Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/03094/2014

THE IMMIGRATION ACTS

Heard at Newport	**Determination Promulgated**
On 3 December 2014	**On 16 January 2015**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

AAA
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms J Elliott-Kelly instructed by Duncan Lewis Solicitors
For the Respondent: Mr I Richards, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal is subject to an anonymity order made by the First-tier Tribunal pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230). Neither party invited me to rescind the order and I continue it pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

Introduction

2. The appellant is a citizen of Somalia who was born on 2 March 1994. He arrived in the United Kingdom on 10 February 2011 with an EEA family permit as a dependent extended family member of his aunt who lived in the UK. He subsequently applied for a UK residence card based upon his relationship with his aunt but that was refused on 7 June 2013. He did not appeal against that decision.

3. The appellant then claimed asylum. He claimed to come from Mogadishu in Somalia. He claimed to be a member of a minority Bandhabo clan, sub-clan Bhar Sufi, sub-sub-clan Ahmed Nur. He claimed that when he was a child a bomb was thrown at his house which injured him causing the loss of an eye. His father and mother were killed and he went to live in another village outside Mogadishu where he lived with his aunt and her daughter. In 2009, the appellant says that he left Somalia to live in Ethiopia where he remained for 2 years before obtaining a family permit to live with his aunt in the UK.

4. On 17 April 2014, the Secretary of State refused the appellant's claim for asylum, humanitarian protection and for leave outside the Immigration Rules. The Secretary of State accepted that the appellant was a citizen of Somalia. However, the Secretary of State did not accept that the appellant was a member of the Bandhabo clan or that his home had been bombed, as he claimed, when he was a child. Further, the Secretary of State concluded that it had not been established that the appellant would be exposed to a real risk of indiscriminate violence falling within Article 15(c) of the Qualification Directive (Council Directive 2004/83/EC).

The Appeal to the First-tier Tribunal

5. The appellant appealed to the First-tier Tribunal.

6. In a determination promulgated on 1 August 2014, Judge Davidge dismissed the appellant's appeal on asylum and humanitarian protection grounds and under Articles 3 and 8 of the ECHR. The Judge made an adverse credibility finding against the appellant and concluded that he had not established that he was a member of a minority clan or that his home had been bombed when he was a child and as a result would be at risk on return. Further, in relation to Article 15(c), the Judge concluded that the appellant would not be at real risk of indiscriminate violence if returned to Mogadishu.

7. On 24 September 2014, the First-tier Tribunal (DJ McDonald) granted the appellant permission to appeal. Thus, the appeal came before me.

The Issues

8. The appellant challenges the Judge's decision on five grounds set out in the grounds of appeal and developed by Ms Elliott-Kelly in her detailed skeleton argument and oral submissions before me.

1. The Judge erred in law by failing to follow the (then) relevant country guidance decision relating to Somalia of AMM and Others (Conflict; Humanitarian Crisis; Returnees; FGM) Somalia CG [2011] UKUT 00445 (IAC) in finding that the appellant had not established an Article 15(c) risk in Mogadishu.

2. In applying AMM, the Judge erred in law in finding that the appellant had not established that he had a lack of affiliations or connections with Mogadishu relevant to his risk on return under Article 15(c).

3. The Judge's adverse credibility finding was flawed as she had failed to take into account the medical evidence concerning the appellant's mental health, including a diagnosis of PTSD.

4. The Judge erred in law in concluding that the appellant would not be at real risk of inhuman or degrading treatment contrary to Article 3 of the ECHR by failing to take into account the appellant's vulnerability on return as a result of his mental health as set out in the expert's report.

5. It was unfair of the Judge to find that the appellant had not established that he was a member of the Bandhabo clan and sub-clans by concluding that there was no objective evidence of its existence when that was not a point raised by the Secretary of State or at the hearing.

Discussion

9. In considering the grounds, it will be helpful to consider grounds 3-5 dealing with the Judge's findings of fact before considering grounds 1 and 2 dealing with her application of the CG case of AMM.

