Upper Tribunal
(Immigration and Asylum Chamber)

Ainte (material deprivation – Art 3 – AM (Zimbabwe)) [2021] UKUT 0203 (IAC)

THE IMMIGRATION ACTS

At: Field House	**Decision Promulgated**
On: 10th-11th March 2021	**22 July 2021**

Before

UPPER TRIBUNAL JUDGE BRUCE
UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

The Secretary of State for the Home Department

Appellant

and

Mahad Abdullahi Ainte
(no anonymity direction made)

Respondent

For the Appellant:	**Mr J. Anderson, Counsel instructed by the Government Legal Department**
For the Respondent:	**Mr R. Toal and Mr T. Lay, Counsel, instructed by Brighton Housing Trust Immigration Legal Services**

(i) *Said [2016] EWCA Civ 442 is not to be read to exclude the possibility that Article 3 ECHR could be engaged by conditions of extreme material deprivation. Factors to be considered include the location where the harm arises, and whether it results from deliberate action or omission.*

(ii) *In cases where the material deprivation is not intentionally caused the threshold is the modified N test set out in AM (Zimbabwe) [2020] UKSC 17. The question will be whether conditions are such that there is a real risk that the individual concerned will be exposed to intense suffering or a significant reduction in life expectancy.*

(iii) The Qualification Directive continues to have direct effect following the UK withdrawal from the EU.

DECISION AND REASONS

1. The Respondent, Mr Ainte (MAA), is a national of Somalia born on the 23rd October 1991. He has lived in this country since 2008 when he arrived, aged 16, and sought protection as a refugee. That protection was never granted. The Secretary of State was still considering submissions when, in November 2011, MAA received his first conviction, for possessing cannabis. Further convictions followed in 2013 and in April 2014 he was convicted of possession of a Class A drug (cocaine) with intent to supply. He was sent to prison for 4 years. It is therefore in the public interest that MAA be deported from this country.

2. Before the First-tier Tribunal MAA advanced two reasons why the 'automatic deportation' procedure set out in s32 of the UK Borders Act 2007 should not apply to him.

3. First, he submitted that he was entitled to protection as a refugee: s33(2)(b) of the UK Borders Act 2007 applied. Although the First-tier Tribunal was satisfied that MAA should not be denied protection as a result of his criminality, it rejected the submission that MAA had a currently well-founded fear of persecution on any of the alternative or cumulative bases advanced by him. The appeal was therefore dismissed on Refugee Convention grounds and MAA was refused permission to appeal against that decision.

4. The second limb of the appeal before the First-tier Tribunal was that the removal of MAA to Mogadishu would result in him facing a real risk of living in conditions of such extreme material deprivation, and so lacking in security, that they would constitute inhuman and degrading treatment under Article 3 ECHR[1] and/or Article 15(b) of the Qualification Directive[2], and/or amount to "very compelling circumstances" establishing that deportation would be a disproportionate interference with MAA's Article 8 private life. The First-tier Tribunal found this argument to be made out, and consequently allowed the appeal on both human rights and humanitarian protection grounds. It was that finding of fact which was the subject of the Secretary of State's appeal to the Upper Tribunal, heard on the 15th October 2020.

5. By a decision dated the 25th October 2020 Upper Tribunal Judge Bruce found that the First-tier Tribunal had erred in its approach. Paragraph 10 of the 'error of law' decision explains why:

[1] European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome 4.XI.1950

[2] 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 real difficulty with the decision is in the gaps in the reasoning, and the failure to make clear findings. At its §39 the Tribunal rehearses the views of [country expert] Ms Harper about what "might" happen to [MAA] if he returned to Mogadishu, but nowhere does the Tribunal go on to reach its own conclusion, applying the appropriate standard of proof and considering the relevance of its own findings about [MAA] circumstances, in particular that he is not a member of the Ashraf minority. As the Secretary of State points out, Ms Harper proceeded on the basis that he was, and it was for the Tribunal to determine whether the views expressed at paragraph 8.10 of her report, and summarised at the Tribunal's §39, survived that rejection. It was entirely possible that they would, but some findings had to be made. Insofar as such conclusions are reached at §40 of the decision, these are flawed for lack of reasoning: there was for instance no exploration of why [MAA] might find himself without clan support".

6. Judge Bruce directed that the decision, insofar as it related to human rights (Articles 3 & 8) and Article 15 of the Qualification Directive, be re-made. This is that remade decision, to which both members of the panel have contributed. We were referred to a great deal of evidence and had the benefit of detailed argument from Counsel about the proper approach to take in cases involving material deprivation generally, and in the context of Somalia in particular. We begin by addressing those legal issues, before considering and determining MAA's claim.

The Legal Framework

7. As we are considering protection grounds our starting point must be the applicable country guidance on Somalia. Although new guidance is shortly to be forthcoming, at the date of this appeal the current country guidance is MOJ & Ors (Return to Mogadishu) Somalia CG [2014] UKUT 00442 (IAC). Neither party has asked us to depart from that guidance. The material part of it, for the purpose of this appeal, is set out in the headnote:

> *(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 may 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.*

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

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

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

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

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

8. It is common ground that this country guidance must now be read in line with the decision in Secretary of State for the Home Department v Said [2016] EWCA Civ 442, [2016] Imm AR 1084. Said was a Somali national who faced deportation following his conviction for rape. He resisted deportation on the grounds that upon return to Mogadishu he would very likely become destitute, and thus be exposed to the risk of having to enter an IDP camp, where conditions would be very poor. On appeal the Upper Tribunal had held that Said could work, speak

Somali, was of a majority clan and that he could benefit from remittances from family members in the UK if necessary. The 'real question', identified the Tribunal, was whether Said's mental health was so poor that he would be unable to cope with relocation to Mogadishu and thus end up in an IDP camp, where applying the guidance set out in the headnote of MOJ (above), it found that conditions would fall so far below acceptable humanitarian standards that the appeal fell to be allowed on Article 3 grounds. The Secretary of State appealed to the Court of Appeal on perversity grounds; Said defended the decision of UTIAC on the grounds that the Tribunal had, on the evidence, been rationally entitled to conclude that he would end up in an IDP camp, and that the "conclusion that removal would violate Article 3 necessarily followed" from the decision in MOJ.

9. In delivering the lead judgment Lord Justice Burnett (as he then was) was concerned to make two points. The first was of general application. Having reviewed the caselaw, and in particular the judgment of Lord Justice Laws in GS (India) v Secretary of State for the Home Department [2015] EWCA Civ 40, [2015] Imm AR 608, he emphasised that claims based on harms arising from naturally occurring phenomena, such as illness or famine, are not paradigm Article 3 claims. Because the feared harm was not being intentionally inflicted (either by omission or positive action) the threshold to establish a violation of Article 3 was a high one. Equating cases involving material deprivation with health claims [at §15 and §18] the Court held that the applicable threshold is that set out in N v United Kingdom (App. No. 26565/05), [2008] Imm AR 657 and N v Secretary of State for the Home Department [2005] UKHL 31, [2005] Imm AR 353.

10. The second point arose specifically from the way in which the Tribunal had applied the guidance in MOJ to Said's claim. Although this part of the judgment is *obiter* – the decision of UTIAC having already been set aside on perversity grounds – it has been expressly endorsed by the Court of Appeal in Secretary of State for the Home Department v MS (Somalia) [2019] EWCA Civ 1345, [2020] Imm AR 131 and by the Upper Tribunal in SB (refugee revocation: IDP camps) Somalia [2019] UKUT 358 (IAC). Burnett LJ held that MOJ cannot be read as automatically equating life in an IDP camp to a violation of Article 3: such a "stark proposition of cause and effect" would be inconsistent with the Strasbourg jurisprudence to the effect that any potential violation of Article 3 is to be evaluated with reference to the personal characteristics of the individual concerned. As the decision in MOJ had made clear, it was not uniformly the case that all IDPs in Somalia were at that time facing inhuman and degrading treatment: indeed some had managed to resettle with "'a reasonable standard of accommodation' and with access to food, remittances from abroad or an independent livelihood" [Said at §29]. In Said's case the Tribunal had therefore erred in apparently drawing a line directly between entry into a camp, and a violation of Article 3. The proper approach was that set out at § 422 of MOJ:

> "422. The fact that we have rejected the view that there is a real risk of persecution or serious harm or ill treatment to civilians or returnees in Mogadishu does not mean that no Somali national can succeed in a refugee or humanitarian protection or article 3 claim. Each case will fall to be decided on its own facts. As we have observed, there will need to be a careful assessment of all the circumstances of a particular individual."

11. We know then from the decision in Said that MOJ is not to be read as saying what earlier, undisturbed, Somali country guidance cases had held. In NM and Others (lone women -Ashraf) Somalia CG [2005] UKIAT 00076 [*obiter* at §102], HH and Others (Mogadishu: armed conflict: risk) Somalia CG [2008] UKAIT 00022 [§299] and AMM and Others (conflict; humanitarian crisis; returnees; FGM) Somalia CG [2011] UKUT 00445 (IAC) [§486] , the Tribunal had found conditions in the camps to be so universally appalling and degrading that a general risk pertained. At various points during the decades long Somali conflict a direct line could, on the facts, be drawn between displacement and a violation of Article 3 for *any* civilian in a given area. Conclusions to a similar effect were reached by European Court of Human Rights in Sufi and Elmi v United Kingdom (App. Nos 8319/07 and 11449/07) (2012) 54 EHRR 9 [at §291]: there the entire civilian population in a large section of Southern Somalia were held to be at such a risk. By 2014, and the decision in MOJ, the situation on the ground in Somalia had improved so that this could no longer be said to be true. There therefore needed to be a "careful assessment of all the circumstances" of the particular individual.

12. Before we are able to conduct such an assessment in respect of MAA, we must address a number of legal matters arising in the submissions before us.

Understanding Said

13. The first matter can be shortly dealt with, since it is uncontentious. It would seem that just as the decision in MOJ has been misconstrued by decision makers, so subsequently has the decision in Said. Mr Toal informed us that the decision has been interpreted by some as authority for the proposition that 'naturally occurring' socio-economic deprivation can never, as a matter of *law*, found a claim under Article 3. As Mr Anderson readily accepted, such an interpretation would plainly be wrong. It would be contrary to Strasbourg authority[3], the decision in Said itself [at §18 and §31], and we note that a submission to the same effect was carefully considered, and rejected, by the Tribunal in AM and AM (armed conflict: risk categories) Rev 1 Somalia CG [2008] UKAIT 00091 [at §87]. The N threshold is undoubtedly an extremely high one, but it is not insurmountable. Insofar as cases subsequent to Said have been read to the contrary, such readings are inaccurate. We are told, for instance, that the following passage in Secretary of State for the Home

[3] See below at §26

Department v MA (Somalia) [2018] EWCA Civ 994, [2018] Imm AR 1273 has been cited as authority for the proposition that Article 3 can never be engaged in instances of non-intentional socio-economic deprivation:

> "63. The analysis in Said's case [2016] Imm AR 1084, by which this court is bound, is that there is no violation of article 3 by reason only of a person being returned to a country for which economic reasons cannot provide him with basic living standards. …"

The key to this passage is the term "only": there should be an analysis of the impact on the individual concerned, and living conditions must be bad enough to reach the minimum level of severity required to engage the article. Neither Said nor MA (Somalia) close the door on such cases.

14. Alternatively, we understand, the judgment in Said has been read as saying that resort to an IDP camp cannot, as a matter of *fact*, found such a claim. Again, that is a misunderstanding. The higher courts have repeatedly emphasised the value of the careful and intense scrutiny that this Tribunal gives to the evidence in country guidance cases[4]: we do not think that Burnett LJ was seeking to displace that role by conducting his own factual examination of the IDP camps in Somalia. He was simply pointing out that on the Tribunal's *own* analysis of the facts in MOJ, the line of causation could not at that time be directly drawn between life in the camp and inhuman and degrading conditions.

The Country Guidance

15. The second matter can also be shortly stated, since it has already been authoritatively addressed by the President, Mr Justice Lane, and Upper Tribunal Judge Rimington in SB (refugee revocation: IDP camps) Somalia [2019] UKUT 00358 (IAC).

16. As we have detailed above, for the moment MOJ remains the country guidance on Somalia. Its guidance on the particular question of the material deprivation faced by IDPs must however be read in light of the judgment in Said. It is Mr Toal's contention that this part of the decision in MOJ having been set aside, we must as decision makers revert to the earlier decision in AMM: as we allude to above, this guidance, given in 2011, was to the effect that the drought and resulting famine then ravaging southern and central Somalia was of such drastic proportions that the Tribunal could be satisfied that there was a generalised Article 3 risk for any civilian returning to that region.

