OPINION OF ADVOCATE GENERAL
HOGAN
delivered on 30 April 2020(1)

Case C-255/19

Secretary of State for the Home Department
v
OA
joined parties:
United Nations High Commissioner for Refugees (UNHCR)

(Request for a preliminary ruling from the Upper Tribunal (Immigration and Asylum Chamber) (United Kingdom))

(Reference for a preliminary ruling — Directive 2004/83/EC — Minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection — Refugee — Article 2(c) — Actors of protection — Article 7 — Cessation of refugee status — Article 11 — Change of circumstances — Article 11(1)(e) — Possibility of availing of protection of the country of nationality — Criteria for assessment)

I. Introduction

1. Modern refugee law essentially traces its origins to the 1951 Geneva Convention on the Status of Refugees. (2) Article 1A(2) of that Convention provides that the term 'refugee' applies to any person who:

'… owing to [a] well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or, who not having a nationality and being outside the country of his former habitual residence …, is unable or, owing to such fear, is unwilling to return to it …'.

2. In the context of the precise questions which are posed by the referring court in this preliminary reference, it is perhaps striking that the 'criteria for refugee status set out in Article 1A(2) of the [Geneva Convention] are clearly based on a framework of the state and nationality.' (3) Yet this definition is hardly surprising, since international protection (4) is an aspect of state obligations under international law and in 1951 only nation states were regarded as the relevant state actors in international law.

3. In some respects, however, there has been an evolution in modern thinking regarding the extent of State protection in the context of refugees, not least so far as the law of the European Union is concerned. This is reflected in Article 7 of the Qualification Directive. (5)

4. Article 7(1) of the Qualification Directive provides that protection can either be provided by the State (Article 7(1)(a)) or by 'parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State.' (Article 7(1)(b)).

5. The present request for a preliminary ruling concerns, inter alia, the proper interpretation of Article 7(1)(b) of the Qualification Directive and, specifically, whether the existence of private actors such as a network of clans and families providing protection might suffice to satisfy the requirements of this provision. This reference accordingly provides an opportunity for the Court to rule on an important aspect of the Qualification Directive in respect of which it has only had an opportunity to consider in one previous case and even then only in passing. (6)

6. This preliminary reference itself arises out of proceedings before the Upper Tribunal (Immigration and Asylum Chamber) (United Kingdom) ('the Upper Tribunal') between OA and the Secretary of State for the Home Department concerning the cessation of his refugee status.

7. The proceedings before the referring court concern, in essence, the cessation of refugee status, particularly the scope of the term of 'protection of the country of nationality' within the meaning, inter alia, of Article 2(c) and Article 11(1)(e) of the Qualification Directive, the identification of actors of protection for the purposes of Article 7(1) of that directive and the level of protection to be provided pursuant to Article 7(2) thereto.

8. The referring court has also adverted to the possible relevance in this context of the availability of financial support for a person who may be returned to his or her country of origin. It is therefore necessary to examine this question in the context of the cessation of refugee status.

9. Before considering these questions, it is, however, first necessary to describe the procedure before the Court and then to set out the relevant legal provisions.

II. Procedure before the Court

10. Written observations on the questions referred by the Upper Tribunal were lodged by the French, the United Kingdom and the Hungarian Governments and by the European Commission.

11. The United Kingdom left the European Union at midnight (CET) on 31 January 2020. In accordance with Article 86(2) of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy

Community (the 'Withdrawal Agreement'), (7) the Court remains competent to rule on requests for a preliminary reference lodged by courts and tribunals of the United Kingdom before the transition period as defined in Article 126 of that agreement ends, which is in principle, on 31 December 2020.

12. Moreover, pursuant to Article 89 of the Withdrawal Agreement, the judgment of the Court which will be handed down at a future date will have binding force in its entirety on and in the United Kingdom.

13. The present request for a preliminary reference was lodged at the registry of the Court on 26 March 2019. The Court thus remains competent to rule on the present request for a preliminary reference and the Upper Tribunal is bound by the judgment to be handed down by the Court in the present proceedings.

14. A hearing was heard before the Court on 27 February 2020 at which the United Kingdom and French governments and the Commission attended.

III. Legal Framework

A. International Law

15. Article 1(C)(5) of the Geneva Convention provides that:

'This Convention shall cease to apply to any person falling under the terms of section A if:

…

5. He can no longer, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality.'

B. European Union law

16. Article 18 of the Charter of Fundamental Rights of the European Union ('the Charter') provides:

'The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union …'

17. Article 78 of the Treaty on the Functioning of the European Union provides:

'1. The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*. This

policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.

…'

1. The Qualification Directive

18. Recital 19 of that directive states:

'Protection can be provided not only by the State but also by parties or organisations, including international organisations, meeting the conditions of this directive, which control a region or a larger area within the territory of the State.'

19. Article 1 of that directive provides that:

'The purpose of this Directive is to lay down minimum standards for the qualification of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.'

20. Article 2 of that directive, entitled 'Definitions', provides that:

'For the purposes of this Directive:

…

(c) 'refugee' means a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply;

(d) 'refugee status' means the recognition by a Member State of a third country national or a stateless person as a refugee;

…'

21. Article 4 of that directive, entitled 'Assessment of facts and circumstances', provides at paragraphs 3 and 4;

'3. The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:

(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application; including laws and regulations of the country of origin and the manner in which they are applied;

…

(c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;

…

4. The fact that an applicant has already been subject to persecution or serious harm or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.'

22. Article 6 of that directive, concerning actors of persecution or serious harm, provides:

'Actors of persecution or serious harm include:

(a) the State;

(b) parties or organisations controlling the State or a substantial part of the territory of the State;

(c) non-State actors, if it can be demonstrated that the actors mentioned in (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm as defined in Article 7.'

23. Article 7 of that directive entitled 'Actors of Protection' states:

'1. Protection can be provided by:

(a) the State; or

(b) parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State.

2. Protection is generally provided when the actors mentioned in paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection.

…'

24. Article 11 of that directive provides that:

'1. A third country national or a stateless person shall cease to be a refugee, if he or she:

…

(e) can no longer, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, continue to refuse to avail himself or herself of the protection of the country of nationality;

…

2. In considering [point (e) of paragraph 1], Member States shall have regard to whether the change of circumstances is of such a significant and non-temporary nature that the refugee's fear of persecution can no longer be regarded as well founded.'

C. National law

25. The Qualification Directive was transposed into UK law by the Immigration Rules (8) and by the Refugee or Person in Need of International Protection (Qualification) Regulations 2006. (9)

26. The relevant Immigration Rules provide:

'Revocation or refusal to renew a grant of refugee status

338A. A person's grant of refugee status under paragraph 334 shall be revoked or not renewed if any of paragraphs 339A to 339AB apply. A person's grant of refugee status under paragraph 334 may be revoked or not renewed if paragraph 339AC applies.

Refugee Convention ceases to apply (cessation)

339A. This paragraph applies when the Secretary of State is satisfied that one or more of the following applies:

> …
>
> (v) they can no longer, because the circumstances in connection with which they have been recognised as a refugee have ceased to exist, continue to refuse to avail themselves of the protection of the country of nationality;
>
> …

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

27. Regulation 4 of the Refugee or Person in Need of International Protection Regulations 2006 defines 'actors of protection' as follows:

'(1) In deciding whether a person is a refugee or a person eligible for humanitarian protection, protection from persecution or serious harm can be provided by:

(a) the State; or

(b) any party or organisation, including any international organisation, controlling the State or a substantial part of the territory of the State.

(2) Protection shall be regarded as generally provided when the actors mentioned in paragraph (l)(a) and (b) take reasonable steps to prevent the persecution or suffering of serious harm by operating an effective legal system for the detection, prosecution and punishment of

acts constituting persecution or serious harm, and the person mentioned in paragraph (1) has access to such protection.

