further representations were submitted with respect to that order in March 2005, but these were rejected in September 2005.

88. On 29 November 2006 he was served with directions for his removal to Nairobi. It had been intended that this would be the first stage of a journey to Mogadishu. Judicial review proceedings were brought to challenge that removal on article 3 grounds, and the directions were suspended in the light of that challenge.

89. Further removal directions were sent on 10 January 2007, which were intended to remedy some of the defects in the previous directions. The applicant then challenged these removal directions and the Secretary of State accepted that the situation in Mogadishu had changed significantly since the earlier decision and therefore he should treat this application as a fresh claim. Having done so, he decided not to revoke the deportation order. This was then the subject of an appeal, and it is that appeal with which we are now concerned.

90. Initially, his claim was allowed on article 3 grounds only. The AIT held that he would be at risk of persecution if returned to Mogadishu. A claim under the Refugee Convention was found to be precluded by section 72 of the Nationality, Immigration and Asylum Act 2002, which takes certain people who have committed serious offences outside the protection of that Convention. A claim for humanitarian protection was held inapplicable by virtue of Paragraph 339D of the Immigration

Rules which likewise removes that protection from someone who commits serious offences of this nature.

91. Reconsideration was ordered at the respondent's behest and Senior Immigration Judge Spencer found at the first stage reconsideration that there had been a material error of law. The error of the Tribunal was to fail to consider whether the appellant might be able to arrange for protection in Mogadishu from a majority clan. SIJ Spencer ordered a second stage reconsideration on article 3 grounds only in which the matter was to be considered completely afresh save that he directed that certain positive credibility findings relating to the appellant's claim should be preserved and that the decision of the Tribunal to prefer the expert evidence of Mr Hőhne to that relied on by the Secretary of State should also be preserved.

92. The effect of this ruling was that certain facts were not disputed in the AIT. These included that the appellant is a Somali national of the Isaaq clan who comes from Mogadishu, and that his parents are from Hargeisa.

93. The AIT second stage reconsideration was heard on the 18 December 2008, although the decision was not promulgated until July 2009. There are two features of this case that distinguish it from the other cases we are considering. First, as we have said, by virtue of committing his criminal offences, the appellant fell outside the scope of those who can claim humanitarian protection. Accordingly, the only issue in his case was whether it would infringe his rights under article 3 for him to be deported. Second, by the time his case was reconsidered, the AIT had given its judgment in the country guidance case of *AM and AM (armed conflict: risk categories) Somalia CG* [2008] UK AIT 00091. This is the most recent country guidance case on Somalia. The AIT in that case recognised that the situation has become far more serious in the recent past. It identified recent changes in Mogadishu (paragraph 172) as follows:

> "As already noted the movements of population out of Mogadishu in the past two years have been unprecedented. UN sources have 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 have been turned into an urban battleground. Since the beginning of 2008 there have been significantly fewer returns. Whatever the precise figures, it is clear that the ongoing violence has forced substantial numbers to flee the city more than once and flight seems an ongoing process: the IRIN report of 29 September 2008 cites Elman estimates that 18,500 people recently fled their homes due to the fighting and shelling (COIS, A 4). The COIS Reply dated 24 October 2008 states that: "[a]ccording to the UNHCR an estimated 5,500 people were displaced from the city during the week and over 61,000 since 21 September 2008". Armed clashes have increasingly destroyed housing, market areas (Bakara market has been deliberately shelled) and infrastructure and the recent closure of the airport is likely to make matters in Mogadishu worse. According to Grayson and Munk, the aid community has been largely ineffective in providing the necessary aid to those who have stayed in Mogadishu (Nairobi evidence 65). They also state that Mogadishu is a "ghost town" and that only the most vulnerable remain there."

94. They noted that the situation had changed dramatically from the position when the earlier country guidance decision in *HH* was decided. Their conclusions as to the risks facing those returning to Mogadishu were as follows (paras 178 and 179):

> "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.
>
> It will be evident from the above findings relating to Mogadishu that although we follow KH (Iraq) in considering that Article 15(c) has a protective scope additional to that afforded by the Refugee Convention and Article 15(b) of the Qualification Directive (and Article 3 of the ECHR), it is unnecessary on the facts of this case to rely on such additional scope, since return to that city for the great majority would amount to a real risk of persecution, serious harm and ill-treatment."