Ground 3: Credibility

10. Ms Elliott-Kelly submitted that the Judge had failed to take into account the medico-legal report of Dr Longman (at appellant's bundle pages 7-44) in reaching her adverse credibility finding. Ms Elliott-Kelly submitted that the Judge had merely paid "lip service" to the medical evidence. She had failed to take into account the evidence concerning the appellant's PTSD and the effect that might have had on his recollection and therefore provided explanations for the differences in his account which the Judge relied upon in finding the appellant not to be credible. She submitted that the Judge had found the appellant not to be credible at paragraph 22 of her determination and had merely "tagged on" at paragraph 23 reference to the expert's report which she had found to be "little assistance" in assessing credibility. Ms Elliott-Kelly relied upon the decision of the Court of Appeal in SA (Somalia) v SSHD [2006] EWCA Civ 1302 where the Court of Appeal had approved a statement by the IAT in HE (DRC – Credibility and Psychiatric Reports) [2004] UKIAT 00321 at [22] that:

> "Where the report is specifically relied on as a relevant factor in credibility, the Adjudicator should deal with it as an integral part of the findings on credibility rather than just as an add-on, which does not undermine the conclusion to which he would otherwise come."

11. Ms Elliott-Kelly's submissions on this ground have their origin in the Court of Appeal's decision in Mibanga v SSHD [2005] EWCA Civ 367 where the Court of Appeal concluded that an Adjudicator's adverse credibility finding was legally flawed as she had failed to consider the relevant medical evidence (there as to scarring on the appellant's body) before reaching an adverse credibility finding. In his concurring judgement, Buxton LJ succinctly stated the relevant principle at [30] as follows:

> "The Adjudicator's failing was that she artificially separated the medical evidence from the rest of the evidence and reached conclusions as to credibility without reference to that medical evidence; and then, no doubt inevitably on that premise found that the medical evidence was of no assistance to her. That was a structural failing, not just an error of appreciation,…"

12. In SA, the Court of Appeal considered Mibanga. Sir Mark Potter P (with whom Brooke and Moore-Bick LJJ agreed) said at [32]:

> "…where there is medical evidence corroborative of an appellant's account of torture of mistreatment, it should be considered as part of the whole package of evidence going to the question of credibility and not simply treated as an 'add-on' or separate exercise for subsequent assessment only after a decision on the credibility has been reached on the basis of the contents of the appellant's evidence or his performance as a witness."

13. Sir Mark Potter P went on to emphasise that a judge's decision must be looked at "as a matter of substance" based upon a fair reading of the decision (see [34]).

14. The medical evidence relied upon by the appellant under this ground is found at paras 7.3.1-7.4.7 of Dr Longman's report (at pages 14-17 of the appellant's bundle). At para 7.3.1-7.3.3 Dr Longman makes a clinical diagnosis of PTSD:

> "7.3.1 AAA showed clinical features of post-traumatic stress disorder so I assessed him more formally using the PHQ-9 depression questionnaire and the PTSD checklist (PCL-C), as well as using the DSM-IV diagnostic criteria for these conditions.
>
> 7.3.1 A diagnosis of post-traumatic stress disorder is in my opinion compatible with AAA's observed mental state. AAA's trauma symptoms were assessed formally using the PCL-C which is a PTSD (Post-Traumatic Stress Disorder) checklist used to evaluate symptoms of PTSD according to the DSM-IV diagnostic criteria. AAA scored 36 out of a possible 85 and met several of the DSM-IV diagnostic criteria (note that patients rarely fulfil every criterion and the diagnosis is based on the cluster of symptoms), which is consistent with a diagnosis of PTSD. See Appendix V.
>
> 7.3.2 AAA requires further assessment and will likely need treatment for his PTSD. He underwent a traumatic event at a young age. Furthermore he lost his parents at a young age. These factors make his situation complex and it is my opinion that a specialist referral is warranted. AAA is likely to require trauma-focused therapy or counselling, as

> stipulated in NICE guidance. NICE recommends that patients with PTSD should be offered trauma-focused therapy, and may require antidepressants. The guidelines suggest a limited course of therapy initially, but recognize that those whose trauma or PTSD has been prolonged may require longer courses of treatment."