(3) In deciding whether a person is a refugee or a person eligible for humanitarian protection the Secretary of State may assess whether an international organisation controls a State or a substantial part of its territory and provides protection as described in paragraph (2).'

IV. The facts of the main proceedings and the reference for a preliminary ruling

28. OA, is a Somali national who came to the UK in 2003 on a multi-entry visa as the spouse of his then wife who had been granted refugee status in October 2001.OA was subsequently granted refugee status as his then wife's dependant. The Upper Tribunal found that he was a member of a particular minority clan and that he had originally resided in the capital Mogadishu. It further found that in the early 1990s both he and his then wife had suffered persecution at the hands of a particular militia and that both were physically attacked and wounded at various stages during the 1990s. The Upper Tribunal went on to say that if returned to Mogadishu, OA would have employment opportunities although these were limited to jobs where adjustments could be made due to his reduced mobility. In addition, the Upper Tribunal observed that OA had some close family in Mogadishu and that he could look to them for some financial support. It was said that he could also look for such support from his sister (who is, it appears, was last known to be based in Dubai ((the United Arab Emirates) and fellow clan members in the UK. (10)

29. On 8 July 2014, the Secretary of State for the Home Department (the 'SSHD'), informed OA of her intention to revoke his refugee status owing to a change in circumstances in his country of origin.

30. On 27 April 2016, the SSHD made a deportation order against OA. Moreover, on 27 September 2016, the SSHD revoked OA's refugee status under Article 1(C)(5) of the Geneva Convention and excluded him from humanitarian protection under paragraph 339D of the Immigration Rules. In the letter sent to OA on 27 September 2016, the SSHD stated that 'clan support remains for you in Mogadishu and the country guidance case-law indicates that your safety would not be subject to the availability of majority clan support.' The SSHD further decided that OA's return to Somalia would not breach the UK's obligations under Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR').

31. OA appealed those decisions. On 20 July 2017, OA's appeal was dismissed by the First-tier Tribunal (Immigration and Asylum Chamber) (United Kingdom) ('the First-Tier Tribunal'). That dismissal was set aside for material error of law by the Upper Tribunal, which remitted the case to another member of the same First-tier Tribunal. By judgment of 30 January 2018, the First-tier Tribunal found that the removal of OA to Somalia would violate Article 3 of the ECHR. However, OA's appeal on asylum grounds was dismissed.

32. Following leave to appeal being granted to SSHD, on 13 November 2018, the judgment of the First-tier Tribunal was set aside by the Upper Tribunal.

33. The entire matter is now being heard afresh before the Upper Tribunal.

34. The SSHD claims that she was entitled, pursuant to the Immigration Rules and Article 11(1)(e) of the Qualification Directive, and applying the country guidance set out in the judgments of the Upper Tribunal in *MOJ and Others (return to Mogadishu) Somalia CG* [2014] UKUT 00442 (IAC) ('the *MOJ* case'), to conclude that there has been a durable change of circumstances in OA's country of nationality in that, in his home area of Mogadishu, there was no longer persecution of minority clans by majority clans and there was effective state protection.

35. OA submits that given that this was a cessation case it was significant that the SSHD's view was at odds with the assessment provided by the United Nations High Commissioner for Refugees (the 'UNHCR') in June 2014 which noted, as regards the issue of availability of state protection, that the security situation in Mogadishu gave rise to serious concerns and that minority clans remain at a particular disadvantage in Mogadishu, southern, and central Somalia. OA asserts both that he has a well-founded fear of persecution in Mogadishu and that the state authorities in Mogadishu are unable to protect him against such serious harm. He also submits that the analysis carried out by the Upper Tribunal in the *MOJ* case was based on a mistaken understanding of state protection. According to the UNHCR guidelines on cessation, (11) state protection has to be afforded through the state structure by state actions. Yet the assessment in the *MOJ* case that there was generally state protection available in Mogadishu was based in part on the availability of support and protection from family and/or fellow clan members. At the same time, the family or clan actors were private, non-State actors. In assessing whether the circumstances in Mogadishu that had rendered the claimant a refugee (in 2003) had changed significantly and durably so that the claimant could no longer 'continue to [refuse to] avail himself of the protection of the country of nationality', it was legally impermissible to take account of protective functions performed by non-State actors.

36. The Upper Tribunal considered that the resolution of the proceedings required an interpretation of national rules implementing Union legislation on the qualification of refugees, namely, the Qualification Directive.

37. By decision of 22 March 2019, the Upper Tribunal (London, United Kingdom) referred the following questions to the Court for a preliminary ruling:

'(1) Is "protection of the country of nationality" within the meaning of Article 11(l)(e) and Article 2(e) of the Qualification Directive to be understood as State protection?

(2) In deciding the issue of whether there is a well-founded fear of being persecuted within the meaning of Article 2(e) of the [Qualification Directive] and the issue of whether there is protection available against such persecution, pursuant to Article 7 of the [Qualification Directive], is the "protection test" or "protection inquiry" to be applied to both issues and, if so, is it governed by the same criteria in each case?

(3) Leaving to one side the applicability of protection by non-State actors under Article 7(l)(b) [of the Qualification Directive] and assuming the answer to question (1) above is yes, is the effectiveness or availability of protection to be assessed solely by reference to the protective acts/functions of State actors or can regard be had to the protective acts/functions performed by private (civil society) actors such as families and/or clans?

(4) Are (as is assumed in questions (2) and (3)) the criteria governing the "protection inquiry" that has to be conducted when considering cessation in the context of

Article 11(l)(e) [of the Qualification Directive] the same as those to be applied in the Article 7 context?' (12)

V. Preliminary remarks

38. It would appear from the request for a preliminary ruling that the case before the referring court concerns the cessation of OA's refugee status, his exclusion from humanitarian protection pursuant to paragraph 339D of the Immigration Rules and whether his return to Somalia would breach Article 3 ECHR (13) and thus by implication Article 4 and Article 19(2) of the Charter. (14)

39. The questions which, however, have been referred by the Upper Tribunal relate *only* to the issue of the cessation of refugee status and *not* to the separate issue of whether OA might find himself exposed to severe poverty if returned to Somalia, thereby potentially infringing guarantees contained in Article 3 ECHR and, by extension, Article 4 and Article 19(2) of the Charter.

40. It must thus be noted that there would appear to be a number of findings of fact in the request for a preliminary reference which are not directly relevant to the cessation of refugee status and the specific questions posed. These other findings of fact would appear to relate to the other matters before the referring court.(15) I propose, therefore, to seek to identify the relevant facts in relation to the questions posed to this Court from those which are not.

41. Before considering the specific questions on the cessation of refugee status, some other preliminary remarks may also be in order. First, as both Advocate General Mazák (16) and the Court observed in its judgment of 2 March 2010, *Salahadin Abdulla and Others* (C-175/08, C-176/08, C-178/08 and C-179/08, EU:C:2010:105, paragraph 52) it is clear from recitals 3, 16 and 17 of Directive 2004/83 that the Geneva Convention remains 'the cornerstone of the international legal regime for the protection of refugees'. Furthermore, the Qualification Directive was adopted in order 'to guide the competent authorities of the Member States' in the application of the Geneva Convention 'on the basis of common concepts and criteria'. (17)

42. Second, where the text of the Qualification Directive departs from the language of the Geneva Convention, these provisions of the directive should nonetheless be interpreted as closely as possible with the underlying objectives of the Geneva Convention itself. After all, Article 78(1) TFEU provides that the Union's common policy on asylum and subsidiary protection must be in accordance with the Geneva Convention, and Article 18 of the Charter provides that the right to asylum 'shall be guaranteed with due respect for the rules of the Geneva Convention.' This in turn implies that the Union legislator intended that any legislative measures such as the Qualification Directive must conform as nearly as possible with both the letter and the spirit of the Geneva Convention.