95. In short, unless the individual is fortunate enough to be able to obtain protection by virtue of having close connections with powerful people in Mogadishu, he or she will face a real risk of persecution sufficient to engage article 3.

GM

96. Before considering the decision of the Tribunal, it is necessary to discuss the decision of this court in GM (Eritrea) [2008] EWCA Civ 833, since this informed the AIT's decision. *GM* concerned three distinct appellants who were seeking to resist deportation to Eritrea. The AIT had formed the view that an individual who had left Eritrea illegally would be at risk of persecution on return, but one who left legally would not. The issue with respect to each of the three appellants was whether they may have left the country illegally. In the case of all three the Tribunal had found their accounts not to be credible. GM and YT were young men who had both asserted that they were in active military service when they left Eritrea and the argument advanced on their behalf was that they must accordingly have left illegally since they were deserters. The Court of Appeal (Buxton, Laws and Dyson LJJ) rejected that argument on the basis that it was only their word that they were still in active military service and they had been disbelieved by the AIT.

97. An alternative argument was that in any event it was only a limited number of exceptional categories of person who were allowed to leave Eritrea legally and therefore it was highly unlikely that they would have done so. Statistically, the odds were heavily against it; it was said that they compelled the conclusion there was a real risk that these appellants would have left illegally even though there was no evidence before the Tribunal as to their own particular method of exit.

98. The court unanimously rejected this submission. There was evidence that students were often permitted to leave and since neither of these applicants had put forward any truthful material about what they were doing in the relevant period leading up to their departure from Eritrea, it was not possible to say that there was a real of likelihood that they had left illegally. There was simply no evidence one way or the other. As Buxton LJ put it:

> " … It may not be necessary for the appellant in such circumstances to say much, but he must say something, adduce some evidence, that puts him in a vulnerable position, before the effective burden of contradicting his case passes to the Secretary of State."

Lord Justice Laws and Lord Justice Dyson specifically agreed with that analysis with respect to those two appellants.

99. However, the court was divided with respect to the third appellant, MY. She too gave no acceptable evidence about the way in which she had left Eritrea. In fact she gave evidence which, if accepted, would have demonstrated that she had left legally, although the immigration judge did not believe her. She was not, however, in the same situation as the other two appellants, being just 17 yrs 4 months old when she came to the United Kingdom. Lord Justice Buxton considered that this was sufficient evidence to show that it was highly unlikely that she would have left Eritrea illegally. She was too young to fall into the student category and did not even arguably fit into any of the other categories of persons who might obtain an exit visa lawfully. Although she had not given a credible account, the Tribunal had to examine the totality of the material before them and there was, in Lord Justice Buxton's view, just sufficient to establish that it was unlikely that she would have left legally. Once that had been determined, there was a real risk that she would face persecution on return.

100. Lord Justice Laws and Lord Justice Dyson disagreed with that analysis of YM but they did not dispute the applicable principle. Lord Justice Laws specifically accepted that there may be cases where an appellant's testimony is disbelieved but where the existence of other evidence proves the asylum claim. A court is under a duty to vindicate a good asylum claim notwithstanding that the appellant may have lied or have acted in bad faith. However, he took the view that as a consequence of YM having been disbelieved, there was no material on which the judge could make the finding as to how she had left Eritrea. He summarised his conclusion as follows (paras 53, 54):

> "The fact (if it be so) that it is reasonably likely that any 17 year old girl from Eritrea, about whom nothing else relevant is known, left the country illegally does not entail the conclusion that *this particular* 17 year old girl did so. The reason is that the probability that a particular person has or has not left illegally must depend on the particular facts of her case. Those facts may

> produce a conclusion quite different from that relating to illegal exit by members of such a class of persons about whose particular circumstances, however, the court knows nothing more than their membership of the class. There may indeed be a general probability of illegal exit by members of the class; but the particular facts may make all the difference. ….
>
> The position would only be otherwise if the general evidence was so solid as to admit of only fanciful exceptions; if the court or tribunal concluded that the 17 year old must have left illegally *whatever* the particular facts."

101. In this case Lord Justice Laws did not consider that the case fell within the exceptional circumstances identified in paragraph 54. There was evidence that some persons did leave Eritrea and the absence of any evidence relating to this particular appellant meant that she had not satisfied the Tribunal, even to the low standard of proof required in cases of this nature.