17. We do not accept that it would be right to simply revert to this earlier country guidance. To do so would be clearly contrary to the stated intentions of the

[4] See for instance Secretary of State for the Home Department v AH (Sudan) [2007] UKHL 49, [2007] Imm AR 584, per Baroness Hale [at §30]

panel in MOJ [at paragraph (i) of the 'country guidance' section of the headnote]:

> "The country guidance issues addressed in this determination are not identical to those engaged with by the Tribunal in AMM and others (conflict; humanitarian crisis; returnees; FGM) Somalia CG [2011] UKUT 445 (IAC). Therefore, where country guidance has been given by the Tribunal in AMM in respect of issues not addressed in this determination then the guidance provided by AMM shall continue to have effect."

18. We deduce from this that any issue addressed by both decisions – as the socio-economic conditions prevailing in the country plainly were – the earlier guidance was replaced by the later. It cannot sensibly be 'reinstated' by default. The reason for that, as the Presidential panel in SB explain, is that conditions on the ground had changed between 2011 and 2014:

> "54. Although Mr Toal attempted, with his customary skill, to rely upon extracts from the country guidance decision in MOJ in order to show that that decision had not, in fact, superseded the above findings in AMM, it is, in our view, plain on any full reading of MOJ that the Upper Tribunal in that case was well aware that the drought conditions, which had led to a UN-recognised famine in rural areas and parts of Mogadishu in 2011, no longer pertained. The nature of the armed struggle was also markedly different.
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> 55. We therefore agree with Mr Jarvis's submissions on this issue and respectfully decline to follow those of Mr Toal. The largely naturally-caused events that led the Upper Tribunal in AMM to find that the high threshold for Article 3 harm, as regards conditions in IDP camps, had been met, no longer applied at the time of MOJ. Given that there is nothing in MOJ or anywhere else that we have seen which suggests human agency is responsible for the generalised conditions faced in IDP camps (as opposed to instances of specific harm), that high threshold needs to be met. Insofar as MOJ might have been read to suggest otherwise, or insofar as it might otherwise be read as indicating a generalised risk of Article 3 harm, Burnett LJ's judgment cogently explains why that is wrong. Irrespective of whether his judgment is formally binding on us, it is fully-reasoned and compelling and should be followed. In our view, it will be an error of law for a judge to refuse to do so."

Intentional and Non-intentional harm

19. The third issue is whether this appeal is a Said case at all, that is to say a claim involving non-intentional or naturally occurring harm, where the N threshold should be applied. There had hitherto been an assumption by the parties that it was: certainly this was the way that the argument was put before the First-tier Tribunal. Mr Toal was not, however, satisfied that this was the case. He pointed to evidence that the Somali government is itself complicit in actions, such as the

forced eviction of squatter camps, which cause or exacerbate the suffering of the displaced population; the government has further omitted to deal with abuses of power and corruption by the 'Gatekeepers', those men who control the camps. In those circumstances, Mr Toal submits, this Tribunal should find that harms feared by MAA are not naturally occurring, and that for that reason the standard to be applied is simply whether there is a real risk that he will face inhuman or degrading treatment. In addressing this submission we have found it necessary to look in more detail at the different kinds of cases where material deprivation has been held to engage Article 3.

20. Article 3 reads:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

21. In GS (India) Lord Justice Laws expressed this uncontroversial view about the harms that the article was originally conceived, in 1950, to prevent:

> "In my judgment the language of the Article shows that the paradigm case of a violation is an intentional act which constitutes torture or inhuman or degrading treatment or punishment".

22. As he goes on to explain, however, the Convention has expanded, or evolved, so that in 1997 the ECtHR found a violation of Article 3 where the suffering arose not from an intentional act, but from wholly natural causes. The applicant in D v United Kingdom (App No. 30240/96), (1997) 24 EHRR 423 was a convicted drug smuggler suffering from end-stage AIDS, who asserted that if he were to be deported to his native St Kitts, he would face an inhumane and degrading death. In assessing D's claim under Article 3 the Court noted that Contracting States have the right to expel aliens, and take measures to prevent crime, however:

> "47… in exercising their right to expel such aliens Contracting States must have regard to Article 3 of the Convention (art. 3), which enshrines one of the fundamental values of democratic societies. It is precisely for this reason that the Court has repeatedly stressed in its line of authorities involving extradition, expulsion or deportation of individuals to third countries that Article 3 (art. 3) prohibits in absolute terms torture or inhuman or degrading treatment or punishment and that its guarantees apply irrespective of the reprehensible nature of the conduct of the person in question…
>
> 49. **It is true that this principle has so far been applied by the Court in contexts in which the risk to the individual of being subjected to any of the proscribed forms of treatment emanates from intentionally inflicted acts of the public authorities in the receiving country or from those of non-State bodies in that country when the authorities there are unable to afford him appropriate protection…Aside from these situations and given the fundamental importance of Article 3 in the Convention system, the Court must reserve to itself sufficient flexibility to address**

> **the application of that Article in other contexts which might arise. It is not therefore prevented from scrutinising an applicant's claim under Article 3 where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article. To limit the application of Article 3 in this manner would be to undermine the absolute character of its protection**. In any such contexts, however, the Court must subject all the circumstances surrounding the case to a rigorous scrutiny, especially the applicant's personal situation in the expelling State."

[Emphasis added]

23. The Court proceeds to detail the grim fate that awaited D in St Kitts, before concluding [at §53]: "in view of these exceptional circumstances and bearing in mind the critical stage now reached in the applicant's fatal illness" that there would be a violation if the deportation were to proceed.

24. The introduction of the term "exceptional" in D was suggestive of a higher threshold than the "minimum level of severity" ordinarily applied. This was certainly the interpretation adopted by the Court in Bensaid v United Kingdom (App No. 44599/98), (2001) 33 EHRR 10 [at §40]:

> "40. … Having regard, however, to the high threshold set by Article 3, **particularly where the case does not concern the direct responsibility of the Contracting State for the infliction of harm,** the Court does not find that there is a sufficiently real risk that the applicant's removal in these circumstances would be contrary to the standards of Article 3. The case does not disclose the **exceptional circumstances** of [D v the United Kingdom] …"

[Emphasis added]

25. It was not however until N v United Kingdom in 2008 that the Court elaborated on what might be meant by such "exceptional circumstances":

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

> critically ill and appeared to be close to death, could not be guaranteed any nursing or medical care in his country of origin and had no family there willing or able to care for him or provide him with even a basic level of food, shelter or social support.
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> 43. **The Court does not exclude that there may be other very exceptional cases where the humanitarian considerations are equally compelling. However, it considers that it should maintain the high threshold set in *D v the United Kingdom* and applied in its subsequent case-law, which it regards as correct in principle, given that in such cases the alleged future harm would emanate not from the intentional acts or omissions of public authorities or non-State bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country**."

[Emphasis added]

26. The approach taken in D, Bensaid and N to health cases has subsequently been uncontroversially applied to those involving non-intentional material deprivation: for instance by the ECtHR in SHH v United Kingdom (App No. 60367/10), (2013) 57 EHRR 18, and domestically in Said. In such cases, where the feared harm is not caused by the actions of others, that is to say it is "naturally occurring", outwith the jurisdiction, applicants are required to demonstrate that theirs is a *very exceptional case*, where the humanitarian grounds against the removal are compelling.

27. A different type of case is where the material deprivation in question arises within the jurisdiction of a signatory state, and where it can to some degree, by its acts or omissions, be held responsible for that suffering. In MSS v Belgium and Greece (App No. 30696/09), (2011) 53 EHRR 2 the asylum-seeking applicant had been subject to a third-country removal from Belgium to Greece where he found himself living on the streets in conditions of extreme and unremitting poverty. Holding that those conditions were inhuman and degrading the ECtHR emphasised that asylum seekers were a "a particularly underprivileged and vulnerable population group in need of special protection" and that Greece had purposely failed in its legal duties, both domestic and international, to give them such protection. In these circumstances the threshold for proving a violation of Article 3 was simply that ordinarily applied: having regard to the personal characteristics of the claimant, can it be said that the treatment he suffered was "inhuman and degrading"?

28. A related claim arose in Sufi and Elmi. This too concerned extreme poverty, but not in a signatory state: here the feared harm arose in southern Somalia. Accepting that the civilian population were in effect starving *en masse*, and living in conditions of extreme fearfulness and insecurity, the ECtHR went on to examine why. It found that those conditions were not naturally occurring, but arose from the ongoing conflict. For this reason the case was distinguished from N [at §282]:

> "282. If the dire humanitarian conditions in Somalia were solely or even predominantly attributable to poverty or to the state's lack of resources to deal with a naturally occurring phenomenon, such as a drought, the test in N v United Kingdom may well have been considered to be the appropriate one. However, it is clear that while drought has contributed to the humanitarian crisis, that crisis is predominantly due to the direct and indirect actions of the parties to the conflict. The reports indicate that all parties to the conflict have employed indiscriminate methods of warfare in densely populated urban areas with no regard to the safety of the civilian population. This fact alone has resulted in widespread displacement and the breakdown of social, political and economic infrastructures. Moreover, the situation has been greatly exacerbated by al-Shabaab's refusal to permit international aid agencies to operate in the areas under its control, despite the fact that between one-third and one-half of all Somalis are living in a situation of serious deprivation."

Consequently it was the ordinary threshold of harm that was applicable. In respect of what factors might be relevant in this context the ECtHR specifically directed itself to the approach taken in MSS: having "regard to an applicant's ability to cater for his most basic needs, such as food, hygiene and shelter, his vulnerability to ill-treatment and the prospect of his situation improving within a reasonable time-frame".

29. Which of these approaches should we take here?

30. Neither party asked us to take the Sufi and Elmi option. There the ECtHR had found a clear causal nexus between behaviour of the various parties to the conflict and the suffering of the population. As we have seen[5], developments in Somalia have since changed that calculus. In AMM the Tribunal found the preponderant cause of dire poverty in Somalia to be the country's worst famine in 60 years. Today the objective evidence points towards a plague of locusts that have destroyed successive harvests. In common with the panel in AMM, we are in no doubt that three decades of civil war has some part to play in the lack of resources faced by Somalia, but for the purpose of this appeal the parties agree that at present it is this plague which is the "preponderant cause". As such Mr Toal did not seek to persuade us to embark on a Sufi and Elmi analysis of the facts.

31. Mr Toal does, however, seek to persuade us that we could properly find this to be an MSS type case. First, he asks us to equate the situation of IDPs/returnees in Somalia with that of asylum seekers in Greece: both are particularly vulnerable populations. Second, he draws an analogy between the failure of the Greek government to meet its legal obligations under *inter alia* the relevant EEA Reception Directive with those of the Somali government under the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa ('the Kampala Convention').

[5] See our §11 above

32. We think it uncontroversial that Somali IDPs – an umbrella term in this appeal accepted to include 'returnees' - are in general terms a particularly vulnerable group. Successive country guidance cases, and the facts on the ground, would suggest it to be so, as does the preamble to the Kampala Convention.

33. We further accept that Somalia is a signatory to the Kampala Convention and that it has undertaken to incorporate the obligations therein into its domestic law (although we are not told whether it has in fact done so). Those obligations include "meeting the basic needs" of, and "providing sufficient protection" to, IDPs.

34. We are not however satisfied that the *ratio* of MSS can be applied here. MSS was concerned with inhuman and degrading treatment *within Europe* of a particularly vulnerable individual whom the Greek authorities had both the ability, and legal duty, to protect. That duty arose from Greece's obligations not only under the ECHR, but under the EEA treaties and its own domestic legislation. Nothing in the decision suggests that the same considerations would extend to a feared violation in a non-signatory state. Indeed the ECtHR has expressly held to the contrary. In SHH v United Kingdom it was asked to consider the potential for violation of Article 3 in the case of a disabled man whom the United Kingdom proposed to return to Afghanistan. It declined to take the MSS approach in the following terms [at §90]:

> "90. Second, the Court considers that the present case can be distinguished from *M.S.S.* In that case, a fellow Contracting State, Greece, was found to be in violation of Article 3 of the Convention through its own inaction and its failure to comply with its positive obligations under both European and domestic legislation to provide reception facilities to asylum seekers. Central to the Court's conclusion was its finding that the destitution of which the applicant in that case complained was linked to his status as an asylum seeker and to the fact that his asylum application had not yet been examined by the Greek authorities. The Court was also of the opinion that, had they examined the applicant's asylum request promptly, the Greek authorities could have substantially alleviated his suffering (see paragraph 262 of the judgment). By contrast, the present application concerns the living conditions and humanitarian situation in Afghanistan, a non-Contracting State, which has no such similar positive obligations under European legislation and cannot be held accountable under the Convention for failures to provide adequate welfare assistance to persons with disabilities. In that regard, it is recalled that the Convention does not purport to be a means of requiring Contracting States to impose Convention standards on other States (see, as a recent authority, *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 141, 7 July 2011)."