43. Third, as is apparent from recital 10 of the Qualification Directive, the directive itself must be interpreted in a manner which respects the fundamental principles recognised by the Charter, (18) including the requirements of Article 1 of the Charter providing for the respect and protection of human dignity. (19)

VI. Analysis of the questions referred

A. The first question: the meaning of the concept 'protection' of the 'country of nationality' as it appears in Article 2(c) and Article 11(1)(e) of the Qualification Directive

44. The first question is directed to the meaning of the concept 'protection' of the 'country of nationality' as it appears in Article 2(c) and Article 11(1)(e) of the Qualification Directive. (20) In essence, the question is whether these references should be understood as referring to State protection. (21)

45. For my part, I think it is plain from both the actual wording and context of these provisions that, subject to one important exception, the reference to 'the protection of the country of nationality' is a reference to State protection (22) on the part of the applicant's country of nationality, in the present case, Somalia.

46. In any event, it is clear from the judgment of 2 March 2010, Salahadin Abdulla and Others (C-175/08, C-176/08, C-178/08 and C-179/08, EU:C:2010:105) that these provisions should be understood in this way. Thus, for example, the Court observed at paragraphs 57 to 59 of that judgment that a refugee is a national of a third country who, 'on account of circumstances existing in his country of origin, [has] a well-founded fear of being personally the subject of persecution for at least one of the five reasons listed in the Directive and the Geneva Convention. Those circumstances will indicate that the *third country does not protect its national against acts of persecution*. Those circumstances form the reason why it is impossible for the person concerned, or why he justifiably refuses, to avail himself of the *'protection' of his country of origin* within the meaning of Article 2(c) of the Directive, that is to say, in terms of that country's ability to prevent or punish acts of persecution.' (23)

47. For the sake of completeness, I would add, however, that it is necessarily implicit in the provisions of Article 7(1)(b) and Article 7(2) of the Qualification Directive that in certain instances actors other than the State such as parties or organisations can supply protection deemed equivalent to State protection in lieu of the State where stringent criteria are observed. I propose to elaborate further on this point when examining Question 3.

B. The second question: Protection test — the interaction between Article 2(c) of the Qualification Directive (definition of 'refugee' — well-founded fear of being persecuted) and Article 7 of the Qualification Directive (availability of protection)

48. The second question of the Upper Tribunal is directed to the interpretation of Article 2(c) and Article 7 of the Qualification Directive in the context of the cessation of refugee status pursuant to Article 11(1)(e) of that directive. This question must be answered in the light of the fact that OA, who faces possible cessation of his refugee status in the United Kingdom, alleges a fear of persecution by non-State actors (24) and the lack of effective State protection in his country of nationality.

49. In essence, the national court inquires whether the availability of protection against persecution, within the meaning of Article 7 of the Qualification Directive, is only assessed when examining whether there is a well-founded fear of being persecuted in accordance with Article 2(c) of that directive or whether such a 'protection inquiry' is also carried out when examining whether protection is available against such persecution. The referring court also inquires whether the criteria in respect of the existence of such protection are the same in both cases.

50. It is clear from the request for a preliminary ruling that this question arises due to divergent judgments from the United Kingdom courts with respect to the concept of 'protection' found in Article 1A(2) of the Geneva Convention and thus by implication in Article 2(c) of the Qualification Directive. (25)

51. Under one approach, based on the judgment of the Court of Appeal of England and Wales in *AG and Others v Secretary of State for the Home Department* [2006] EWCA Civ 1342, the inquiry into 'protection' arises only at 'the stage of considering whether there is a real risk of serious harm.'

52. Under the second approach, which was outlined by Lord Hope of Craighead in *Horvath v Secretary of State for the Home Department* [2000] UKHL 37, [2001] 1 Appeal Cases 489, the inquiry into protection arises at two different points. He thus stated in *Horvath* [2000] UKHL 37, [2001] 1 Appeal Cases 489 that 'where the allegation is of persecution by non-State agents, the sufficiency of state protection is relevant to a consideration whether each of the two tests — the "fear" test and the "protection" test — is satisfied. The proper starting point, once the tribunal is satisfied that the applicant has a genuine and well-founded fear of serious violence or ill-treatment for a Convention reason, is to consider whether what he fears is "persecution" within the meaning of the Convention. At that stage the question whether the state is able and willing to afford protection is put directly in issue by a holistic approach to the definition which is based on the principle of surrogacy …' (26)

53. The referring court noted that the House of Lords in *Horvath v Secretary of State for the Home Department* [2000] UKHL 37 considered that unless protection is seen as an interdependent part of the concept of persecution, it would be possible for persons to qualify as a refugee simply by showing a well-founded fear of serious harm, even if they would be fully protected against it. That would violate the principle of surrogacy. (27)

54. One can, I think, rather overcomplicate an analysis of what, in the end, is a *single concept* which accordingly applies *identical criteria* in the context of the application of both Article 2(c) and Article 7 of the Qualification Directive and, indeed, in turn Article 11(1)(e) of that directive. (28)

55. In examining any application for refugee status, the question must always be whether an applicant has established a well-founded fear of persecution pursuant to Article 2(c) of the Qualification Directive. The use of the term *'well-founded'* fear in the definition of 'refugee' in Article 2(c) of the Qualification Directive requires, inter alia, an analysis of whether the conditions in the applicant's country of nationality or origin are such as to objectively justify the applicant's fear of persecution.

56. This test will necessarily require, in my view, an objective examination of whether or not there is protection in the applicant's country of nationality by actors of protection as defined in Article 7 of the Qualification Directive against persecution(29)*and* whether the applicant has access to that protection. (30)

57. I therefore agree, in essence, with the Commission's observation (31) that refugee status falls to be determined by reference to a *single protection test* which meets the requirements laid down in Article 7 of the Qualification Directive. I would stress, however, that protection in the country of nationality must be available against all actors of persecution as defined by Article 6 of the Qualification Directive. (32)

58. While there is, strictly speaking, no formal definition of 'protection' in Article 2 of the Qualification Directive, protection is in fact described in Article 7(2) of the Qualification Directive. This occurs when the actors of protection mentioned in Article 7(1) of the Qualification Directive take 'reasonable steps to prevent the persecution …, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution …' (33) and where the applicant 'has access to such protection.' (34)

59. Thus, the continued necessity for international protection (refugee status) in a case such as that in the main proceedings is determined, inter alia, by the ability or otherwise of an actor of protection to take reasonable steps to prevent the persecution of the applicant at the hand of non-State actors by, inter alia, operating an effective legal system for the detection, prosecution and punishment of such acts by, inter alia, non-State actors. (35)

60. If, for whatever reason, actors of protection fail to or cannot otherwise take such reasonable steps to prevent the persecution of the applicant, then the applicant is in principle entitled to refugee status. (36)

61. I therefore consider that in order to ascertain whether a person has a well-founded fear of persecution, in accordance with Article 2(c) of the Qualification Directive, from non-State actors, the availability of 'protection' as described by Article 7(2) of the Qualification Directive by actors of protection must be taken into consideration. The same analysis must be conducted in respect of the cessation of refugee status in accordance with Article 11(1)(e) of the Qualification Directive.

C. Third question: the interpretation of the concept of protection by the 'State' in Article 7(1)(a) of the Qualification Directive — Inclusion of protective acts by clans/families

62. The issue posed by the third question lies at the heart of this reference. It is this: if 'protection of the country of nationality' within the meaning of Article 11(1)(e) and Article 2(c) of the Qualification Directive refers to State protection pursuant to Article 7(1)(a) of the Qualification Directive, can such protection also include protective acts or functions performed by purely private actors, such as families and/or clans who could offer the applicant protection?