15. At paragraphs 7.4.1-7.4.7 Dr Longman goes on to deal with the effect on the appellant's mental health "on discrepancies between accounts". Dr Longman begins at 7.4.1-7.4.2 to deal with the potential effects of those suffering from PTSD as follows:

> "7.4.1 In my professional opinion and from the clinical point of view, it is important to keep in mind that people who suffer from PTSD are frequently confused about dates and times. In patients with PTSD, memories – especially (but not only) those associated with the trauma – can be forgotten or "blocked out", and hence may be difficult to describe or retell in an interview, particularly during proceedings such as immigration interviews or court hearings, which are often perceived as stressful or adversarial.
>
> 7.4.2 I am aware that there are differences in AAA's accounts given on different occasions, and that these discrepancies have led to adverse findings regarding his credibility. Clinically, there are many reasons why differences between accounts may arise. It is recognised that traumatic experiences may be highly distressing to recount, that there may be 'gaps' in recall or retelling, and that the survivor may be unable to reveal their full trauma history in every interview, as the research summarized below has established."

16. At 7.4.3, Dr Longman quotes from a research paper setting out a number of conclusions concerning the effect on human memory and accounts of trauma in asylum seekers and refugees:

> "7.4.3 The medical and psychological research on human memory and trauma, and on accounts of trauma in asylum seekers and refugees, is relevant when considering AAA's account (Herlihy & Turner, 2006; Cohen, 2001; BPS, 2010; Istanbul Protocol, 2004, Van der Kolk, 1997). The researchers' conclusions include:
>
> *a.* *Memory is not a 'videotape' of events. Even in ordinary (non-traumatic) memories, there can be gaps, events recalled out of sequence, or discrepancies between accounts given on different occasions.*
>
> *b.* *Memories of trauma may be fragmented and difficult to retell in a coherent and sequential manner. PTSD may exacerbate difficulties with memory.*
>
> *c.* *In refugees and asylum seekers, discrepancies between accounts given on different occasions are very common.*

d. The discrepancies are greater when there are long time intervals between accounts and if there is PTSD.

e. Many persons suffering from PTSD also have difficulties recalling dates and times. Cohen (2001) remarks "Memory for dates and times is notoriously inaccurate."

f. Memory may be adversely affected by mental and physical illness such as head injury, poor nutrition, sleep deprivation, PTSD and depression, which are common in survivors of torture and abuse.

g. The medical research on memories of trauma concludes that discrepancies in asylum seekers' accounts do not necessarily imply a lack of credibility."

17. At paras 7.4.4-7.4.7, Dr Longman then reaches the following conclusions:

"7.4.4 In my opinion the above factors are relevant to AAA's accounts. He describes a highly traumatic experience. He has a clinical picture of PTSD and has a history of a serious head injury. He sleeps poorly and is likely to be sleep deprived. With these conditions and according to the medical research on memory, gaps in AAA's memory and discrepancies between his accounts would not be surprising clinically.

7.4.5 In this context, it is in my view unsurprising and clinically plausible that AAA did not disclose his full history during his initial police and screening interviews. AAA reported to me: "I was nervous in my interview and felt panicked. I wanted the interview to be over as quickly as possible because I felt so uncomfortable". Even in the relatively relaxed setting of a medical consultation AAA had difficulty in giving his account. In my opinion this lack of disclosure does not negate his account of trauma. I have seen many asylum seekers whose initial accounts were discrepant with their later accounts. In such cases it is common to find that the trauma history only emerges over considerable time. Paradoxically, it is often the case that the greater the level of clinical trauma, the more difficult it is for the survivor to speak about it, leading to misunderstandings about their clinical level of need.

7.4.6 There are also some clinical issues in working with medical interpreters. Trauma survivors may have difficulty in trusting interpreters, particularly telephone interpreters, who are anonymous (they usually provide only their first name if any, and an ID number for the agency they work with). It is common for survivors to be wary of confiding in interpreters from their own community. They may fear that the confidentiality will not be respected, and that their history will become known to their community. Face-to-face interpreters may be more easily trusted, because in general it is easier for someone to trust another person they can see. These problems are acknowledged by doctors and nurses working with diverse populations.

7.4.7 In addition, some individuals do not use the Western calendar to measure the passage of time and in some cultures the concept of

> orientation in time is of less relevance than it is in the West. The interpreter informed me that this was the case with AAA. Illiteracy may also limit AAA's access to information about date. These factors need to be borne in mind when considering AAA's difficulties of recalling temporal details of events in his history."