35. We are accordingly satisfied that the MSS approach cannot be extended to cover situations in which non-ECHR signatories fail to meet their own regional or international commitments. It follows that the approach to take here is that set

out in N, bringing us at last to the central legal issue before us: where is the N threshold to be set in such cases today?

Non-intentional harm and the N threshold: Paposhvili applied?

36. As we have seen, in Said Burnett LJ expressly equated cases involving non-intentional material deprivation with those concerning ill-health: the Court held that it was the high N threshold that must be applied to such claims. This is also the view taken by the ECtHR, see for instance Sufi and Elmi [§282], and by the Court of Appeal, see for instance MI (Palestine) v Secretary of State for the Home Department [2018] EWCA Civ 1782, [2019] Imm AR 75 [§16-23]. To date there has never been any suggestion that different approaches should be taken to these related species of claims. Yet before us this was the case put by Mr Anderson.

37. The reason that the Secretary of State is now concerned to draw a distinction between these two types of 'non-intentional harm' cases is the modification of the N test introduced by the ECtHR in Paposhvili v Belgium (App No. 41738/10), [2017] Imm AR 876 and endorsed in December 2020 by the UK Supreme Court in AM (Zimbabwe) v Secretary of State for the Home Department [2020] UKSC 17, [2020] Imm AR 1167. Following N claimants were required to demonstrate circumstances so exceptionally appalling that they reached the high threshold set in D: where the applicant was critically ill and appeared to be close to death, could not be guaranteed any nursing or medical care in his country of origin and had no family there willing or able to care for him or provide him with even a basic level of food, shelter or social support. That 'deathbed' scenario has now been held to set too high a threshold to properly reflect the values that Article 3 is designed to protect. The formula posited in Paposhvili was that there must be a real risk of:

> "being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy".

This was the test endorsed by the Court in AM (Zimbabwe), albeit it that it is properly understood as a departure from, rather than a clarification of, N. It is therefore no longer a requirement of such cases that *death* be imminent: the focus shifts instead to whether there will be *intense suffering* in the country of return, or to a significant reduction in life expectancy.

38. For MAA Mr Toal simply asks us to apply this modified N threshold. He points out that the Upper Tribunal has already indicated, in KAM (Nuba – return) Sudan CG [2020] UKUT 00269 (IAC), that this would be appropriate:

> 52. Whilst the case of N v UK (2008) 47 EHRR 39 has recently been reconsidered by the Strasbourg Court in Paposhvili v Belgium [2017] Imm

> AR 867 and adopted by the Supreme Court in AM(Zimbabwe) v SSHD [2020] UKSC 17 so as to broaden the category of 'exceptional case' falling within Art 3 in medical/health cases (and here by analogy we assume in 'living condition' cases), it remains a rigorous test requiring serious and immediate suffering reaching the high Art 3 threshold or a significant diminution in life expectancy (see [27]-[31] per Lord Wilson in AM).

39. For the Secretary of State Mr Anderson points out that we are not bound by KAM (Sudan), particularly since the Tribunal does not appear to have heard any argument on the point. He submits that contrary to the assumption made therein, there are good reasons to distinguish what that Tribunal refers to as 'living condition' cases from the health cases discussed in Paposhvili and AM. His argument, skilfully put, was as follows.

40. In the beginning there was Article 3. The contracting parties wanted to draw a line in the sand about what kind of behaviour was acceptable in post-war Europe. Torture was not. Recalling the horrors of the concentration camps, nor was inhuman and degrading treatment. Those are the paradigm behaviours that the article prohibits, in absolute terms.

41. It was never intended that the Convention would be concerned with securing rights outside the territory of the contracting parties: indeed Article 1 specifically requires the High Contracting Parties to secure to "everyone *within their jurisdiction* the rights and freedoms defined in section I". Then in 1989 came Soering v United Kingdom (App No. 14038/88) (1989) 11 EHRR 439, an American extradition case where the ECtHR was asked to find a real risk of violation in another place entirely – in the death row cells of a Virginia penitentiary. The Court embarked on what Mr Anderson describes as the first significant extension of the ambit of Article 3 [from §87]:

> "87. In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms. Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective. In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with "the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society".
>
> 88 …
>
> The question remains whether the extradition of a fugitive to another State where he would be subjected or be likely to be subjected to torture or to inhuman or degrading treatment or punishment would itself engage the responsibility of a Contracting State under Article 3. That the abhorrence of torture has such implications is recognised in Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that "no State Party

> shall ... extradite a person where there are substantial grounds for believing that he would be in danger of being subjected to torture". The fact that a specialised treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3 of the European Convention. **It would hardly be compatible with the underlying values of the Convention, that "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture,** however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intendment of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article[6]."
>
> [Emphasis added]

42. Soering was quickly followed by Cruz Varas v Sweden (App No. 15576/89), (1992) 14 EHRR 1, Vilvarajah v United Kingdom (App No. 13163/87), (1992) 14 EHRR 248 and Chahal v United Kingdom (App No. 22414/93), (1996) 23 EHRR 413. Application of this 'extraterritorial extension' thereafter became a regular feature of the ECtHR's work.

43. All of these cases were, however, still concerned with harms that were to be deliberately inflicted by the authorities in the receiving states. It was not until 1997 that the ECtHR in D v United Kingdom found Article 3 to be engaged in circumstances where the feared degradation and suffering arose naturally. Mr Anderson identifies this as the second significant extension to the ambit of the Convention as it was originally conceived. In D the Court found a violation not only where the harm occurred outside of the jurisdiction, but where it arose from the Appellant's naturally occurring illness: D, and N which followed, represented an 'extension of an extension'.

44. Having taken us this far, Mr Anderson asks us to find that the application of the D/N *ratio* to cases involving material deprivation is an extension further still. He makes two points in support of that submission. First, he points out that nowhere in any of the judgments in D or N, domestic or European, do the courts expressly contemplate such a leap. More importantly it is clear from the drafting, and indeed the history of the Convention, that its focus is upon civil and political rights as opposed to social, cultural and economic rights. In Said type cases, the argument goes, we are dealing with 'an extension of an extension of an extension': we are pushing at the very limits of the Convention's protections. Whilst the Convention may be a 'living instrument', Mr Anderson

[6] References in original text removed

submits that its boundaries should not be distorted to the point where it would be unrecognisable to the original signatories. To this end Mr Anderson prays in aid the judgment of Lord Justice Laws in GS (India) and in particular its approval of Lord Bingham's speech in Brown v Stott [2003] 1 AC 681 [at §703D-G]:

> "In interpreting the Convention, as any other treaty, it is generally to be assumed that the parties have included the terms which they wished to include and on which they were able to agree, omitting other terms which they did not wish to include or on which they were not able to agree. Thus particular regard must be had and reliance placed on the express terms of the Convention, which define the rights and freedoms which the contracting parties have undertaken to secure. This does not mean that nothing can be implied into the Convention. The language of the Convention is for the most part so general that some implication of terms is necessary, and the case law of the European Court shows that the court has been willing to imply terms into the Convention when it was judged necessary or plainly right to do so. But the process of implication is one to be carried out with caution, if the risk is to be averted that the contracting parties may, by judicial interpretation, become bound by obligations which they did not expressly accept and might not have been willing to accept. As an important constitutional instrument the Convention is to be seen as a 'living tree capable of growth and expansion within its natural limits' (*Edwards v Attorney General for Canada* [1930] AC 124, 136 per Lord Sankey LC), but those limits will often call for very careful consideration."

45. It is against this background that Mr Anderson urges the Tribunal to proceed with caution: the modification of the N test introduced by Paposhvili and confirmed in AM (Zimbabwe) was a humanitarian recalibration based very specifically on the circumstances arising in medical cases. Those judgments focused on the illogicality of a distinction between dying on arrival or dying within some months. Should that relaxation of the standard be extended to cases concerned with material deprivation, it will in the Secretary of State's submission be an extension too far. It would risk, as Laws LJ puts it, binding the contracting parties to obligations which they did not expressly accept [at §38 GS (India)]. For those reasons we are asked to confine the Paposhvili modification to health cases.

46. Impressed as we were with Mr Anderson's argument, and his oral presentation of it, we are unable to accept it.

47. The Secretary of State's case rests on the principle that the 'living instrument' doctrine should not be so liberally applied that it renders the protections of the Convention unrecognisable. This was Lord Bingham's caution, echoed by Lord Justice Laws in GS (India) [at §38]:

> "38. … So the starting-point is the text, and any implication or enlargement requires a careful avoidance of the imposition of obligations beyond the actual or assumed scope of the States parties' agreement. But there is at

> once a difficulty, unacknowledged in these *dicta*. How is the "living instrument" approach to be reconciled with the court's duty to be loyal to the founders' agreement? The notion that the modern scope of ECHR rights may be resolved by asking whether the States parties might have consented to this or that outcome suggested by circumstances which were or might have been beyond contemplation when the text was agreed is surely problematic. I think the best one can do is to confine any implication or enlargement to situations which have some affinity with the paradigm case; situations which are, so to speak, within the spirit of the paradigm case, whose identification therefore assumes a considerable importance."

48. As a matter of principle, this is plainly correct, and it accords with the general rule of interpretation set down in Article 31(1) of the Vienna Convention on the Law of Treaties. Decision makers must be careful not to read into the Convention protections beyond its scope, since to do so would be to bind signatories to obligations that they never agreed to. It would however be equally wrong to take a restrictive, originalist approach to the text. The Convention is to be interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory, and in a manner which continues to reflect the values of the societies that it serves. A review of the jurisprudence since 1950 reveals just how far, applying those principles, the branches of the tree have already spread.

49. The first decades of the Convention's lifespan saw little legal activity in Strasbourg: the Convention then simply served as a declaration of the values and political will of post-war Europe. In this early period it was seen primarily as a mechanism by which that democratic order could be enforced: see for instance the Greek Case[7], in which other members of the Council of Europe charged the fascist junta in Athens with the torture of political opponents. It was not in fact until the mid-1960s that the United Kingdom, in common with other major powers, accepted the right of individual petition at all[8]. Having taken that leap, however, the ECtHR soon accepted that it is the purpose of the Convention which is to be given primacy in its interpretation, taking a teleological approach in Wemhoff v Federal Republic of Germany (App No 2122/64), (1979-80) 1 EHRR 55, Golder v United Kingdom (App No. 4451/70), (1979-80) 1 EHRR 524 and then Tyrer v United Kingdom (App No. 5856/72), (1979-80) 2 EHRR 1 in which the court expressly recognised that this purpose was to be interpreted in light of societal developments:

> The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions.

[7] Denmark v Greece (App No 3321/67), Norway v Greece (App No 3322/67), Sweden v Greece (App No 3323/67), The Netherlands v Greece (App No 3324/67)

[8] See for instance Bates, E. *The Evolution of the European Convention on Human Rights: from its Inception to the Creation of a Permanent Court of Human Rights* (Oxford, 2010)

50. Applying the 'living instrument' doctrine the ECtHR has since Tyrer repeatedly enlarged the scope of the Convention's protections beyond scenarios within the contemplation of the signatory parties in 1950. In for instance Marckx v Belgium (App No 6833/74), (1980) 2 EHRR 330 the ECtHR recognised the Article 8 family life rights of children born out of wedlock, and in Dudgeon v United Kingdom (App No 7525/76), (1981) 4 EHRR 149 the private life rights of gay men. As Mr Anderson's own chronology demonstrates, the protection of the Convention was then (in effect) extended outwith the borders of Europe in Soering, and in D to cases far beyond the original paradigm. As these cases illustrate, the 'living instrument' doctrine has already yielded results which would seventy years ago have been regarded as radical, but in applying it the ECtHR has expressly recognised that its decisions must reflect the prevailing norms in the societies that it serves. As the court put it in Wemhoff, it is necessary "to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties".