63. The findings of fact made by the Upper Tribunal assume some relevance in this context. The Upper Tribunal noted that as regards 'the country conditions in Mogadishu, both parties were content to rely on the findings made by the Upper Tribunal in *MOJ*.' (37) The relevant findings in *MOJ* were, inter alia, as follows:

'(ii) Generally, a person who is "an ordinary civilian" (i.e. not associated with the security forces; any aspect of government or official administration or any NGO or international organisation) on returning to Mogadishu after a period of absence will face no real risk of persecution or risk of harm such as to require protection under Article 3 of the ECHR or Article 15(c) of the Qualification Directive …

(vii) A person returning to Mogadishu after a period of absence will look to his nuclear family, if he has one living in the city, for assistance in re-establishing himself and securing a livelihood. Although a returnee may also seek assistance from his clan members who are not close relatives, such help is only likely to be forthcoming for majority clan members, as minority clans have little to offer.

(viii) The significance of clan membership in Mogadishu has changed. Clans now provide, potentially, social support mechanisms and assist with access to livelihoods, performing less of a protection function than previously. There are no clan militias in Mogadishu, no clan violence and no clan based discriminatory treatment, even for minority clan members.

…

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

(xii) The evidence indicates clearly that it is not simply those who originate from Mogadishu that may now generally return to live in the city without being subjected to an Article 15(c) risk or facing a real risk of destitution. On the other hand, relocation in Mogadishu for a person of a minority clan with no former links to the city, no access to funds and no other form of clan, family or social support is unlikely to be realistic as, in the absence of means to establish a home and some form of ongoing financial support there will be a real risk of having no alternative but to live in makeshift accommodation within an IDP camp where there is a real possibility of having to live in conditions that will fall below acceptable humanitarian standards.' (38)

64. In its request for a preliminary ruling, the Upper Tribunal observed that the earlier decision in *MOJ* presupposed that 'although the relevant protection must be state protection, the assessment of the effectiveness of that protection requires consideration of protective functions in a wide sense to include those carried out by families and clans. A similar approach appears to be adopted by the European Court of Human Rights (the 'ECtHR') as regards the concept of protection against Article 3 ECHR ill-treatment in *RH v. Sweden* (Application No 4601/01), 10 September 2015 at paragraph 73. [(39)] Accordingly, there is a significant lack of clarity regarding the meaning of the term "protection" within Article 11(1)(e) and Article 2([c]) of the Qualification Directive.' (40)

65. Returning now to the facts of the present case, as I have already noted, the Upper Tribunal further found that OA had some close family in Mogadishu and that he could look to them for some financial support. He could also look for such support from his sister (who is, it appears, based in the United Arab Emirates) and fellow clan members in the United Kingdom.

66. It seems implicit in the request for a preliminary reference — although there is no express finding to this effect — that the Upper Tribunal considered that availability of the clan and family support structure would provide OA with a support structure amounting to an alternative form of protection, albeit it seems chiefly by means of financial and other practical support, rather than support designed to protect his own personal security.

67. Against this background, the question really reduces itself to whether the alleged availability of such financial and other practical support from private actors can satisfy, at least in part, the requirements of Article 7 of the Qualification Directive so far as any protection inquiry is concerned. In my view, it is clear from both the wording and the general context of Article 7 that it cannot.

68. Article 7(1)(b) of the Qualification Directive states that protection can be provided by either the State or by: 'parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State.'

69. It is therefore plain from the wording of Article 7(1)(b) of the Qualification Directive that the parties or organisations in question must control the State or a substantial part of that State. Article 7(2) of the Qualification Directive further requires that these parties or organisations must also take reasonable steps to provide protection from persecution or serious harm by 'operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm.'

70. All of this means that these parties or organisations must seek to exercise or duplicate State sovereignty (or something approximating to this) in respect of the applicant's country of origin because this is what the reference to '*controlling the State*' in Article 7(1)(b) of the Qualification Directive necessarily means and implies. Specifically, these parties or organisations must endeavour to provide for a policing and justice system based on human dignity and the rule of law in order to come within the scope of this provision. As Advocate General Mazák observed in his Opinion in *Salahadin Abdulla and Others* (C-175/08, C-176/08, C-178/08 and C-179/08, EU:C:2009:551) these legislative requirements 'entail the presence of an actor of protection which has the authority, organisational structure and means, inter alia, to maintain a minimum level of law and order in the refugee's country of nationality.' (41)

71. The French government in its written observations and at the hearing on the 27 February referred to a leading judgment of the Cour nationale du droit d'asile (CNDA) (National Asylum Court) of 3 May 2016, No 15033525. In paragraph 4 of that judgment the CNDA held that 'when it is established that there is no State protection, certain other authorities, exhaustively defined in Article L. 713-2 [of the (Code on the Entry and Stay of Foreign Nationals and the Right of Asylum] (42) may offer the protection that that State is incapable of providing on its own territory; among those authorities, *organisations controlling a substantial part of the territory of a State are those which have stable institutional structures allowing them to exercise exclusive and continuous civil and armed control on a delimitated territory within which the State no longer fulfils the obligations or exercises the authority of its sovereignty*; once those constitutive elements have been satisfied, and provided that that organisation is not itself the actor of the alleged persecution, it must be determined whether the substitute protection offered by that organisation is, for the person concerned, *accessible, effective and not temporary*.' (43)

72. It would, I think, be difficult to improve upon this passage from the judgment of the CNDA which succinctly captures the essence of Article 7(1)(b). For my part, I consider that it correctly represents the position of the European legislator as found in Article 7 of the Qualification Directive and, indeed, the interpretation of that provision already given by this Court in the judgment of 2 March 2010, Salahadin Abdulla and Others (C175/08, C176/08, C178/08 and C179/08, EU:C:2010:105).

73. So far as the present case is concerned, it is, I think, unnecessary to be more specific than this because there is really nothing in the request for a preliminary reference to suggest that either the family support structure or clan system in Somalia and more specifically in Mogadishu, could even remotely satisfy this requirement, although this is ultimately a matter for the national court to verify.

74. Yet even taking the previous general findings of the Upper Tribunal in *MOJ* (which were adopted by the Upper Tribunal for the purposes of the present case) and the specific findings in respect of OA in the present case at their very highest, the evidence simply demonstrates that the clan system in Mogadishu provides an informal — although doubtless important — social support structure. As the Tribunal noted, OA might also reasonably look to family members (and perhaps also his clan) for some financial support in the event that he were to be returned there. These findings invite the following responses.

75. First, the availability of such financial support is not directly relevant in the context of the cessation of refugee status. As I have already indicated, it *would*, however, be relevant to the quite separate question of whether the deportation of a former refugee to Somalia would expose that person to the real risk of extreme and severe material poverty, thus infringing the guarantees in respect of inhuman or degrading treatment contained in Article 3 ECHR and, by extension, Article 4 of the Charter. That, I suggest, is the true explanation for decisions such as *RH v Sweden* (44) to which the Upper Tribunal made reference, the details of which I will presently consider.

76. Second, there is nothing at all here in these findings of fact to suggest that this clan and family support system controls Somalia or any part of the territory of that state in the manner contemplated by Article 7(1)(b). Nor is it suggested that these private actors seek to operate a quasi-police and justice system *based on human dignity and the rule of law* or even that they attempt to offer such a police and justice system.

77. A further consideration here is that Article 7(1)(b) of the Qualification Directive departs from the actual text of the Geneva Convention in that it envisages that protection may be supplied by non-State actors, including international organisations. While it has been argued with much force that in this respect Article 7(1)(b) of the Qualification Directive is actually inconsistent with the terms of the Geneva Convention, (45) it is perhaps sufficient for present purposes to say that the Union legislator was presumably thereby seeking to take account of actual experience since the entry into force of that Convention many decades ago on 22 April 1954. This includes humanitarian intervention by the United Nations, intervention in certain states by multinational military forces and the phenomenon of 'failed' States, where the general apparatus of the traditional state has simply ceased to exist in any meaningful sense. These developments do not appear to have been anticipated by the drafters of the Geneva Convention where the existence of protection was predicated on a functioning state apparatus.