102. Lord Justice Dyson agreed. He said this (paras 61-62):

> "In substance, the issue for the judge was whether MY had established that there was a reasonable likelihood that she had left Eritrea illegally. I agree with Buxton LJ that the fact that MY herself had given no credible evidence as to how she left Eritrea was not conclusive of that issue, which had to be determined on the basis of all the material that was before the judge. But I agree with Laws LJ that the fact that there is a reasonable likelihood of illegal exit by members of a particular category, say 17 year old girls, does not necessarily entail the proposition that there is a reasonable likelihood that the exit by a particular member of that category was illegal. Unless it can safely be said that exit by *any* 17 year old girl is illegal, whether it is reasonably likely that the exit by an individual 17 year old girl was illegal will depend on the facts of her particular case. Her failure to give a credible account of those facts may lead to the conclusion that she has not shown that there is a reasonable likelihood that her exit was illegal.
>
> Laws LJ says that where a case depends entirely on general evidence, it will only succeed if, fanciful exceptions apart, the claimant "must have left illegally *whatever* the facts" [52] and unless the "possibility that the particular facts may make a difference is effectively excluded [55]. I agree."

103. Essentially, therefore, the court was in agreement that where an appellant tells lies, that may leave a tribunal with no evidence from which they can determine whether in the particular case he or she will face a real risk of persecution on return. However, this will only be in a case where, to use the language of Laws LJ, it knows "nothing more" than that they fall into a general class; or, as Dyson LJ put it, the case depends *entirely* on general evidence. If there is evidence independently of the applicant's testimony relating to the particular situation of the applicant, so that the tribunal is not left simply with general statistical evidence, then the tribunal must consider that evidence and reach such conclusion as they consider appropriate.

104. The lie may have a heavy bearing on the issue in question, or the tribunal may consider that it is of little moment. Everything depends on the facts. For example, if in the Eritrea cases the Secretary of State had prima facie evidence that the appellants had left legally, the tribunal might think it appropriate to put considerable weight on the fact that the claimant told lies when seeking to counter that evidence. The lie might understandably carry far less weight where, as in *YL* itself, the judge is satisfied that the appellant has lied where the lie is against her interests.

The AIT decision.

105. The Tribunal correctly directed itself at paragraph 17 that it was for the appellant to prove his case and demonstrate that there was a real risk of his suffering ill treatment of such severity that his rights under article 3 would be breached. They recorded that the Secretary of State had accepted that the guidance enunciated in the case of *AM and AM* limited the scope for protection on return. The Tribunal then considered the appellant's evidence. They found it to be evasive, obstructive and untruthful and they gave cogent reasons for reaching that conclusion. Since it is not disputed that this was a finding open to them, there is no purpose in setting out those reasons.

106. The Tribunal recounted the expert evidence of Mr Hőhne to the effect that a member of the Isaaq clan who had no longstanding personal connections to residents of the city would be at risk of criminal or other violence prevailing in Mogadishu. He did not think that there would be a sufficient community of the Isaaq clan to provide such protection, given the enormous exodus of people from Mogadishu in the recent past.

107. The Tribunal then summarised the submissions of both parties. The appellant was submitting that the evidence in *AM and AM* demonstrated that it was inevitable that the appellant would face a real risk of persecution or serious harm if returned. The Secretary of State submitted that the appellant was not believable and could not prove his case because of his lack of credibility. The case fell in *GM* territory.

108. The Tribunal broadly accepted the Secretary of State's analysis. At paragraph 105 it said this:

> "The Tribunal is not unfamiliar with the difficulties created by appellants who have not been truthful but who still may be at risk. This was considered by the Court of Appeal in **GM(Eritrea) v SSHD** [2008] EWCA Civ 833. We must be very careful not to dismiss an appeal just because an appellant has told lies. Even if very large parts of his story have been disbelieved it is still possible that the appellant has shown that he would be at risk on return. An appellant's own evidence has to be considered in the round with other evidence and that can include unimpeachable evidence from expert reports or country guidance cases or other evidence about the general state of affairs in that country."

Then at paragraph 107 the Tribunal noted that, while they did not believe the appellant:

> "… we have to decide if the background conditions show that he will be at risk."