51. This being so, we find a number of ECtHR cases in which social, cultural and economic rights feature, either tangentially, or centrally, notwithstanding their apparent exclusion by the signatories in 1950. It is trite history that in this wholly *western* European project the drafters selected from the Universal Declaration of Human Rights only those civil and political rights believed to best reflect democratic values: the economic rights ideologically vaunted by the eastern bloc were deliberately omitted[9]. Yet as early as 1979 the ECtHR had in Airey v Ireland (App No. 6289/73), (1979-80) 2 EHRR 305 cautioned against imagining a "water-tight division" between the two classes of rights. The Court subsequently recognised the multifaceted nature of suffering in cases such as Seljuk and Asker v Turkey (1998) 26 EHRR 477, Bilgin v Turkey (App. No 23819/24) 2000 and Dulas v Turkey (App. No 25801/94) 2001, all applications in which Turkey was found to be in violation of Article 3 (and 8) notwithstanding that they were ostensibly concerned with the destruction of property and homelessness. Both Commission and Court have further accepted that dire poverty is capable of engaging Article 3: see for instance Larioshina v Russia (App No. 56869/00) (23rd April 2002) and then in another case concerning inadequate provision for pensioners, Budina v Russia (App. No 45603/05) (18 June 2009). In Budina the Court expressly rejected the Russian submission that it lacked the jurisdiction to consider such matters[10]:

> "as to compatibility *ratione materiae*, the Court reiterates that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation".

[9] For an alternative view see Harris, DJ, O'Boyle M, Warbrick, C *Law of the European Convention on Human Rights (*London, 1995) [page 4]: "This was a matter of priorities and tactics. While it was not disputed that economic, social and cultural rights required protection too, the immediate need was for a short, non-confrontational text which governments could accept at once, while the tide for human rights was strong"

[10] See also Panchenko v Latvia (App. No 40772/98)

52. An analysis to the same effect is found in our own domestic jurisprudence in Adam, Limbuela and Tesema v Secretary of State for the Home Department [2005] UKHL 66, [2007] 1 All ER 951 where the House of Lords was asked to consider whether legislation depriving those who had failed to claim asylum on arrival - "late applicants" - of financial support had given rise to a violation of Article 3. Their Lordships expressly recognised that the Convention imposes no positive obligations upon signatory states to guarantee socio-economic rights[11], but where the lack of them is abject, the Article may be engaged. As Lord Bingham of Cornhill puts it [at §7]:

> "Treatment is inhuman or degrading if, to a seriously detrimental extent, it denies the most basic needs of any human being. As in all article 3 cases, the treatment, to be proscribed, must achieve a minimum standard of severity, and I would accept that in a context such as this, not involving the deliberate infliction of pain or suffering, the threshold is a high one. A general public duty to house the homeless or provide for the destitute cannot be spelled out of article 3. But I have no doubt that the threshold may be crossed if a late applicant with no means and no alternative sources of support, unable to support himself, is, by the deliberate action of the state, denied shelter, food or the most basic necessities of life. It is not necessary that treatment, to engage article 3, should merit the description used, in an immigration context, by Shakespeare and others in *Sir Thomas More* when they referred to "your mountainish inhumanity".

53. In all of the cases to which we have been referred, whether they are about poverty, or a lack of palliative care, or homelessness, the 'living instrument' approach has enabled the ECtHR to focus not on fact that the suffering endured by the claimants is socio-economic in nature, but on the suffering itself, and in particular its assault on the human dignity of the individuals concerned. There is no right to health care, but it may be a violation if the lack of it exposes the sick to inhuman and degrading conditions: see D v United Kingdom. Nor is there a right to a minimum level of income, but an existence below that subsistence level could engage Article 3 if it is damaging to physical or mental health, or leaves the individual in "a situation of degradation incompatible with human dignity": Budina v Russia. There is no guarantee under the Convention of a right to housing *per se* (see for instance Muslim v Turkey (App No. 53566/99), (2006) 42 EHRR 16) but there may be a violation of Article 3 if the lack of housing fundamentally undermines the dignity of the homeless: in Moldavan v Russia (No 2) (Apps No 41138/98 and 64320/02) the severely overcrowded and unsanitary conditions endured by the applicants over a long period was found, in light of the state's indifference to their plight, to arouse in them feelings of "humiliation and debasement".

54. This focus upon dignity has led the Court in recent years to find violations in some arguably unlikely scenarios. In Vinter & Ors v United Kingdom (Apps Nos 66069/09 130/10 and 3896/10) III ECHR 317, for instance, the Court found

[11] See in particular the speech of Lord Scott of Foscote [at §66]

the hopelessness faced by prisoners serving sentences without the prospect of parole to be incompatible with the UK's obligations under Article 3, notwithstanding the s ECtHR's long stated commitment to giving signatory states a wide margin of appreciation when it came to penal policy. In Bouyid v Belgium (App No 23380/09), (2015) ECHR 819 the facts, a single slap by a police officer, did not at first blush come close to reaching the minimum level of severity required: indeed it had been the unanimous verdict of the Chamber that they did not. By a substantial majority the Grand Chamber overturned the decision below. Central to the Grand Chamber's reasoning was a confirmation that although the word does not feature in Article 3 itself - the Court lists no fewer than 20 human rights instruments in which it does - human dignity is, and always has been, "the very essence of the Convention"[12] :

> 87. Ill-treatment that attains such a minimum level of severity usually involves actual bodily injury or intense physical or mental suffering. However, even in the absence of these aspects, where treatment humiliates or debases an individual, showing a lack of respect for or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition set forth in Article 3 …
>
> 89. The word "dignity" appears in many international and regional texts and instruments (see paragraphs 45-47 above). Although the Convention does not mention that concept – which nevertheless appears in the Preamble to Protocol No. 13 to the Convention, concerning the abolition of the death penalty in all circumstances – the Court has emphasised that respect for human dignity forms part of the very essence of the Convention.
>
> 90. Moreover, there is a particularly strong link between the concepts of "degrading" treatment or punishment within the meaning of Article 3 of the Convention and respect for "dignity". In 1973 the European Commission of Human Rights stressed that in the context of Article 3 of the Convention the expression "degrading treatment" showed that the general purpose of that provision was to prevent particularly serious interferences with human dignity (see *East African Asians v. the United Kingdom*, nos. 4403/70 and 30 others, Commission's report of 14 December 1973, Decisions and Reports 78-A, p. 56, § 192). The Court, for its part, made its first explicit reference to this concept in the judgment in *Tyrer* …

55. Having had regard to this jurisprudence we are unable to accept the Secretary of State's submission that cases concerned with material deprivation are necessarily at the very outer limits of Convention protection and should accordingly be subject to the most stringent of standards, the unmodified N test. Strasbourg has already in a variety of contexts recognised rights which, although ostensibly socio-economic in nature, arise in situations fundamentally concerned with human dignity and so capable of engaging Article 3. As the

[12] Pretty v United Kingdom [at §65]

decision in Bouyid makes clear, this approach is consistent not only with the object of the Convention itself, but with the wider humanitarian purpose of human rights law as a whole.

56. Furthermore we are unable to accept the proposition that material deprivation cases are a tenuous 'extension' of the health cases at all: on the contrary, we find them to be growth on the same branch.

57. In the health cases what is the factor that fundamentally undermines the dignity of the individuals concerned? It was not the *illness* of Mr D, Ms N, nor Mr Paposhvili which led to the cases before the ECtHR: it was the lack of medical treatment - i.e. *material deprivation* - that they would face upon expulsion from the host country. This is explained by the Court in Pretty v United Kingdom [at §53]:

> In the present case, it is beyond dispute that the respondent State has not, itself, inflicted any ill-treatment on the applicant. Nor is there any complaint that the applicant is not receiving adequate care from the State medical authorities. The situation of the applicant is therefore not comparable with that in *D. v. the United Kingdom*, in which an AIDS sufferer was threatened with removal from the United Kingdom to the island of St Kitts **where no effective medical or palliative treatment for his illness was available** and he would have been exposed to the risk of dying under the most distressing circumstances. The responsibility of the State would have been engaged by its act ("treatment") of removing him in those circumstances. There is no comparable act or "treatment" on the part of the United Kingdom in the present case.

[Emphasis added].

58. And in SHH v United Kingdom:

> "74. In *Salah Sheekh v. the Netherlands*, cited above, the Court held that socio-economic and humanitarian conditions in a country of return did not necessarily have a bearing, and certainly not a decisive bearing, on the question of whether the persons concerned would face a real risk of ill treatment within the meaning of Article 3 in those areas (§ 141).
>
> 75. However, in *N. v. the United Kingdom,* cited above, the Court held that although the Convention was essentially directed at the protection of civil and political rights, the fundamental importance of Article 3 meant that it was necessary for the Court to retain a degree of flexibility to prevent expulsion in very exceptional cases. Noting that Article 3 did not place an obligation on Contracting States to alleviate disparities in the availability of medical treatment in different States through the provision of free and unlimited health care to all aliens without a right to stay within their jurisdictions, the Court nevertheless held that humanitarian conditions would give rise to a breach of Article 3 of the Convention in very exceptional cases where the humanitarian grounds against removal were compelling (§42).

…

> 89. The Court finds that the principles of *N. v. the United Kingdom* should apply to the circumstances of the present case for the following reasons. First, the Court recalls that *N.* concerned the removal of an HIV-positive applicant to Uganda, where her lifespan was likely to be reduced on account of the fact that the treatment facilities there were inferior to those available in the United Kingdom. In reaching its conclusions, the Court noted that the alleged future harm would emanate not from the intentional acts or omission of public authorities or non-State bodies but from a naturally occurring illness **and the lack of sufficient resources to deal with it in the receiving country**. The Court also stated that Article 3 did not place an obligation on the Contracting State to alleviate disparities in the availability of medical treatment between the Contracting State and the country of origin through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction (ibid, § 44). The Court acknowledges that, in the present case, the applicant's disability cannot be considered to be a "naturally" occurring illness and does not require medical treatment. **Nevertheless, it is considered to be significant that in both scenarios the future harm would emanate from a lack of sufficient resources to provide either medical treatment or welfare provision rather than the intentional acts or omissions of the authorities of the receiving State**."

[Emphasis added] [13].

59. And in Paposhvili itself:

> 183. The Court considers that the "other very exceptional cases" within the meaning of the judgment in *N. v. the United Kingdom* (§ 43) which may raise an issue under Article 3 should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, **on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment**, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy. The Court points out that these situations correspond to a high threshold for the application of Article 3 of the Convention in cases concerning the removal of aliens suffering from serious illness.

[Emphasis added]

60. As the unfortunate demise of Mr Paposhvili illustrates, the illness remained a constant, wherever he was: for the purpose of the court's enquiry, it was simply a personal characteristic that fell to be evaluated as part of the assessment of whether the conditions he faced on return to Georgia gave rise to a real risk of

[13] Sheekh v Netherlands (2007) 45 EHRR 50 is referred to in similar terms at [§278] of Sufi and Elmi v United Kingdom *(supra)*

inhuman and degrading treatment. In fact in each of the health cases to which we have been referred, a defence of the contracting party has not been to query the impact of the claimant's illness, but to argue that prevailing circumstances on the ground are not dire enough to find a violation[14].

61. Consequently we cannot agree that there is any jurisprudential distinction between the health cases and those concerned with material deprivation: it is no doubt for this reason that none of the authorities to which we have been referred have drawn one. To the contrary, the Courts have treated them in the same way, uniformly applying the N test wherever the feared harm arises from naturally occurring circumstance.

62. Thus whilst we accept that the Convention has expanded, and that each incremental spurt of growth must be carefully considered, we do not accept that in applying Paposhvili to this case we would materially, or impermissibly, be adding to that growth. We would simply be applying the law within its existing limits. The N threshold has been modified by Paposhvili and AM (Zimbabwe) and it is that less exacting, but nevertheless very high, test that we must apply. We are no longer concerned with whether there would be an imminence of death for MAA upon return to Somalia, but rather whether he will be exposed to conditions resulting in intense suffering *or* to a significant reduction in his life expectancy such that the humanitarian case for granting leave is compelling.

The Qualification Directive

63. MAA relies, in addition to Article 3, upon Article 15(b) of the Qualification Directive:

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

64. The parties agreed that the United Kingdom's departure from the European Union notwithstanding, the Directive continued to have direct effect, although neither was in a position to articulate exactly why. The Supreme Court in G v G [2020] EWCA Civ 1185 certainly proceeded on the same footing but again

[14] An argument which has repeatedly succeeded. See for instance Tanko v Finland (App No 23634/94), NADC v Switzerland (46553/99) and SCC v Sweden (9384/81): all health cases which failed because the material conditions in the receiving countries were held not to reach the minimum level of severity.

without explanation: see [§84]. The reason is set out at ss2 -4 of the European Union Withdrawal Act 2018:

> **2 Saving for EU-derived domestic legislation**
>
> (1) EU-derived domestic legislation, as it has effect in domestic law immediately before exit day, continues to have effect in domestic law on and after exit day.
>
> (2) In this section "EU-derived domestic legislation" means any enactment so far as—
>
> (a) made under section 2(2) of, or paragraph 1A of Schedule 2 to, the European Communities Act 1972,
>
> (b) passed or made, or operating, for a purpose mentioned in section 2(2)(a) or (b) of that Act,
>
> (c) relating to anything—
>
> (i) which falls within paragraph (a) or (b), or
>
> (ii) to which section 3(1) or 4(1) applies, or
>
> (d) relating otherwise to the EU or the EEA,
>
> but does not include any enactment contained in the European Communities Act 1972.
>
> …
>
> **3 Incorporation of direct EU legislation**
>
> (1) Direct EU legislation, so far as operative immediately before exit day, forms part of domestic law on and after exit day.
>
> (2) In this Act "direct EU legislation" means—
>
> (a) any EU regulation, EU decision or EU tertiary legislation, as it has effect in EU law immediately before exit day…
>
> (3) For the purposes of this Act, any direct EU legislation is operative immediately before exit day if—
>
> (a) in the case of anything which comes into force at a particular time and is stated to apply from a later time, it is in force and applies immediately before exit day,
>
> (b) in the case of a decision which specifies to whom it is addressed, it has been notified to that person before exit day, and
>
> (c) in any other case, it is in force immediately before exit day.