78. For all of the reasons I have already mentioned, I think it must be presumed that even when departing from the actual text of the Geneva Convention in this fashion, the Union legislator intended that the basic underlying objectives of the Geneva Convention should nonetheless be respected. It follows, therefore, that Article 7(1)(b) of the Qualification Directive should be interpreted with this basic principle in mind. The protection envisaged by the Geneva Convention is fundamentally, in substance, the traditional protection offered by a State, namely, a functioning legal and policing system based on the rule of law.

79. All of this reinforces the conclusion that the non-State protection envisaged by Article 7(1)(b) of the Qualification Directive is not simply the protection which might be offered by purely private parties — such as, for example, that of a private security firm guarding a gated compound (46) — but is rather that offered by non-State actors who control all or a substantial part of the territory of a state and who have also sought to replicate traditional State functions by providing or supporting a functioning legal and policing system based on the rule

of law. In other words, Article 7(1)(b) of the Qualification Directive should thus be seen as essentially a supplementary and exceptional provision which takes account of the contemporary experience of which I have already spoken where, exceptionally, the country of nationality is controlled in whole or in part by non-State actors who essentially seek to reproduce the justice and policing systems of the traditional State apparatus.

1. The decision of the ECtHR in R.H. v. Sweden

80. In arriving at this conclusion, I have not overlooked the decision of the ECtHR in *R.H. v. Sweden,* (47) to which reference was made by the Upper Tribunal and to which the parties also referred at the hearing. As that decision itself recognises, this was very much a judgment based on the facts of that particular case. In that judgment, the ECtHR considered the claims of a female applicant who maintained that her rights under Article 3 ECHR would be violated if she were returned to Mogadishu. The ECtHR held that the deportation of Ms. R.H., *whose application for asylum had previously been rejected*, to Somalia (and, specifically, to Mogadishu) would not violate the prohibition against torture or inhuman or degrading treatment or punishment contained in Article 3 of the ECHR. (48)

81. In that regard, the applicant submitted that, should the expulsion order against her be enforced, she would face a real risk of either being killed by her uncles because she had refused to agree to a forced marriage before fleeing Somalia or being forced to marry someone against her will again upon return. She also stated that the general situation in Somalia was very severe for women, in particular for those who lacked a male network. As a consequence, she would risk having to live alone in a refugee camp, which would expose her to serious danger. (49) The ECtHR first found that there was no indication that the situation in Mogadishu is of such a nature as to place everyone who is present in the city at a real risk of treatment contrary to Article 3 of the ECHR. The Court then examined the applicant's personal circumstances on return. Her claim was rejected on the facts, with the Court saying:

'73. In sum, the Court considers that there are significant inconsistencies in the applicant's submissions. The claims concerning her personal experiences and the dangers facing her upon return have not been made plausible. Accordingly, there is no basis for finding that she would return to Mogadishu as a lone woman with the risks that such a situation entails. In this connection, the Court notes that the applicant was informed of the death of her father in 2010 and her mother in 2011, indicating that she has retained contacts in Mogadishu. Moreover, she has family living in the city, including a brother and uncles. She must therefore be considered to have access to both family support and a male protection network. Furthermore, it has not been shown that the applicant would have to resort to living in a camp for refugees and IDPs.

74. Consequently, while not overlooking the difficult situation of women in Somalia, including Mogadishu, the Court cannot find, in this particular case, that the applicant would face a real risk of treatment contrary to Article 3 of the [ECHR] if returned to that city. Thus, her deportation to Mogadishu would not involve a violation of that provision.'

82. While it is true that the existence of a family support structure was a factor which influenced to some extent that Court's conclusions that the applicant would not face a risk of treatment contrary to Article 3 ECHR if returned to Mogadishu, it cannot be said that in this particular respect the decision in *R.H.* v *Sweden* articulated any wider principle. This is also evident from the fact that the court found her statements unreliable. (50) The evidence of family ties and practical support in Mogadishu and elsewhere to which reference was made by the

ECtHR would appear essentially to have been for the purpose of calling into question the veracity of the applicant's statements.

83. Even if it were otherwise, it must be recalled that the test of protection envisaged by Article 7(1)(b) of the Qualification Directive is quite a different one from the test prohibiting the removal of a person to a State where there is a serious risk of inhuman or degrading treatment for Article 3 ECHR or, for that matter, for the purposes of Article 4 and Article 19(2) of the Charter. Accordingly, I do not think that the decision is of great assistance so far as the specific questions posed by the referring court concerning the interpretation of the Qualification Directive are concerned.

84. I therefore consider that in accordance with Article 7(1) and Article 11(1)(e) of the Qualification Directive 'protection' can be provided by the State or, in the alternative, by non-State actors who control all or a substantial part of a State and who have also sought to replicate traditional State functions by providing or supporting a functioning legal and policing system based on the rule of law. Mere financial and/or material support supplied by non-State actors falls below the threshold of protection envisaged by Article 7 of the Qualification Directive.

D. Fourth question: The interpretation of Article 11(1)(e) of the Qualification Directive

85. The final question relates to the interpretation of Article 11(1) of the Qualification Directive dealing with cessation of refugee status, and, specifically, whether the reference in Article 11(1)(e) to 'the protection of country of nationality' implies that any inquiry as to the nature of the protection available in that country in the context of a cessation decision is essentially the same as envisaged by Article 7, so far as any grant of such status is concerned.

86. Article 11(1) deals with the circumstances in which a third country national ceases to be a refugee. It provides in relevant part as follows:

'A third country national or stateless person shall cease to be a refugee, if her or she:

…

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

87. In this respect Article 11(1)(e) of the Qualification Directive reproduces almost verbatim the provisions of Article 1C(5) of the Geneva Convention. This latter provision also provides for the conditions that must be satisfied in respect of the ending or cessation of refugee status.

'This Convention shall cease to apply to any person falling under the terms of section A if:

…

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

…'

88. It is clear from the terms of the Geneva Convention and — critically, for present purposes — the Qualification Directive, that both the grant and cessation of refugee status turn on the issue of necessity. Just as an applicant who can point to a well-founded fear of persecution is entitled to refugee status, the converse is also the case. If the circumstances giving rise to the need for international protection and the grant of refugee status have changed sufficiently, such that international protection is no longer necessary, then in principle refugee status may cease.(51)

89. As Article 11(2) of the Qualification Directive provides, the change of circumstances must, of course, be of a 'significant and non-temporary nature' and, as this Court observed at paragraph 73 of the judgment of 2 March 2010, Salahadin Abdulla and Others (C-175/08, C-176/08, C-178/08 and C-179/08, EU:C:2010:105) this means in turn that this will occur only 'when the factors which formed the basis of the refugee's fear of persecution may be regarded as having been permanently eradicated.' All of this means that Member States should approach the question of cessation of refugee status with some caution, giving, where necessary, the person enjoying refugee status the benefit of any doubt. Yet where, in the words of the Court, the risk of persecution may be regarded as having been 'permanently eradicated', then refugee status may be revoked.

90. The basic point, however, remains: both the grant and cessation of international protection are essentially symmetrical. It is this very point which clearly emerges from paragraphs 65 to 70 of the Court's judgment of 2 March 2010, Salahadin Abdulla and Others (C-175/08, C-176/08, C-178/08 and C-179/08, EU:C:2010:105) which are in the following terms:

'Article 11(1)(e) of the Directive, in the same way as Article 1C(5) of the Geneva Convention, provides that a person ceases to be classified as a refugee when the circumstances as a result of which he was recognised as such have ceased to exist, that is to say, in other words, when he no longer qualifies for refugee status.

By stating that, because those circumstances "have ceased to exist", the national "can no longer … continue to refuse to avail himself or herself of the protection of the country of nationality", that article establishes, by its very wording, a causal connection between the change in circumstances and the impossibility for the person concerned to continue to refuse and thus to retain his refugee status, in that his original fear of persecution no longer appears to be well founded.