They referred to the passage in paragraph 178 of *AM and AM* to the effect that a person may be safe in Mogadishu if he or she has close connections with powerful actors there, and they accepted that there was no positive evidence that this appellant did have such links. In paragraph 109, however, they said this:

> "The difficulty is that the appellant has not told us the truth about his links and circumstances in Mogadishu and we cannot exclude the possibility that he is a person with connections of this kind. The point is that it is not fanciful to say that he would not necessarily be at risk on return. Some people are not. Even though the appellant has to prove only a real risk rather than a probability of him being at risk we cannot make the necessary findings when he will not tell the truth about his connections and contacts there."

109. The Tribunal considered and rejected an argument advanced by the Secretary of State that the appellant could safely travel from Mogadishu to Somaliland, although they considered that he would be safe in Somaliland if he could get there. Finally, they summarised the reason for rejecting the appellant's claim in the following terms (para 121):

> "Paragraph 178 of **AM** does not give an exclusive list of people who are not at risk. It makes the point there are people who are not at risk. The burden is on the appellant and he has not told the truth about his links with Mogadishu and we are not able to say that he is a person who has shown he would be at risk there. He has stopped proper enquiry of a kind that might reveal the links and protection he would have. It would be very sad if, by so doing, the appellant has deprived himself of protection that he would otherwise need but he has told lies and must accept the consequence of that. It does diminish his credibility and makes it harder for him to prove his case."

Grounds of appeal.

110. There were two points advanced in this appeal. We can deal with the first very shortly. Mr Drabble submitted that the Tribunal had failed properly to appreciate the significance of *AM and AM*; in particular, he says that they could not properly conclude in the light of that case, as they did in para.109, that it was not "fanciful" to say that the appellant may not be at risk on return. We reject that submission. The Tribunal plainly had *AM and AM* at the forefront of their minds and had cited it in some detail. In our view they were simply identifying the fact that there were exceptionally some people who received protection in Mogadishu. This case therefore did not fall into the category of case identified by Laws LJ in *GM* where the general evidence would suffice because anyone in the appellant's situation would necessarily be subject to persecution on return.

111. The second and more substantial ground was that the Tribunal had misdirected themselves when considering the question of risk on return. They had wrongly applied the principles in the *GM* case. They had focused on the difficulties caused by the failure of the appellant to tell the truth, but they should have asked whether there

was evidence relating to the appellant's own particular situation, even ignoring his own rejected testimony, which would support his contention that there was a real risk that he would not have such protection on return.

112. Mr Drabble submits that there was such evidence and that the Tribunal did not properly or adequately evaluate it. He submits that had they done so, they could not properly have reached any conclusion other than that there was a real risk that he would not have the benefit of such protection, and therefore in the light of the general findings in *AM and AM*, there was a real risk that he faced article 3 ill-treatment on return.

113. The evidence he relies upon is in particular the fact that the appellant has been in the UK for some fifteen years, and that for almost all of the last twelve or so he has been in detention of one sort or another. In addition, his parents were from Hargeisa, not Mogadishu, and the evidence of Mr Höhne was to the effect that he would not get protection from the Isaaq clan in Mogadishu given the dramatic evacuation from that city. In the circumstances, Mr Drabble submits that it is fanciful to think that the appellant would be likely to fall into the exceptional category of persons with contacts in Mogadishu who could provide the requisite protection.

114. Ms Laing submits that the AIT loyally applied the principles in *GM*. The evidence of the appellant was disbelieved. In the Eritrean cases the issue was whether there was evidence independently of the appellant's own testimony supporting the contention that he or she had left Eritrea illegally. That was a question of fact. Here the issue was again a question of fact, namely whether the appellant would receive effective protection or not. Statistically it may have been unlikely that he would, but it was equally unlikely in *GM* that any of the three appellants would have left legally. If there was a real possibility that he may be protected in Mogadishu, it was for him to adduce sufficient evidence before the Tribunal to satisfy the Tribunal that there was a real risk that he would not. If there was no evidence, the burden was not discharged.

115. That was essentially the conclusion which the Tribunal made here. They properly directed themselves, as paragraph 105 makes clear, and thereafter held that there was no evidence independently of the appellant's perjured testimony relating to the crucial question they had to determine. They said in terms that they were considering the whole of the evidence about the state of affairs generally in Mogadishu. Their finding that the appellant had not discharged the admittedly low burden placed on him was open to them on the evidence – or more accurately, the lack of it. Given his inability to provide any truthful evidence as to his contacts in Mogadishu, the Tribunal could not properly conclude that there was a real risk that article 3 would be infringed on his return.