…

4 Saving for rights etc. under section 2(1) of the ECA

(1) Any rights, powers, liabilities, obligations, restrictions, remedies and procedures which, immediately before exit day—

(a) are recognised and available in domestic law by virtue of section 2(1) of the European Communities Act 1972, and

(b) are enforced, allowed and followed accordingly,

continue on and after exit day to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly).

…

65. Prior to the end of the implementation period the relevant parts of the Qualification Directive were implemented domestically by The Refugee or Person in Need of International Protection (Qualification) Regulations 2006, and the Immigration Rules. They continue therefore, by virtue of s2(1) above, to have direct effect.

66. That having been established, no material discrete issue arose under Article 15: the parties accepted that if MAA is able to make out a claim under Article 3, success under Article 15(b) would follow, and vice versa. The only discussion about the Qualification Directive before us arose in the context of Mr Toal's reply to Mr Anderson's argument about the various enlargements to the Convention, discussed above. As Mr Toal points out the language of Article 15(b) requires the torture, inhuman or degrading treatment or punishment to be faced in an applicant's "country of origin" thus expressly incorporating the *Soering* extension into European law. Support, if support is needed, for the contention that in human rights law, once radical departures eventually become orthodoxy.

67. For the sake of completeness we note that the Secretary of State accepts that MAA would be entitled to humanitarian protection if he discharges the burden upon him: he is not excluded by his criminality, the First-tier Tribunal having quashed the Secretary of State's certification under s72 Nationality, Immigration and Asylum Act 2002.

Article 8

68. There was no disagreement between the parties about the approach we must take to Article 8, which we only intend to address should MAA fail to make out his Article 3 protection grounds. As a foreign criminal who has been sentenced to 4 years or more, MAA cannot succeed on Article 8 grounds on the basis of one of the 'exceptions' to the automatic deportation procedure set out in s33

Borders Act 2007. He can only defeat the proposed action if he can demonstrate that there are "very compelling circumstances over and above" those matters. This very high test is reflective of the strong public interest in the deportation of serious criminals. In making our assessment we must have regard to a wide range of factors which in this context, would include conditions on the ground in Somalia.

Article 4

69. Before we turn to make our findings on MAA's appeal, it is appropriate that we record one submission which we do not intend to address. It was Mr Toal's analysis of the evidence about 'Gatekeepers' – those who guard and control the IDP camps in and around Mogadishu - that the inhabitants of those camps are kept in conditions which mean that they are, as a matter of law, to be classified as victims of trafficking. In very brief summary the point made is that the definition of trafficking set out at Article 4 of the European Convention on Action Against Trafficking in Human Beings (ECAT) includes the "harbouring or receipt of persons" for the purpose of financial exploitation. Since there is some evidence of Gatekeepers keeping IDPs confined to their camp, and subjecting those IDPs to unlawful and oppressive 'taxation' – i.e. taking a proportion of their meagre resources - that definition is *prima facie* met. As we explained to Mr Toal at the hearing, we are not going to deal with this blanket submission. This is not a country guidance case, and it is of no concern to MAA whether or not other Somalis find themselves in a trafficking situation. We are concerned only with the potential risks to him.

The Facts

MAA's Life in Somalia

70. MAA arrived in the UK on the 11th April 2008, when he was sixteen years old. We accept the following relevant facts about his life until that point.

71. MAA states that he was born in Farhad in the Lower Shabelle but when he was very young his family moved to Mogadishu after militias seized their land. They lived in a district called Hodan, near 30th Street. MAA attended the Imam Shafi'i school. There was a period when the fighting was too heavy to attend, but on and off he was there for about 4 years. MAA was a good student. He states that security in Mogadishu at this time was very poor. He details a number of incidents where he was attacked or robbed or both, and a time when a missile hit his family home. He also experienced a lot of bullying and difficulties with other boys in the area.

72. When he claimed asylum it was MAA's case that he is from the minority Ashraf clan. That claim was rejected by the First-Tier Tribunal. In seeking permission to appeal against that decision MAA made no direct challenge to that finding. Insofar as a challenge could be implied, in the ground that the Tribunal had failed to have regard to his mother's statement, permission was in any event refused. MAA did not make any representations on the issue of his ethnicity by way of a response to the Secretary of State's appeal filed in accordance with Rule 24(3)(e) of the Tribunal Procedure (Upper Tribunal) Rules 2008. Nor was the matter raised before Judge Bruce at the 'error of law' hearing in October 2020. Before us Mr Toal nevertheless sought to re-open the question of whether MAA is from a minority Somali clan. We declined to hear those submissions. Having had regard to that chronology of proceedings thus far we are satisfied that it would not be in the interests of justice to permit a challenge to be mounted to this finding of fact at such late stage. The finding that MAA is not of a minority clan is therefore preserved.

73. MAA states that he has not seen any member of his immediate family since 2005. He had gone to school early in the morning but fighting broke out and so the children were all told to go home. MAA tried to make his way home but there was gunfire so he ran the opposite way. By the evening he managed to reach the family home. He found the door locked. He went to his neighbour's house and found no adults, only children. They told him that they had returned home from school to find that their parents, and his, had fled. The children all stayed together: MAA, the twin neighbour boys aged 16, and their elder brother Abdi who made a living, and supported them all, by selling *qaat*. Sometimes the boys would get leftovers given to them by local cafes and shops. MAA remained with these brothers for about a year. He continued to attend school: because he had been a good student they did not ask for any fees.

74. After some time MAA heard from people in the area that his family had fled back to Farhan. He was told that his father was ill. He wanted to travel to Farhan to find his family but there were two obstacles. He did not have any money, and the fighting meant that travel was risky. He knew that his paternal grandmother lived just outside Mogadishu in Lafoole – it was only about one hour away on foot but once when he tried to go there he was attacked in the street so he was afraid to try again for a long time. It was not until 2006 that he managed to reach his grandmother's house. MAA remembers his grandmother as being "fairly well off". She had a herd of cows and used to sell milk. He stayed with her for about two months. She gave him money for another year of school fees and told him to go back to Mogadishu and carry on with his education. She had heard from people travelling from Farhan that his parents were there and this was their wish.

75. By the autumn of 2007 MAA had resolved to leave Somalia. The ongoing heavy fighting had meant that he had been unable to attend school for a month and. Many people left the city – when MAA reached his grandmother's house in January 2008 he found the whole area full of refugees. His grandmother sold

some of her herd and raised $10,000 to pay for MAA's journey. She got a relative to make contact with a well-known agent in Mogadishu, and MAA's trip was arranged. He flew to Somaliland, and then to Djibouti before continuing on to the UK.

MAA's Family

76. When MAA arrived in the UK he was in possession of a telephone number of a lady he had not at that point met. Her name is AH and she identifies herself as his paternal cousin – her mother and his father were half siblings. AH is the only relative MAA has any contact with. Since arriving in this country he has lived with her on and off and before she lost her job in the pandemic she had been supporting him financially. We heard oral evidence from AH. Not all of it was particularly helpful – she has been in the UK since 1996 and so much of her evidence about events in Somalia was hearsay. As we explain below, we are however prepared to place significant weight on what she had to say about the current whereabouts of members of MAA's family,

77. At the point that he left Somalia MAA had been living with his next door neighbours for approximately three years. The only family member with whom he had had direct contact was his grandmother in Lafoole. After his arrival in the UK MAA called his neighbour Abdi in Mogadishu to tell him of his safe arrival and Abdi had some exciting news for him. His father had returned to the city. He was unwell and had come to try and obtain medical treatment. Abdi told MAA that he would arrange for his father to be there when he called back. After a couple of days this call took place. MAA's father told him that his two sisters were living with a maternal uncle in Farhan, and that his three brothers were placed with another uncle. Their mother was living with friends. Mr Anderson asked us to reject the evidence about this telephone call on the basis that it was unclear how MAA's father would have had contact with Abdi. We are satisfied that this was quite straightforward – he was the next door neighbour. It is natural that upon returning to the city MAA's father would go to his own house, and speak to the neighbours. Further, MAA's evidence is that his grandmother in Lafoole had at least indirect contact with her son in Farhad, communicated through people who were travelling between the locations, so it is probable that MAA's family were aware that he had been living with Abdi and his brothers.

78. It is MAA's case that this was the last time he spoke with his father. He claims that in 2013 his father was killed in a bomb blast at the Supreme Court in Mogadishu where he had got a job working for the government. This evidence was rejected by the First-tier Tribunal because it was contradicted by evidence elsewhere that the father made a living selling farmland and labouring. Permission to appeal that finding was refused on the 12th June 2020 by Upper Tribunal Judge Macleman. Undeterred by that, Mr Toal sought before us to

argue the point, calling evidence from AH about her understanding of where MAA's father had worked and when, and the circumstances of his death. As we indicated at hearing, we are not prepared to revisit a matter upon which permission has been expressly refused. We would note that even if we had exercised our discretion in MAA's favour, it would not have assisted him. That is because the evidence we heard about MAA's father was even more confused than the evidence already before the First-tier Tribunal. The previous evidence that he died in a bomb blast was directly contradicted by the testimony of AH that he was in fact shot by an al-Shabaab fighter. The evidence that he died at the Supreme Court complex is contradicted by a letter from the Somali Embassy in Kampala that he died at the Benadir District Court. Had this been a matter upon which we could properly replace the finding of the First-tier Tribunal, we would have found that the evidence was not capable of discharging the burden of proof, even to the lower standard. Finally we would note that the point is, for the purpose of our risk assessment, largely moot, since MAA's own expert witness, Mary Harper, concludes that no additional or discrete risk would attach to him if his father had happened to be killed in a terror attack on the court complex in 2013.

79. The question then arises: where are MAA's family today?

80. We are satisfied on the evidence before us that his paternal grandmother resident in Lafoole died in Somalia in 2014. This was the evidence of AH, and we have no reason to doubt her evidence on the point. AH was not in Somalia at the time but we accept that she was told, and she believes, that her grandmother died at that time. Applying the lower standard of proof, and having regard to the life expectancy for women in Somalia, we accept that it is reasonably likely that this lady did indeed die in 2014.

81. We are satisfied on the evidence before us that MAA's mother and siblings are now living in Kenya. This was the understanding of both MAA and AH, and their assertions were supported by corroborative evidence to which we are prepared to attach significant weight. We have before us a signed statement prepared by Rosemary Kate Jessop, MAA's solicitor at Brighton Housing Trust. Ms Jessop explains that on the 31st October 2019 she telephoned a number with a Nairobi dialling code and spoke, with the assistance of an interpreter, to a woman who identified herself as MAA's mother. Although the line cut off on the first few occasions Ms Jessop tried again and on the fourth attempt managed to speak to the lady for 42 minutes. The statement Ms Jessop took is in the bundle. The woman told her that she and her children had fled Somalia and they were living in a house in Nairobi with other Somalis and Muslims from the mosque. She is unwell and she and the children survive on the charity of others. Ms Jessop asked the woman if she could provide some evidence that she and the children are in Kenya: she took some photographs and sent them. They show a lady in a burqa with a number of children. They have taken the picture in front of the sign for the children's school, and in front of the school bus. In his oral evidence MAA identified the people pictured as his mother and

siblings. We recognise that it is of course possible that MAA's mother travelled temporarily to Kenya in order to lie to Ms Jessop and this Tribunal but we think it unlikely. There are a huge number of Somali refugees living in Kenya and given that she is a female head of a household we find it altogether more likely that she has left that country, where she is - according to the country guidance in MOJ - particularly vulnerable.