In so far as it provides that the national "can no longer … continue to refuse" to avail himself of the protection of his country of origin, *Article 11(1)(e) of the Directive implies that the "protection" in question is the same as that which has up to that point been lacking, namely protection against the acts of persecution envisaged by the Directive*.

In that way, the circumstances which demonstrate the country of origin's inability or, conversely, its ability to ensure protection against acts of persecution constitute a crucial element in the assessment which leads to the granting of, or, as the case may be, by means of the opposite conclusion, to the cessation of refugee status.

Consequently, refugee status ceases to exist where the national concerned no longer appears to be exposed, in his country of origin, to circumstances which demonstrate that that country is unable to guarantee him protection against acts of persecution against his person for one of the

five reasons listed in Article 2(c) of the Directive. Such a cessation thus implies that the change in circumstances has remedied the reasons which led to the recognition of refugee status.

In order to arrive at the conclusion that the refugee's fear of being persecuted is no longer well founded, the competent authorities, by reference to Article 7(2) of the Directive, must verify, having regard to the refugee's individual situation, that the actor or actors of protection of the third country in question have taken reasonable steps to prevent the persecution, that they therefore operate, inter alia, an effective legal system for the detection, prosecution and punishment of acts constituting persecution and that the national concerned will have access to such protection if he ceases to have refugee status.' (52)

91. It follows in turn that the nature of the protection inquiry in both instances (53) is essentially the same. Refugee status will be granted where that protection was absent and, correspondingly, the necessity for refugee status will cease where the circumstances in the country of nationality have permanently changed (54) such that adequate levels of protection are now available in the applicant's country of nationality and that he or she has access to it.

VII. Conclusion

92. I would accordingly propose that the questions referred by the Upper Tribunal (Immigration and Asylum Chamber) London (United Kingdom) be answered as follows:

The concept of 'protection' of the 'country of nationality' in Article 2(c) and Article 11(1)(e) of Council Directive 2004/83/EC of 29 April 2004 on 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 refers primarily to State protection on the part of an applicant's country of nationality. It is nonetheless necessarily implicit in the provisions of Article 7(1)(b) and (2) Directive 2004/83 that in certain instances actors other than the State, such as parties or organisations can supply protection deemed equivalent to State protection in lieu of the State where those non-State actors control all or a substantial part of a State and have also sought to replicate traditional State functions by providing or supporting a functioning legal and policing system based on the rule of law. Mere financial and/or material support provided by non-State actors falls below the threshold of protection envisaged by Article 7 of Directive 2004/83.

In order to ascertain whether a person has a well-founded fear of persecution, in accordance with Article 2(c) of Directive 2004/83, from non-State actors, the availability of 'protection' as described by Article 7(2) of that directive by actors of protection must be taken into consideration. The same analysis must be conducted in respect of the cessation of refugee status in accordance with Article 11(1)(e) of Directive 2004/83.

The term 'the protection of country of nationality' in Article 11(1)(e) of Directive 2004/83 implies that any inquiry as to the nature of the protection available in that country in the context of a cessation decision is the same as envisaged by Article 7 of that directive. In order to arrive at the conclusion that a refugee's fear of being persecuted is no longer well-founded, the competent authorities, by reference to Article 7(2) of Directive 2004/83, must verify, having regard to the refugee's individual situation, that the actor or actors of protection of the third country in question have taken reasonable steps to prevent the persecution, that they therefore operate, inter alia, an effective legal system for the detection, prosecution and punishment of

acts constituting persecution and that the national concerned will have access to such protection if he or she ceases to have refugee status.

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1 Original language: English.

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2 The Convention relating to the Status of Refugees signed in Geneva on 28 July 1951 and entered into force on 22 April 1954 (*United Nations Treaty Series*, Vol. 189, p. 150, No. 2545, 1954). It was supplemented by the Protocol relating to the Status of Refugees of 31 January 1967 which entered into force on 4 October 1967, (the 'Geneva Convention').

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3 O'Sullivan M, 'Acting the Part: Can Non-State Entities Provide Protection Under International Refugee Law?', *International Journal of Refugee Law,* vol. 24, Oxford University Press, 2012, p. 89.

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4 Article 2(a) of Council Directive 2004/83/EC of 29 April 2004 on 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 ('the Qualification Directive') provides that international protection refers to refugee and subsidiary protection status as defined therein. The Geneva Convention refers only to refugees and their corresponding status.

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5 Some clarification is required. As it happens, the Qualification Directive was repealed with effect from 21 December 2013 by Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9). Recital 50 of Directive 2011/95 states that 'in accordance with Articles 1, 2 and Article 4a(1) of Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the TEU and to the TFEU, and without prejudice to Article 4 of that Protocol, the United Kingdom and Ireland are not taking part in the adoption of this Directive and are not bound by it or subject to its application.' However, recital 38 of the Qualification Directive states that 'in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom has notified, by letter of 28 January 2002, its wish to take part in the adoption and application of this directive.' All of this is to say that the Qualification Directive continued to apply to the United Kingdom despite the fact that it was repealed and replaced by Directive 2011/95 so far as the majority of the Member States are concerned.

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6 Judgment of 2 March 2010, *Salahadin Abdulla and Others* (C-175/08, C-176/08, C-178/08 and C-179/08, EU:C:2010:105). This was a cessation case where the applicants had previously been granted refugee status by Germany on the basis that they had suffered persecution in Iraq during the Saddam Hussein regime. Following the fall of that regime in the wake of the US-led invasion, the German authorities sought to revoke their refugee status. While the case was therefore principally concerned with the interpretation of Article 11(1)(e) of the Qualification Directive dealing with cessation, the Court did nonetheless observe *en passant* (at paragraph 75) that Article 7(1) of that directive did not preclude 'the protection from being guaranteed by international organisations,

including protection ensured through the presence of a multinational force in the territory of the third country.'

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7 OJ 2020, L 29, p. 1.

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8 Available at https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-11-asylum.

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9 S.I. 2006/2525.

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10 See paragraph 29 of the request for a preliminary reference to the CJEU dated 22 March 2019 in which the Upper Tribunal set out its assessment of the disputed facts.

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11 See Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses), HCR/GIP/03/03, 10 February 2003, paragraph 15, p. 5.

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12 The French Government considers that the first and second questions of the referring court contain a typographical error, since, instead of the reference to Article 2(e) of the Qualification Directive, which defines the expression 'person eligible for subsidiary protection', the reference should instead have been to Article 2(c) of that directive, which defines the term 'refugee'. I agree. Article 11 of the Qualification Directive, which is the subject matter of the first question, and the existence of a 'well-founded fear of being persecuted', referred to in the second question, only concern refugees. Moreover, OA was granted refugee status in the United Kingdom in 2003 rather than subsidiary protection. Thus, the case in the main proceedings concerns the cessation of refugee status in accordance with Article 11 of the Qualification Directive rather than the cessation of subsidiary protection in accordance with Article 16 of that directive. I therefore consider that the first and second questions of the Upper Tribunal relate in fact to Article 2(c) of that directive. I propose, therefore, to confine my Opinion to an interpretation of the Union rules applicable to refugees as distinct from those related to subsidiary protection.

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13 In accordance with Article 52(3) of the Charter, in so far as the rights guaranteed by Article 4 thereof correspond to those guaranteed by Article 3 of the ECHR, the meaning and scope of those rights are the same as those laid down by Article 3 of the ECHR. See judgment of 24 April 2018, MP (Subsidiary protection of a person previously a victim of torture) (C-353/16, EU:C:2018:276, paragraph 37).

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14 Article 19(2) of the Charter provides that no one may be removed to a State where there is a serious risk that he would be subjected to inhuman or degrading treatment.