116. In our judgment, the appellant's argument is to be preferred. We accept that the tribunal impeccably directed themselves in paragraph 105. But we do not believe that they subsequently properly applied that direction. In particular, in para.109 they say that the appellant has not told the truth:

> "and we cannot exclude the possibility that he is a person with connections";

and later in that paragraph:

> "Even though the appellant has to prove only a real risk rather than a probability of him being at risk we cannot make the necessary findings when he will not tell the truth about his connections and contacts there."

117. We think, with respect to the Tribunal, that it is there adopting the wrong approach. Their analysis suggests that the fact that the appellant has lied has of itself disabled them from reaching a conclusion on the article 3 risk. They seem to be throwing up their hands in despair; since the appellant has concealed the truth, they cannot make any necessary findings. This is further confirmed by paragraph 121 when they say that because his lying has prevented a full and proper inquiry, there is no relevant finding the Tribunal can make.

118. That does not, however, follow from *GM*. They first have to ask whether there is other evidence, independently of his unreliable testimony, casting light on the appellant's particular situation. If so, they must have regard to that evidence. As Buxton LJ put it in *GM* (see para.98 above), there does not need to be much evidence, only sufficient to suggest that there is a real risk of persecution and thereby shift the burden to the Secretary of State to show otherwise. Nowhere does the Tribunal say that the only potential evidence is the appellant's rejected testimony and that without it there is no relevant evidence, and we do not think that it can be fairly inferred from their decision that this was how they approached the matter. For example, there is no reference in the whole judgment to the fact that the appellant has spent the best part of the last twelve years in prison or administrative detention in the UK. In our view that must on any view have relevance to the likelihood of this particular appellant having current contacts in Mogadishu which will afford him the necessary protection.

119. In any event, in our judgment, if they did analyse the issue in that way, we agree with Mr Drabble that it was not a conclusion open to them on the evidence. That evidence was that the appellant was from a clan which was in the minority in Mogadishu; that he had not been there for some 15 years; and that for most of that time he had been in detention. Whatever links might exceptionally exist to provide protection for an Isaaq returning to Mogadishu, there was in our view sufficient evidence adduced before the Tribunal at least to establish a real risk that it was unlikely to apply to him. He was not simply putting himself into the general category of persons returning to Mogadishu, nor even of a minority clan member taking that step, and then relying on the relevant statistics as to how such persons would in general be treated. There was the particular feature of his history in the UK -the lengthy period and the fact of detention - which constituted evidence relevant to the particular and specific risks which he faced and which enabled the court to make an assessment of risk on the basis of evidence independent of his own testimony.

120. We agree that the Tribunal ought to have made an assessment on the basis of that evidence, and had they done so, they must have concluded that there was a real risk that he would not obtain the relevant protection. Without it, in the light of *AM and AM* he was plainly at risk of adverse article 3 treatment, and therefore his deportation would be unlawful.

121. Accordingly, we uphold the appeal and substitute a finding that the appellant would be at risk of article 3 ill treatment if returned to Mogadishu and that it would therefore be unlawful for effect to be given to the removal directions.

Conclusions

122. It has been sufficient for the purposes of resolving the issues before us to confirm, as this court has said on previous occasions (albeit only *obiter*) that where the route and manner of return are known or can be implied, the first tier tribunal must consider whether the applicant would be put at risk if returned by that route. We have not found it necessary to resolve the wider question whether that tribunal must always consider that question whenever the applicant puts it in issue, although our strong provisional view is that it must. If that is right, it will inevitably have important consequences for the status of the applicant pending directions finally being issued to secure his removal or deportation. We have not had directly to address that issue but it is bound to arise in the near future. Conceivably it might require a reference to the ECJ in due course, but that is not necessary in this case and no-one has suggested it.

123. Of the four cases dealt with in this judgment, the first, that of HH, involves only the application to the known facts of the law decided by the court in *QD (Iraq)*. We have dismissed that appeal.

124. In the second and third appeals, those of AM and J, we have held that where the point of return and any route to the safe haven are known or ascertainable, these form part of the material immigration decision and so are appealable. We have upheld the appeals in both cases.

125. The fourth appeal, that of MA, establishes that even a mendacious appellant is entitled to protection from refoulement if objective evidence shows a real risk that return will place his life and limb in jeopardy. We have upheld the appeal in that case.