82. That leaves MAA's father. It was the conclusion of the First-tier Tribunal that he was not killed in 2013, and as we explain above, we are not prepared to interfere with that finding. We are however prepared to accept, on the lower standard of proof, that it is reasonably likely that he is not currently in Somalia. That is because of the evidence about what he did after MAA left the country in 2008. It was the wholly credible evidence of AH that at some point unknown, MAA's father abandoned his mother and married a second wife. This was not talked about or acknowledged within the family for some time. AH told us that she was very shocked when she found out. The second wife started calling people in the family in approximately 2014 and started asking for help and money – she claimed that al-Shabaab were threatening her. As far as AH is aware this woman, and the children she had with MAA's father, are all now in Uganda. Evidence of their presence there has been produced in the form of a letter dated 27th November 2014 from the Somali Embassy in Kampala and a Ugandan refugee identity card. On the basis of this evidence we are satisfied that wherever MAA's father is, it is reasonably likely that he is not in Somalia, since both his wives and families are now living elsewhere.

83. We further accept on the lower standard of proof that it is unlikely that any support will be forthcoming from MAA's father, wherever he might be. It is MAA's evidence that he had a very poor relationship with his father. When interviewed MAA informed Dr. Bell, a Consultant Psychiatrist, that his father beat him regularly as a child and that they were in effect estranged. This appears to be borne out by the fact that as a teenager MAA stayed on his own in Mogadishu for three years, and then made the journey to Europe, rather than reuniting with his family in Farhan, a journey that may have been difficult, but was evidently possible, given the information passed by travellers between MAA's father there and his grandmother in Lafoole.

84. We are therefore prepared to accept, in light of the above, that MAA has no close relatives to whom he could turn living in Mogadishu today. Mr Anderson is quite right to say that he *may* have more distant relatives such as cousins or uncles in the city. To make such a finding would however require some speculation on our part, and we are satisfied that it is reasonably likely that if any such individuals do exist they would be unwilling to offer him any real support: as someone who has been living in the west for 13 years it is difficult to see why he would attract their sympathy and valuable resources.

MAA's Life in the UK

85. MAA arrived in United Kingdom on the 11th April 2008 when he was sixteen years old. He has never had any leave to remain in the United Kingdom. His asylum claim was refused in 2008; his appeal against that decision was unattended, and subsequently dismissed.

86. In the first few years that he lived here MAA moved between AH's home and the care of the local authority. He found it difficult to settle, moving between Littlehampton and Worthing. MAA succinctly summarises his slide into criminality like this:

> "I was initially looked after by the Social Services under the leaving care provisions, but I lost their support and accommodation in 2011 and became homeless and had no support. I started sofa surfing. I had fallen in with a bad crowd, and started behaving badly myself, first drinking alcohol and later taking drugs. When I arrived in the UK I had never had any alcohol and when I started drinking I became dependent on it and could not live without drugs….I did not have any money to buy them. The dealers who I got my drugs from said that I could have drugs if I sold the drugs for them and gave them money for the drugs and so this is what I did…."

87. He received his first conviction, for selling cannabis, in November 2011. A number of other minor convictions followed before the index offence of possession of a Class A drug with intent to supply led to the sentence of 4 years, handed down at Chichester Crown Court on the 19th April 2014. MAA served 24 months[15]. Although he admits to having tried Spice in prison he states that he has been clean since the beginning of 2015. He worked in the prison's education department and claims to have undertaken some courses, although he has lost the certificates. Since his release he has complied with all his probation requirements and his licence ended in May 2018: he has been assessed as being at a low risk of reoffending. He currently spends his time volunteering for a Somali community group in Brixton. He has been supported by AH but since the pandemic started she has lost her job in accountancy and is finding it difficult to give him what she once did.

88. Having had regard to the probation materials and MAA's circumstances the First-tier Tribunal was satisfied that he presented a low risk of reoffending and accordingly found MAA to have rebutted the presumption in s72 Nationality, Immigration and Asylum Act 2002 that he is a danger to the community. That finding is unchallenged by the Secretary of State.

The Medical Evidence

[15] He served an additional three weeks in immigration detention.

89. MAA relies on the expert assessment of two mental health professionals. We have been provided with a report by Consultant Forensic Psychologist Dr Lisa Davies, dated 20th September 2019, and a report by Consultant Psychiatrist Dr DL Bell dated 8th March 2021. We are satisfied that both Dr Davies and Dr Bell are suitably qualified to give evidence in this capacity. We note Mr Anderson's objections to the late admission of Dr Bell's evidence, which was not filed and served until the day before the hearing. We recognise that this was contrary to directions, but in view of the potential significance of such evidence, and the fact that Mr Anderson was able to produce a cogent supplementary skeleton addressing it, we do not consider that the Secretary of State was so disadvantaged that it would in the interests of justice to exclude it.

90. In 2019 Dr Davies met with MAA for two and half hours and interviewed him with the assistance of a Somali interpreter. Her report is primarily concerned with whether he presented a risk of reoffending: it was relied upon before the First-tier Tribunal to rebut the presumption that MAA is a danger to the community. Dr Davies does however make some findings of potential relevance to the assessment which we must make today, in respect of MAA's circumstances upon return to Somalia. It was not Dr Davies' view that MAA was suffering from Post- Traumatic Stress Disorder or depression, but she acknowledged that at some points he had experienced symptoms associated with both, for instance in 2015 when he witnessed the suicide of a peer in prison. MAA reported to Dr Davies that even in these periods he had not sought medical help but had rather managed his symptoms himself by actively socialising and playing football. Dr Davies found no indications of maladaptive coping strategies being used to manage the stress MAA faced as a result of his proposed deportation. There was at the time that she prepared her report no evidence of suicidal ideation, nor past engagement in suicide attempts or self-harm, but she did conclude that the risk of suicide "could increase if deported", given his reported past history of depressed mood. Dr Davies concluded:

> "Deportation would likely result in an exacerbation of symptoms of depression and trauma should he be exposed to further conflict and the separation from current supportive relationships would likely render him vulnerable to exploitation in his future and a relapse of drug and alcohol abuse".

91. This year, very shortly before the hearing, MAA was interviewed online by Dr Bell. He observed MAA to be clean and appropriately dressed, and that he did not appear to be obviously psychiatrically unwell. The history presented to Dr Bell by MAA was that as a young child he was regularly beaten by his father, with whom he did not enjoy a good relationship; thereafter he witnessed many traumatic scenes such as seeing dead bodies in the street and people being killed or injured around him. He was separated from his family and after his arrival in this country ended up abusing drugs. He then spent time in prison.

92. MAA explained to Dr Bell that he feels depressed and ruminates about his current predicament: he is unable to work, his future is uncertain, and he is filled with feelings of guilt and remorse. He tries to prevent these feelings overwhelming him but sometimes he becomes filled with rage, and when he is very low he cries. Dr Bell records:

> "he does suffer suicidal ideation wishing he were dead or would not wake, although he has never acted upon this, that is there have been no suicide attempts. It is clear that he feels protected by his religion beliefs, being a Muslim he believes it to be a sin to kill himself"

93. MAA told Dr Bell that he has difficulty sleeping, and that sometimes he stays in the same clothes for days without washing. Dr Bell thought this to be a "very significant degree of self-neglect". MAA reported suffering from nightmares once or twice per week, and explained that sometimes the dream continues even after he has woken. Dr Bell states this to be typical of traumatic dreams. MAA said that his days are unstructured, and his appetite is poor; he spends his days in a "profoundly apathetic listless state" and suffers from a high degree of social isolation. Dr Bell records that before the pandemic MAA did however play football, went to restaurants with friends and attended mosque. He feels supported by his friends and although he has not been able to see them over lockdown he has regular contact through social media chatgroups. MAA reported being much more disturbed by phenomena of paranoia, flashbacks and noise sensitivity prior to 2018.

94. Having had regard to the answers given to him by MAA, Dr Bell concludes that he is suffering from Depressive Disorder in partial remission, and that he also shows typical features of PTSD, although he does not currently meet the full diagnostic criteria for this condition: Dr Bell explains that it is common for traumatised states to eventuate into depressive disorder. Dr Bell writes:

> "It is highly likely that the support provided to him by his cousin and his network of friends, particularly those with whom he plays football, has been of great importance in terms of providing emotional and social support. Disorders such as these are however highly context dependent. Any disruption to the current context will result in a relapse into a more disturbed psychiatric state, similar to that which he has encountered previously…
>
> The prognosis for [MAA] is entirely dependent on the outcome of the immigration proceedings…In the event that a decision is made to return him to Somalia there will be a deterioration in his psychiatric state…"

95. Dr Bell notes that although MAA does not currently receive any treatment in this country, given the stability of a regularised immigration status his capacity for further rehabilitation would be improved. By contrast Dr Bell believes that if returned to Somalia, there will "in all likelihood be a deterioration in his mental state". Dr Bell bases this prognosis on the following factors:

i) Any separation from AH and current friends "will re-ignite in his mind the major trauma he suffered when he was suddenly separated from his family as a teenager"

ii) He will have no familiarity with Somalia, nor any familial or social support of any kind. This will constitute a major external stressor leading to a further deterioration in his mental state. "He is likely to become extremely vulnerable to exploitation by others"

iii) Returning to the scene of traumatic events will mean he is "very likely to break down" and end up self-medicating with drugs and alcohol.

96. Mr Anderson has made some cogent criticisms of this medical evidence, in particular the evidence of Dr Bell. The Secretary of State asks us to note that Dr Bell does not appear to have had access to all of the relevant documentation, and that he proceeded on the basis of assertions that have in fact been rejected by the Tribunal, for instance the claim that MAA's father was murdered by Al-Shabaab. Dr Bell concludes that MAA is socially isolated and is exhibiting a "significant degree of self-neglect" without exploring whether not seeing people and not getting dressed for days on end may simply be related to the Covid-19 lockdown: in the context of the pandemic those reported behaviours are not at all unusual. They are to be contrasted with Dr Davies' observations that pre-pandemic MAA had an active social life, regularly playing football, going to cafés etc. Dr Bell himself observed MAA to be cleanly dressed, and did not consider him to display any outward signs of mental illness, and recorded that MAA has continued to have regular social contact with his friends in accordance with public health regulations.

97. We consider much of this criticism of Dr Bell's report to be well-founded. We do not however find much to turn on it. It is accepted that MAA grew up in Mogadishu during a period in which street to street fighting, shelling and inter-clan violence was still commonplace. He made the journey to this country on his own whilst only 16, and it is not contested that he ended up using drugs and in prison, exposing him to the extreme violence of the narcotics industry. On those facts we find it to be unremarkable that he suffers some mental health sequalae from those successive challenges. Since his release from prison he has had the threat of deportation hanging over him. He reports being filled with remorse and regret, and feels despondent about his situation. Again, none of that is surprising and we see no reason to reject that evidence. Both Dr Bell and Dr Davies believe that MAA's symptoms of depression are likely to worsen should he actually be deported. We accept, at least in the short term, that this is likely to be true. He has his cousin in this country who supports him, and a good number of friends. He is actively involved in the Somali community and has spoken of valuing the guidance he receives from the elders. We fully accept that an involuntary dislocation from all of that is likely to be emotionally

difficult, and that MAA will likely experience an increase in his symptoms of depression.

98. We are not however persuaded that such a deterioration will have any significant impact on the decision that we need to make. First we note that no issue arises in respect of the lack of treatment in Somalia, for the simple reason that MAA has not received treatment here. Dr Davies notes that at the very height of his trauma – in the aftermath of witnessing a suicide – MAA was able to deal with it on his own by socialising and playing football. Dr Davies opines that a worsening in MAA's mental health will "likely render him vulnerable to exploitation… and a relapse of drug and alcohol abuse", a view with which Dr Bell concurs. We are unclear about the circumstances in which it is feared that this might arise. We note that in the years since he was sent to prison MAA has shown admirable strength in recovering from what he regarded as a drug addiction. Despite the very difficult circumstances that he currently finds himself in he has made the conscious decision to avoid 'the wrong crowd' and any further involvement in either drugs or alcohol. We further note that Dr Bell bases his conclusions in this regard at least in part on the assumption that MAA will have no familiarity with Somalia: on the facts, this is simply incorrect. MAA lived in Somalia until he was 16, for approximately three of those years independently from his family. He has retained cultural connections through regular contact with the Somali community in this country. The suggestion that he would somehow be a 'fish out of water' is therefore unfounded.

The Country Background

99. We are bound to apply the country guidance of MOJ, and neither party asked us to depart from it. We were nevertheless provided with almost 2500 pages of additional country background evidence. Whilst we have looked at all of that material we do not intend to summarise it in our analysis below. We shall only refer to additional material where it either specifically addresses the issues in this appeal - as in the helpful expert evidence of Ms Mary Harper, BBC Africa Correspondent[16] – or where it post-dates MOJ and materially adds to what is said in that decision.