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15 The referring court has *not* mentioned the possibility that OA might benefit from subsidiary protection in the event of the cessation of his refugee status. In that regard, the Court observed in its

judgment of 2 March 2010, *Salahadin Abdulla and Others* (C-175/08, C-176/08, C-178/08 and C-179/08, EU:C:2010:105, paragraph 80) that 'within the system of the Directive, the possible cessation of refugee status occurs without prejudice to the right of the person concerned to request the granting of subsidiary protection status in the case where all the factors, referred to in Article 4 of the Directive, which are necessary to establish that he qualifies for such protection under Article 15 of the Directive are present.' Article 2(e) of the Qualification Directive provides that in those cases where the applicant does not qualify as a refugee but where there are nonetheless substantial grounds for believing that the person concerned would, if returned to their country of origin, face 'a real risk of suffering serious harm' and such person is 'unable or, owing to such risk, unwilling to avail himself or herself of the protection of that country', then such a person is entitled to subsidiary protection. A 'real risk of suffering serious harm' is defined by Article 15 of that directive as (a) death penalty or execution; (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. As the name implies, the concept of subsidiary protection covers the cases of those applicants who do not face persecution as such, but who, while thereby ineligible for refugee status, nonetheless face a substantial risk of serious harm if returned to their country of origin and who are unable to avail of the protection of that country. See, for example, judgment of 8 May 2014, *N.* (C-604/12, EU:C:2014:302, paragraphs 29 and 30). Article 16(1) of the Qualification Directive provides that a third country national 'shall cease to be eligible for subsidiary protection when the circumstances which led to the grant of subsidiary protection status have ceased to exist or have changed to such a degree that protection is no longer required.' An applicant may be excluded from subsidiary protection pursuant to Article 17 of the Qualification Directive where there are 'serious reasons' for considering, inter alia, that the applicant has committed a serious crime or that he or she 'constitutes a danger to the community or to the security of the Member State in which he or she is present.'

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16 Opinion of Advocate General Mazák in *Salahadin Abdulla and Others* (C-175/08, C-176/08, C-178/08 and C-179/08, EU:C:2009:551, point 43).

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17 See paragraph 52 of the judgment of 2 March 2010, Salahadin Abdulla and Others (C-175/08, C-176/08, C-178/08 and C-179/08, EU:C:2010:105).

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18 See judgment of 2 March 2010, *Salahadin Abdulla and Others* (C-175/08, C-176/08, C-178/08 and C-179/08, EU:C:2010:105, paragraph 54).

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19 Article 1 of the Charter provides that 'human dignity is inviolable'.

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20 While Article 11(1)(e) of the Qualification Directive actually uses the phrase 'protection of the country of nationality', it is clear from the definition of refugee in Article 2(c) of that directive that what is in question in the latter provision is a person who, in certain defined circumstances is unable or unwilling to avail himself or herself of the 'protection of the country of nationality'.

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21 In that regard, while the 'country of origin' is defined in Article 2(k) of the Qualification Directive, that directive does not define the term 'State' or 'State protection' in the definitions

contained in Article 2 thereof. Nonetheless, Article 7 of the Qualification Directive contains a clear description of the single level of protection required of the State and other actors of protection. I will develop this matter further in this Opinion.

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22 This is clear from Article 7 of the Qualification Directive. While by way of this exception other actors of protection may be accepted in lieu of the State, they must, in effect, provide the same level of protection as the State. This is evident from the single standard of protection described in Article 7(2) of the Qualification Directive. The only 'concession' in this regard in respect of the non-State actors referred to in Article 7(1)(b) of the Qualification Directive is the geographical extent of protection. This may be limited to a 'substantial part of the territory of the State'.

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23 Emphasis added.

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24 There is no allegation in the file before this Court that OA was persecuted or risks being persecuted by the Somalian State.

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25 The United Kingdom Government considers that the second question should be answered in the affirmative. It states that the need to consider the scope of available protection arises in the same way at three stages. Firstly, when assessing whether there is a well-founded fear of persecution, then, if protection is, in fact, available from non-State actors at this stage, this must be considered as part of the overall circumstances of the applicant's case. The availability of such protection will mean that the applicant is unable to demonstrate a well-founded fear of persecution. Secondly, where the fear of persecution arises in respect of non-State actors, it is necessary to consider whether either the State or non-State actors can provide effective protection. Thirdly, it is necessary to consider whether the applicant is unwilling or unable to avail himself of 'the protection of the country of nationality'. That government stated that the second and third stages identified above amount to two parts of the same assessment. Indeed, the whole process of assessment of the three identified stages must be conducted in a holistic fashion. The key point is that the approach to the assessment of non-State actor protection is the same at each stage. The French Government stated that in paragraph 70 of the judgment of 2 March 2010, Salahadin Abdulla and Others (C-175/08, C-176/08, C-178/08 and C-179/08, EU:C:2010:105) the Court held that, in order to arrive at the conclusion that the refugee's fear of being persecuted is no longer well founded, the competent authorities, by reference to Article 7(2) of the Qualification Directive, must verify, having regard to the refugee's individual situation, that the actor or actors of protection of the third country have taken reasonable steps to prevent the persecution, that they therefore operate, inter alia, an effective legal system for the detection, prosecution and punishment of acts constituting persecution and that the national concerned will have access to such protection if he ceases to have refugee status. A fortiori, such an examination is necessary where it is a question of ascertaining whether there is a well-founded fear of being persecuted within the meaning of Article 2(c) of the directive. The Hungarian Government considers that in the context of the examination of the condition relating to well-founded fear, it is not solely protection by State actors and by an organisation controlling a substantial part of the territory of the State that is relevant. The administrative and legal authorities called upon to rule in asylum matters must examine, with regard to the condition relating to well-founded fear, whether the protection available is sufficiently efficient, irrespective of whether it is provided by State actors or non-State actors.

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26 Lord Hope of Craighead stated in *Horvath v Secretary of State for the Home Department* [2000] UKHL 37, that 'it seems to me that the Convention purpose which is of paramount importance for a solution of the problems raised by the present case is that which is to be found in the principle of surrogacy. The general purpose of the Convention is to enable the person who no longer has the benefit of protection against persecution for a Convention reason in his own country to turn for protection to the international community. As Lord Keith of Kinkel observed in *Reg.* v. *Secretary of State for the Home Department, Ex parte Sivakumaran* [1988] Appeal Cases 958, 992H-993A, its general purpose is to 'afford protection and fair treatment to those for whom neither is available in their own country.'

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27 In addition, the referring court stated that if the analysis in the judgment of the Court of Appeal in *AG and Others v Secretary of State for the Home Department* [2006] EWCA Civ 1342 were correct, 'the two tests of protection that have to be made under the "well-founded fear of being persecuted" limb of the refugee definition would not be two aspects of a "holistic" assessment but would apply two different sets of criteria: one a purely factual or functional test and the other (treating protection as a term of art to concern the apparatus of the state only) focussing solely on the acts of state actors. Whilst it is consistent with a holistic approach that the degree of state protection may indirectly be a factor in judging whether a person has a well-founded fear …, it is difficult to understand why the nature of this test — whether a factual or functional one or a formalistic one or a mixture of both — should differ between one and the other, particularly given that they are interrelated. In both applications protection must surely have the same qualities of effectiveness and (seemingly also) accessibility and non-temporariness.' (see paragraph 48 of the request for a preliminary reference dated 22 March 2019 of the reference for a preliminary ruling).

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28 See paragraph 67 of the judgment of 2 March 2010, Salahadin Abdulla and Others (C-175/08, C-176/08, C-178/08 and C-179/08, EU:C:2010:105) in which the Court stated that 'in so far as it provides that the national "can no longer … continue to refuse" to avail himself of the protection of his country of origin, Article 11(1)(e) of the Directive implies that the "protection" in question is the same as that which has up to that point been lacking, namely protection against the acts of persecution envisaged by the Directive.'

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29 By 'actors of persecution or serious harm' as defined by Article 6 of the Qualification Directive.