Analysis and Findings

100. MAA is a foreign criminal as defined by s32 of the Borders Act 2007. This means that the public interest requires his automatic deportation, unless he can

[16] We have been provided with two reports by Ms Mary Harper relating specifically to this appeal. The first is dated 9th January 2020, the second the 28th February 2021.

bring himself within one of the 'exceptions' set out in s33. MAA contends that he can bring himself within 'exception 1' as set out at s33(2)(a) of the 2007 Act: he seeks to prove that his deportation would breach his rights under the ECHR. Specifically he contends that he faces a real risk of enduring inhuman and degrading treatment such that would violate Article 3 ECHR and/or that there are "very compelling circumstances" such that his deportation would be a disproportionate interference with his Article 8(1) rights.

101. Because MAA raises protection grounds, through the prism of Article 3, we frame our assessment using the country guidance extant at the date of hearing, MOJ. We begin by considering whether MAA faces a real risk of actual physical violence, before going on to assess whether it is reasonably likely that he will find himself living in conditions of such dire poverty such that he would face "intense suffering" or a significant reduction in his life expectancy.

Violence

102. Generally, a person who is an ordinary citizen returning to Mogadishu will face no real risk of serious harm such as to engage Article 3 of Article 15(c) of the Qualification Directive. In MOJ the Tribunal specifically considered the risks pertaining to returnees, and rejected the contention that this class of person faces any enhanced risk of targeting by groups such as al-Shabaab for that reason alone. Although al-Shabaab continue to pursue a strategy of "asymmetrical warfare" by the use of terrorist attacks in the city, the Tribunal in MOJ held that civilians can mitigate any risk by avoiding areas and establishments that are clearly identifiable as likely targets.

103. MAA has been out of Somalia for 13 years. We accept that during that time a lot will have changed in Mogadishu and that to some extent, this will present MAA with a disadvantage. However it is not an obstacle that will be particularly difficult for him to overcome. As the Tribunal observed in MOJ, avoiding the places that might be vulnerable to terrorist attack is a matter of common sense, not specialist insider knowledge. MAA navigated the city when it was ravaged by open fighting: we infer that he therefore has the experience to understand that today he should not, for instance, linger near an army checkpoint or other location that might be a target.

104. MAA has been candid in his evidence that he can still speak Somali, and that he has ongoing involvement with the Somali community in the UK. It cannot therefore be said that he is unfamiliar with Somali culture, or would have forgotten 'how things work'. In MOJ the Tribunal rejected for lack of evidence the supposition that a returnee might face a risk – from terrorists or other criminals – simply by virtue of being someone who has lived in the West: Mogadishu has in recent years attracted returnees from the diaspora on a large scale, and that as a result many accents can be heard on the streets, from

Geordie to Minnesotan. The evidence does not establish that standing out as a former resident of the UK would cause MAA any problems.

105. In so finding we reject the submission of Mr Toal that there is a real risk that MAA would be targeted for extortion or kidnap by criminal elements. This was a matter specifically addressed in MOJ and the scant evidence before us on the topic did not provide sufficient basis upon which to depart from the conclusions in that case. We were taken to a 2019 article published by Cornell University Law School[17] in which the authors analysed reports of Bantu people forcibly returned to Somalia from the United States facing kidnap and ransom upon their return. As the authors of that study acknowledge, the Bantu are a distinct group who have suffered particular racial discrimination and marginalisation within Somalia. As such they are particularly vulnerable, not just to attack, but to the state's failure to protect them. MAA is not Bantu, and this evidence is of no assistance in establishing that he would face a similar level of risk.

106. In her reports Ms Harper expresses her own concerns about the potential risks to MAA's personal security upon return to Somalia. She states that he "may" encounter problems at the airport if he appears "jittery". We are unclear as to why MAA might appear jittery or what problems he might encounter. Whilst we understand being an obviously non-Somali woman at the airport is probably a challenging experience for Ms Harper, we are unable to understand why MAA might draw adverse attention to himself in this way. Second she suggests that having a criminal conviction for drug dealing is a matter which could lead to MAA facing social stigma or rejection. Even if we accept Ms Harper's expert assessment that Somalis are "extraordinary gossips and communicators" who know each other's business, we have found that MAA knows no-one in the city. In those circumstances it is not reasonably likely that anyone would come to know that he has criminal convictions in the UK. We further note the conclusions in MOJ [at §200] that there is no real evidence of such returnees being shunned.

107. For the sake of completeness we note that the Tribunal in MOJ rejected the suggestion that returnees would face a real risk of forced recruitment to terrorist groups and nothing in the evidence before us leads us to depart from that finding.

108. Having considered all of those matters, we are satisfied that there is no real risk of MAA being targeted by violence or criminality simply because he is a returnee. We do accept that discrete risks may arise if he finds himself living in insecure living arrangements and we return to this matter below.

[17] *Removals to Somalia in Light of the Convention against Torture: Recent Evidence from Somali Bantu Deportees* Van Lehman, Daniel and McKee, Estelle M. 33 Georgetown Immigration Law Journal 357 (2019)

Living Conditions

109. In MOJ the Tribunal heard evidence that there is a broad spectrum of circumstances in which people live in Mogadishu. At one extreme the wealthy live in gated compounds guarded by armed security personnel. At the other are the dispossessed who live in makeshift dwellings described by Mary Harper as "igloos", "made of sticks, cloth, plastic, metal. Not tents. Dwellings. Crammed into patches of spare ground, closely together. Inside there is just sand or cardboard or plastic on the ground". The Tribunal accepted that life in such a structure amounted to destitution [§182] and could properly be described as "appalling" [§411]. Where an individual returnee was likely to end up depended on a number of factors, including whether he had family connections, was in receipt of remittances or another source of income, and whether he was able to work to support himself. The Tribunal concluded, although it was not given evidence on the point, that logically there must also be types of dwellings falling somewhere in the middle of this spectrum.

110. Nothing in the evidence before us indicated that this spectrum, or the circumstances at its polar extremes, had materially changed.

111. In her two reports Ms Mary Harper confirms that she has visited IDP camps in and around Mogadishu on several occasions since she gave her evidence in MOJ. She describes the conditions as "shocking" even compared to other refugee camps elsewhere in Africa: "conditions in most camps are desperate, with inadequate flimsy shelters made from twigs, cloth and plastic, limited food, water and sanitation". In February 2021, Ms Harper received information from an employee of the UN Office for the Coordination of Humanitarian Affairs who works directly with IDPs in Mogadishu. He describes conditions in the camps as "dire, very dire". Before us Mr Toal made extensive argument about a further challenge faced by residents of IDP camps: predation by the 'Gatekeepers', which ranges from the diversion of funds to rape and beatings, as outlined in the Human Rights Watch report cited at §470 of MOJ.

112. Ms Harper reports that for those dispossessed who are unable to gain entry to a camp an alternative living arrangement is to take up residence on the streets or by squatting an abandoned building. She explains that such an arrangement is extremely precarious, not simply because of the likely poor quality of the shelter, but because of the substantial rise in the number of evictions occurring in the city. Evictions were certainly a feature of the evidence before the Tribunal in MOJ, being reported as a routine hazard by organisations such as UNHCR and Amnesty International, but having had regard to the evidence before us, we accept Mr Toal's submission that they appear to have increased exponentially in the intervening years in line with the rapidly increasing demand for land. Today the Secretary of State accepts that forced evictions are a serious problem in Mogadishu. In the November 2020 Country Policy and

Information Note *Somalia (South and Central): Security and humanitarian situation* the joint report of various NGOs is cited as follows:[18]

> 'Forced evictions are a huge threat to Mogadishu's IDPs and urban poor. Benadir is the most affected by evictions: in 2019 so far, there have been 95,004 evictions in the region.... Most are forced, with only very few lawful evictions or evictions with dignified relocations. In most cases, evictions are enforced by a private citizen from his or her property in order to develop their land, where, as often happens, the residents had no formal (written) agreement in place with the landlord.'

113. This concern, of eviction from private land by landlords keen to develop it, is echoed in much of the material produced on behalf of MAA. These reports are concerned not just with 'igloo' dwellers being pushed off a patch of open land, but squatters being forced from buildings, often damaged or abandoned, where they have made their home, sometimes for extended periods of time; there have also been instances in which informal camps have been cleared. As in MOJ, the large influx of people moving into the city is identified as a driver of these evictions, with property prices having risen to meet demand. One aspect of the evidence before us that did not appear to feature in MOJ was alleged government complicity in these evictions. The CPIN cites a report by Refugees International (December 2019) to the effect that the "greatest fear" of insecure communities is that the "government will take their land" [§3.10.2]. As Mr Toal stressed, there is now in addition some evidence of police, soldiers and/or government-affiliated militias assisting in private evictions:

> "The breakneck pace of urbanization has led to price increases and growing competition for property, against the backdrop of a weak institutional framework. Given that they can frequently act with impunity, landlords are known to employ armed men (including police officers acting in a private capacity) and forced evictions are common"

[International Institute for Strategic Studies, May 2020].

114. The evidence before us indicated that for many people living in these precarious circumstances access to food remains a regular concern, as it was at the time of MOJ. The Tribunal then found food insecurity to be a fact of life for many people in Somalia: it was taken to evidence [at §281] that the number of individuals in this category could be as high as 870,000, and that a further 2.3 million were classed as food "stressed".

115. Having had regard to all of this evidence we accept without hesitation that there are many people in Mogadishu living in conditions that can properly be described as inhuman and degrading. If you are a resident of a poorly equipped and run camp, where food supplies are short and you are at the mercy of exploitative Gatekeepers who take the meagre aid intended for you for themselves, you risk facing daily the physical and mental harms of hunger,

[18] Joint Report by the IIED, Econvalue Consult, SDI Kenya, SDDirect and Tana

heat, cold, disease and violence. So too are the 'igloo' dwellers, perching precariously on illegally squatted land in the city, potentially exposed to such conditions. They now contend with the ever present threat of eviction: the dispossessed being further dispossessed. We can accept that even if an eviction is conducted in a calm and non-violent manner, it is still a profoundly challenging life event if you have nowhere else to go. Where the evictions occur without warning, and without mercy, armed men turning up without notice to force residents out, it is likely to be extremely frightening and we accept that it is likely to have a 'knock-on' effect on the individual's ability to continue working, or receive basic humanitarian supplies or other services such as education or healthcare. If your only option is to squat in another – equally insecure – pitch there is certainly the potential for inhuman and degrading circumstances to arise. As Baroness Hale explained in Adan Limbuela and Tesema whether the high threshold is reached will depend on the individual concerned, the overall circumstances in which he or she finds himself, and crucially whether there is any hope of escape from that predicament:

> "It might be possible to endure rooflessness for some time without degradation if one had enough to eat and somewhere to wash oneself and one's clothing. It might be possible to endure cashlessness for some time if one had a roof and basic meals and hygiene facilities provided. But to have to endure the indefinite prospect of both, unless one is in a place where it is both possible and legal to live off the land, is in today's society both inhuman and degrading".

116. Whilst the House of Lords was there considering the position of asylum seekers under the care of the British state, and so applying a different threshold, the point is a good one. Hopelessless undermines dignity, wherever you are. Sustained and extreme deprivation is, we think uncontroversially, a material condition likely to lead to a "significant reduction in life expectancy". Even the strongest and most resilient individual can experience "intense suffering" where conditions are bad enough.

117. We therefore accept that it is certainly possible that a returnee from the UK to Somalia may face a real risk of enduring living conditions which would cumulatively amount to serious harm contrary to our obligations under Article 3. To determine whether that is reasonably likely to be the fate of MAA, we return to the analysis in MOJ.

118. The country guidance is that 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. We accept that it is reasonably likely that MAA has no nuclear family remaining in Mogadishu, and no other relatives to whom he could turn. We cannot know whether MAA will receive support from his clan, for the simple reason that we do not know what clan he is from. We therefore proceed on the assumption that he will not be receiving any support from clan members. Having had regard to the totality of the evidence presented on this point in MOJ we accept that the nuclear

family has become the primary support mechanism in Somali society and that the relevance of clan membership has diminished. MAA is a returnee who has been in the West some 13 years. We consider it unlikely in those circumstances that he would be offered material support by anyone simply by virtue of shared lineage.