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30 See by analogy, paragraphs 56 to 59 of the judgment of 2 March 2010, Salahadin Abdulla and Others (C-175/08, C-176/08, C-178/08 and C-179/08, EU:C:2010:105) in which the Court stated that 'under Article 2(c) of the Directive, the term "refugee" refers, in particular, to a third country national who is outside the country of his nationality "owing to a well-founded fear of being persecuted" … and is unable or, "owing to such fear", unwilling to avail himself of the "protection" of that country. The national concerned must therefore, on account of circumstances existing in his country of origin, have a well-founded fear of being personally the subject of persecution for at least one of the five reasons listed in the Directive and the Geneva Convention. *Those circumstances will indicate that the third country does not protect its national against acts of persecution.* Those circumstances form the reason why it is impossible for the person concerned, or why he justifiably refuses, to avail himself of the *"protection"* of his country of origin within the meaning of Article 2(c) of the Directive, that is to say, in terms of that country's ability to prevent or punish acts of persecution.' Emphasis added.

31 The Commission stated that 'it is considered that the effect of splitting the definition of "refugee" provided for under Article 2(c) of the Directive into two elements and applying a protection test to the first element that is distinct — and more restrictive — of the protection test provided for under Article 7, finds no basis either in the wording nor the scheme of the Directive. Indeed, the development of the test in the UK courts pre-dated the adoption of the Qualification Directive. Moreover, such an approach essentially circumvents the application of Article 7 of the Directive. By "shoe-horning" a more limited protection test into the determination of whether a claimant's fear is well founded, and then using that test as a basis for refusing a further inquiry into protection meeting the requirements of Article 7 of the Directive, a Member State would essentially nullify the effectiveness of that provision.'

32 In accordance with Article 6(c) of the Qualification Directive, actors of persecution include 'non-State actors, if it can be demonstrated that the [State] and [parties or organisations controlling the State or a substantial part of the territory of the State], including international organisations, are unable or unwilling *to provide protection against persecution or serious harm as defined in Article 7*.' Emphasis added.

33 At the hearing on 27 February 2020, the United Kingdom Government submitted that the use of the word 'generally' in Article 7(2) of the Qualification Directive served to indicate that the criteria laid down in that provision are not exhaustive or even indicative but instead merely constituted specific enumerated examples of what the concept of 'protection' entailed. I disagree. I consider that the criteria laid down in Article 7(2) of the Qualification Directive are minimum and necessary standards in order for the requisite degree of protection to exist. This is moreover very clear from the wording of paragraphs 70 and 71 of the judgment of 2 March 2010, Salahadin Abdulla and Others (C-175/08, C-176/08, C-178/08 and C-179/08, EU:C:2010:105).

34 See Article 7(2) of the Qualification Directive.

35 In my view, not only must 'reasonable steps' be taken, they must also be reasonably effective in their objective.

36 See Article 2(d) of the Qualification Directive. If, on the other hand, the applicant does not face persecution but nonetheless faces the risk of 'serious harm' as defined by Article 15, then he or she is in principle entitled to subsidiary protection.

37 See paragraph 21 of the request for a preliminary reference dated 22 March 2019. It is not for this Court to query the findings of fact relied on by the referring court and, indeed, agreed upon by the parties in the proceedings before it. If, however, the findings of fact regarding the situation in Mogadishu are based exclusively on the *MOJ* judgment, then it must be said that there are passages in that judgment which might in themselves suggest that an applicant such as OA does not have a well-founded fear regarding a possible return to Somalia and that the present case in so far as it raises issues regarding financial support etc. is really a case raising issues of inhuman and degrading treatment in the context of a potential exposure to extreme and severe material poverty rather than to

the cessation of refugee status as such. I would stress again, however, that it is not the task of this Court to look behind either the referring Court's findings of fact or, for that matter, the specific questions which it has posed. One might also highlight the fact that the *MOJ* judgment was delivered in 2014 and it may be legitimate to query whether its findings continue to be fully relevant today, six years on. I would also note that at the hearing on 27 February 2020, the French Government stated that it had a very different appreciation of the situation in Somalia. These issues are, however, ultimately matters to be decided upon by the referring court.

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38 See paragraph 38 of the request for a preliminary reference dated 22 March 2019.

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39 ECtHR, *RH v. Sweden* 10 September 2015, CE:ECHR:2015:0910JUD000460114, § 73.

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40 See paragraph 49 of the request for a preliminary reference dated 22 March 2019.

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41 Opinion of Advocate General Mazák in *Salahadin Abdulla and Others* (C-175/08, C-176/08, C-178/08 and C-179/08, EU:C:2009:551, point 54).

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42 Paragraphs 2 and 3 of that article transpose the provisions of Article 7 of the Qualification Directive.

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43 Emphasis added.

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44 ECtHR, 10 September 2015, *RH v. Sweden*, CE:ECHR:2015:0910JUD00460114.

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45 O'Sullivan M, 'Acting the Part: Can Non-State Entities Provide Protection Under International Refugee Law?', *International Journal of Refugee Law,* vol. 24, Oxford University Press, 2012, 98 — 108.

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46 The reference by the United Kingdom Government to paragraph 249 of the judgment of the EctHR of 28 November 2011, *Sufi and Elmi v. United Kingdom* CE:ECHR:2011:0628JUD000831907 is not, I think, directly on point. In that case the EctHR considered that the possibility that certain individuals who were exceptionally well-connected to 'powerful actors' in Mogadishu might be able to obtain protection and live safely in the city was likely to be rare, as only those with connections at the highest level would be in a position to afford such protection. It also observed that an applicant who had not been to Somalia for some time was unlikely to have the contacts necessary to afford him protection on return. That Court thus concluded the violence in Mogadishu is of such a level of intensity that anyone in the city, except possibly those who are exceptionally well-connected to 'powerful actors', would be at real risk of treatment prohibited by Article 3 ECHR. The United Kingdom Government itself acknowledged at the hearing on 27 February 2020 that OA had not been to Somalia in 25 years and there is no suggestion at all that he fell into this privileged category of persons. In any event, as I have already observed, the Article 3 ECHR test is a separate and distinct

one from the question of entitlement to refugee status having regard to the terms of Article 7 of the Directive.

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47 ECtHR, 10 September 2015, *RH v. Sweden*, CE:ECHR:2015:0910JUD00460114.

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48 At paragraph 56 of the judgment of 10 September 2015, *RH v. Sweden*, CE:ECHR:2015:0910JUD00460114, the ECtHR stated that 'expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the [ECHR], where substantial grounds have been shown for believing that the person concerned, if deported, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In such a case, Article 3 implies an obligation not to deport the person in question to that country (*Tarakhel v. Switzerland* [GC], no. 29217/12, § 93, ECHR 2014, with further references).' At paragraph 57 of that judgment the ECtHR stated that 'owing to the absolute character of the right guaranteed, Article 3 of the [ECHR] may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection.'

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49 The ECtHR first examined the situation in Mogadishu and found that there was no indication that the situation was of such a nature as to place *everyone present* in the city of a real risk of treatment contrary to Article 3. The ECtHR thus looked at the applicant's personal situation.

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50 See paragraph 72 in which the ECtHR stated that it has serious misgivings about the veracity of the applicant's statements.

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51 As the Court of Appeal for England and Wales put the matter succinctly, there 'should simply be a requirement for symmetry between the grant and cessation of refugee status.' See *Secretary of State for the Home Department v. MA (Somalia)* [2018] EWCA Civ 994, [2019] 1 Weekly Law Reports 241, paragraph 47, per Arden L.J.

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52 At paragraphs 65-70 of the judgment. Emphasis added.

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53 In accordance with Article 7 and Article 11(1)(e) of the Qualification Directive.

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54 At paragraph 73 of the judgment of 2 March 2010, Salahadin Abdulla and Others (C-175/08, C-176/08, C-178/08 and C-179/08, EU:C:2010:105) the Court stated that 'the change of circumstances will be of a "significant and non-temporary" nature, within the terms of Article 11(2) of the Directive, when the factors which formed the basis of the refugee's fear of persecution may be regarded as having been permanently eradicated.'