119. We therefore need to make a careful assessment of MAA's circumstances. In MOJ the Tribunal identified the relevant considerations to include:

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

120. We accept that MAA is likely to face considerable difficulties in a number of respects. We have already acknowledged that he has no relatives or clan associations that he could call upon in the city. He has been away a long time and as such may not even have any friends left there, for instance we do not know what might have happened to Abdi and his brothers. We accept that it is reasonably likely that MAA will not be in receipt of remittances from abroad. AH has done what she can for him, but having recently lost her job is not in a position to carry on funding him. MAA's remaining family members are living as refugees in neighbouring countries and we see no reason to reject their evidence that they are living in impoverished circumstances themselves. Mr Anderson asked us to note that at the time of his departure MAA's grandmother had managed to sell enough cows to fund a $10,000 one way trip: applying the guidance in MOJ he asked us to find that a family with that kind of resource is likely to still have it. We are not prepared to make that finding. We have already accepted that MAA's grandmother has since died. We have no means of knowing what happened to her herd of cattle, nor indeed any other property she might have had. She apparently had many grandchildren, and a family who have been dispersed both within Somalia and internationally. We find it impossible, in those circumstances, to draw any certain conclusion on

what might have happened to her estate. We can however be satisfied that it is at least reasonably likely that MAA will not derive any material benefit from his deceased grandmother's estate today.

121. We note that before us there was some debate about whether MAA would, upon departure, qualify for any kind of payment from the UK government or other body. The Secretary of State submitted that he would be entitled to a payment of £750 under the Facilitated Returns Scheme, so long as he signed a disclaimer confirming that he had no outstanding submissions or claim: he may in addition be entitled to a further discretionary payment of £500. These payments would be made on the point of departure, and are paid in cash.

122. We have had regard to the Secretary of State's published policy *The Facilitated Return Scheme* (FRS) (Version 8.0, 3rd October 2016). The introduction explains that it exists to "promote and assist early removals by encouraging full compliance and cooperation from eligible foreign national offenders (FNOs) willing to return to their country of origin voluntarily". The payment is intended to assist deportees in reintegrating in their countries of origin, and the document suggests that the money could be used for things such as setting up small businesses etc. It would therefore obviously be of some relevance to the decision we need to make in this case. Further reading reveals that the policy, and the FRS, will however be of no assistance at all to MAA. Contrary to the Secretary of State's submission it appears from the policy that MAA would be expressly *excluded* from the scheme, since he received a sentence of more than four years:

> *Applicants ineligible for FRS*
>
> Certain categories of foreign national offender (FNO) are not within the scope of the Facilitated Return Scheme (FRS) and if they apply will be rejected. These are where the applicant:
>
> • was given a custodial sentence of 4 years or more
>
> • was given a custodial sentence of under 4years but for an offence listed at 'Convictions for serious offences' below
>
> • committed their first criminal offence within 12 months of arrival in the UK
>
> • has pursued an immigration appeal beyond the first-tier tribunal or its earlier equivalents in the past

123. We therefore proceed on the basis that MAA will be returned to Somalia without the benefit of any grant under the scheme. It is unclear why the Secretary of State made submissions to the contrary, given the clear terms in which the policy is expressed.

124. We further note that Ms Harper's respondents appear unanimously pessimistic about the likelihood of MAA obtaining any kind of regular humanitarian relief once he lands in Somalia. Successive stressors currently faced by the aid community mean that basic supplies, and the means to distribute them, are under severe pressure. One NGO worker she spoke to in November 2020 said that for a lone male like MAA "the likelihood of him getting NGO support is zero": what resources there are would be given to the most vulnerable first, for instance the sick, children, women or the elderly.

125. We are therefore satisfied that MAA will, when it comes to income, be on his own. It is reasonably likely that he will find himself in Mogadishu with no 'return grant', no contacts, no access to remittances or NGO aid. The ultimate question posed by MOJ is however whether it is reasonably likely that MAA, an able bodied young man unencumbered by dependents, will be unable to fend for himself by obtaining employment.

126. In MOJ the Tribunal found that Mogadishu was undergoing an "economic boom" and that there are considerable opportunities in the city, particularly for returnees, who are taking jobs at the expense of those who had never been away. The country guidance on employment is set out at §344-352 of MOJ. There the Tribunal describe the post-war economic revival of Mogadishu as "remarkable":

> 345. It is beyond doubt that there has been huge inward investment, large-scale construction projects and vibrant business activity. Land values are said to be "rocketing" and entrepreneurial members of the diaspora with access to funding are returning in significant numbers in the confident expectation of launching successful business projects. The question to be addressed is what, if any, benefit does this deliver for so called "ordinary returnees" who are not themselves wealthy businessmen or highly skilled professionals employed by such people.

127. In answer to its own question the Tribunal rejected the suggestion that it was only a tiny elite who might benefit from the economic boom. In the period leading up to the appeal in MOJ huge numbers of people had returned to the city; the Tribunal heard evidence about a resurgence of the hospitality industry as well as taxi businesses, bus services, drycleaners, electronics stores and so on:

> 349……The evidence speaks of construction projects and improvements in the city's infrastructure such as the installation of some solar powered street lighting. It does not, perhaps, need much in the way of direct evidence to conclude that jobs such as working as building labourers, waiters or drivers or assistants in retail outlets are unlikely to be filled by the tiny minority that represents "the elite".

128. As to the evidence to the effect that returnees from the West may have an advantage in the job market: "this is said to be because such returnees are likely to be better educated and considered more resourceful and therefore more

attractive as potential employees, especially where the employer himself or herself has returned from the diaspora to invest in a new business" [§351].

129. Mr Toal asked us to read that guidance in the light of evidence showing that today, for young people in particular, the unemployment rate is extremely high. An August 2020 report by the Finnish Immigration Service[19], based on a fact finding mission conducted in March of that year found that:

> "Mogadishu offers limited business and employment opportunities. There is hardly any work on offer and the best jobs are usually taken. The labour market in Somalia is very narrow, as the country has no industry that would employ a significant number of people…. There are no precise statistics on unemployment, but the figure is estimated to be high. Youth unemployment is also at a high level"

130. The youth unemployment figures we were shown from sources dated 2017-2021 varied, but averaged at a rate of about 65%. We note that similar figures appeared in the evidence before the Tribunal in MOJ [see for instance §287]. In fact the recent Finnish report concurred with the conclusions in MOJ in two other respects. It agreed that individuals coming from the diaspora have an advantage in the jobs market, and found that the high rate of youth unemployment notwithstanding, there are particular sectors of the economy where work can be found:

> "Mogadishu's lively diaspora-funded reconstruction offers work experience at building sites as a carrier, for instance. However there is a lot of labour on offer and work at construction sites does not pay much. Wages can be approximately US$100 per month. In addition, members of the majority population have negative attitudes towards construction work and do not want to do it. Those who work at building sites are usually members of marginal groups.
>
> The port of Mogadishu provides some job opportunities. Non-governmental organisations and the Somali government have few employees, security forces such as the police and military provide slightly more jobs. Many people earn their living from small scale sales at markets or by working at restaurants and tea shops. However the job of a waitress is one of low esteem and most people do not want to work as one"

131. Whilst we appreciate that low status, or physically demanding, jobs may not be attractive to a wide pool of applicants, it appears from this recent evidence that the position remains as it was when the Tribunal heard MOJ. There is a high rate of unemployment, particularly for the young, but the diaspora-driven boom of the past decade continues to provide work for those who are prepared to do it, particularly in the construction and hospitality sectors. It is logical to assume that those who are rejecting such work do so because they have other

[19] Somalia: Fact Finding Mission to Mogadishu in March 2020 *Security situation and humanitarian conditions in Mogadishu* 7th August 2020 Finnish Immigration Service Country Information Service

income to fall back upon: presumably the stigma attached to being a waiter is not so great that people would rather face destitution. This evidently leaves opportunities for those like MAA, who do not have the support of extended family or clan to fall back upon, and who cannot afford to have such misgivings about the 'status' of such occupations.

132. The burden rests on MAA to demonstrate that it is reasonably likely that he will not be able to secure a livelihood for himself in Mogadishu. On the evidence before us we are not satisfied that this burden has been discharged, even to the lower standard. Having heard his live evidence we concur with the view expressed, amongst others by AH, that he is a socially able and personable man. Although his difficult life experiences have left him with symptoms of both depression and trauma he has shown real fortitude in addressing these issues and does not present as mentally unwell. He is clearly intelligent: he was top of his class whilst still in Somalia and in effect continued to study on a scholarship as a result. He has shown resilience and willing. He has addressed his own mental health issues by exercise and socialising, and by utilising social media during the difficult, isolating days of the pandemic. We accept that he has worked hard to escape the pull of drug culture and rehabilitate himself by undertaking education courses in prison. Even in his current predicament he is continuing to seek to improve his situation by volunteering with a Somali community group.

133. We have also placed considerable weight on the striking fact that at the time that MAA left Somalia in 2008 he had been living independently of his family for between 2-3 years. Despite being a young teenager at the time he was able to utilise social connections (with Abdi and the twins), access education (he continued to attend school for at least a year), and travel within Somalia to visit his grandmother. We do not underestimate how difficult these years were for MAA. Mogadishu was at the time the scene of inter-clan violence and street to street fighting was still liable to erupt at any time, as MAA has himself described. He no doubt felt lonely and distressed that his family left him behind. And yet he managed not only to live and attend school, but to organise, with the assistance of his grandmother, his own departure from the country. We do not accept that as a grown man of 30 years old MAA will somehow have lost the skills that enabled him to do all of that.

134. Today he returns as a mature adult with spoken English and Somali, and a strong imperative to find employment. Whilst we see no reason to reject the concurring medical evidence that MAA's mental health will be negatively impacted by his deportation, we are not satisfied that this will prevent him from obtaining the work that he needs to rebuild his life. Accordingly we are not satisfied that it is reasonably likely that he will remain unemployed for long.

135. We accept, having had regard to the caselaw, the findings in MOJ and the evidence before us, that it is entirely possible that someone returning to Somalia

from the UK will find themselves living in conditions that are inhuman and degrading such that would place the UK in breach of its obligations under Article 3. Even applying the modified N test, the threshold is a high one, but on the evidence of the situation faced by those living at the 'wrong end' of the spectrum, we are wholly satisfied that it could be made out.

136. On the facts in this particular case, however, it is not. We are not satisfied that it is reasonably likely that MAA will find himself living in inhuman or degrading circumstances such that his life expectancy will be significant reduced, or that he will experience intense suffering of the kind envisaged by the jurisprudence. He does not have family, nor the hope of remittances from abroad. He will, we accept, find in difficult to readjust back to life back in Somalia. He is nevertheless a fit and able bodied young man who has proved himself capable of living in Mogadishu in far more challenging circumstances than those he faces today. He will be able to find work, albeit that it may be of low quality or low status, and that work will enable him to find and pay for accommodation somewhere in the middle of the spectrum identified in MOJ. It may be basic, but it will be secure. It follows that we need not consider further the risks attendant with life at the 'lower end' of the spectrum that featured in so much of the evidence presented by Mr Toal. He has the social skills and resilience to found a new private, and in due course a new family life, for himself. We accordingly dismiss the appeal with reference to Article 3/ Article 15(b) of the Qualification Directive.

137. Mr Toal made no discrete submissions on Article 8, save to point out that failure under Article 3 would not automatically translate to a failure under Article 8, applying the test set out at s117C(6) of the Nationality, Immigration and Asylum Act 2002. We accept, as does the Secretary of State, that this must be right. If "very compelling circumstances" was a benchmark intended to be equated with Article 3, the Act would have said so. It is nevertheless a very exacting test, which on the facts before us is not made out.

138. We have found that upon return to Somalia MAA is likely to face considerable difficulties. They are not however difficulties which he will be unable to overcome. He will be able to find work, and a roof over his head, and in time he will start to make his own connections and build a private life. The evidence indicates that he will face a deterioration in his mental health, and we see nothing controversial in that – he has however faced such a deterioration before, and as detailed by Dr Davies, has managed to overcome it. We would accept that MAA has built a private life for himself in this country and that he is socially and culturally integrated here. He has friends, his cousin and is active in his community. He has managed to build this, what might be termed his 'legitimate' private life, apart from and in spite of, his previous association with criminals. It is to his credit that he has done so. It is nevertheless a private life that has been established at a time when he had no status, and as such it is one that attracts only a little weight in the balancing exercise. We have taken into account his young age on arrival, and the fact that he has faced a series of very

difficult life events. We have no reason to doubt the assessment of the probation service, accepted by the First-tier Tribunal, that he presents a low risk of reoffending. We have weighed all of these matters cumulatively against the strong public interest in deporting serious criminals. Having done so we are satisfied that MAA has not established that there are very compelling circumstances in this case, or that his deportation would be a disproportionate interference with his Article 8(1) rights. The appeal is accordingly dismissed on Article 8 grounds.

Decisions

139. The appeal is dismissed on all grounds.

140. There is no anonymity order.

Gaenor Bruce

Upper Tribunal Judge Bruce
12th July 2021