18. Judge Davidge undoubtedly had in mind Dr Longman's evidence. She set out extracts from the report and summarised parts of it relevant to the appellant's PTSD at paras 14-20 of her determination as follows:

> "14. There is a medico legal report from Dr Tania Longman obtained by the solicitors representing for the purpose of assisting me in my decision. The case had been previously adjourned to allow for the provision of such a report in light of the representatives expressed concerns that the Appellant was suicidal because he had been arrested walking on railway tracks. In the event it transpired that he had asked for directions and mistaken the track for his way. On its face the report is evidence capable of corroborating the Appellant's account. The doctor has found that the Appellant has four scars, detailed in a drawing, which are typical to the context of his having been exposed to a bomb explosion over 6 months ago; the writer then considered mental state, although not a psychiatrist the author states she has examined many who allege to have suffered torture. The Appellant here doe not describe any experience of torture.
>
> 15. The author finds that the Appellant describes symptoms compatible with a diagnosis of post-traumatic stress disorder arising from the traumatic experience of the bomb blast in childhood and concludes:
>
> "Mr ….. requires further assessment and will likely need treatment for his PTSD."
>
> 16. The author turns to the issue of discrepancies and states in general terms at para 7.4:
>
> "people who suffer from PTSD are often confused about dates and times",
>
> and further explains that memories especially, but not only, those associated with the trauma may be blocked, so as to be difficult to describe or retell in an interview, particularly during proceedings such as immigration interviews or court hearings, which are often perceived as stressful or adversarial. They may find it highly distressing to recount the traumatic experiences, may have gaps in recall or retelling, and that the survivor may be unable to reveal their full trauma history in every interview."
>
> 17. With regard to the Appellant's case in particular the author states:
>
> "I am aware that there are differences in Mr's accounts given on different occasions, and that these discrepancies have led to adverse findings regarding his credibility.

18. and concludes:

> "in my opinion the above factors are relevant to Mr…'s case, he describes a highly traumatic experience. He has a clinical picture of PTSD and has a history of serious head injury. He sleeps poorly and is likely to be sleep deprived. With these conditions and according to the medical research on memory, gaps in Mr …'s memory and discrepancies between his accounts would not be surprising clinically".

19. In particular the author writes:

20. "it would not be surprising that he had not disclosed his full history in his initial police and screening interviews. Mr… reported to me: "I was nervous in my interview and felt panicked. I wanted the interview to be over as quickly as possible because I felt so uncomfortable". Even in the relatively relaxed setting of a medical consultation Mr … had difficulty giving his account. In my opinion this lack of disclosure does not negate his account of trauma. I have seen many asylum seekers whose initial accounts were discrepant with their later accounts. In such cases it is common to find that the trauma history emerges over considerable time. Paradoxically, it is often the case that the greater the level of clinical trauma, the more difficult it is for the survivor to speak about it, leading to misunderstandings about their clinical level of need."

19. At para 21, Judge Davidge recorded that:

> "I have borne that medical evidence in mind when I have considered the credibility of the appellant and his historical account."

20. Then, at para 22 Judge Davidge identified a number of what she described as "significant discrepancies" internally within the evidence of the appellant and between his evidence and that of his aunt as follows:

> "22. The Appellant's claims (sic) in summary to have suffered targeted persecution in Somalia with his house having been bombed, and his family being forced to flee, with the result that he and his parents ran in different directions so that he lost contact with his parents, and that his parents subsequently, separately, died, killed in the civil war. Difficulties with credibility arise because:
>
> (i) There are significant discrepancies in the account of the destruction of the Appellant's home:
>
> (a) In the appeal before the Immigration Judge concerning his extended family status the Appellant's relatives gave evidence to the point that:
>
> (1) Whilst they were here in the United Kingdom the Appellant's family home in Somalia was decimated by mortar attack, and both of his parents were killed. He was then about 2

years old, and went to live with his grandmother in a village outside Mogadishu. Because the sponsoring aunt in the UK was financially responsible for the Appellant she formally adopted him through the courts in Somalia with her daughter making the necessary arrangements and being responsible for the Appellant on a day-to-day basis.

(b) The Appellant, in his asylum claim, said that the house had suffered the explosion when he was 5 years old, that his aunt was not yet in the United Kingdom and so he went to live with her, there had been no formal adoption although he considered her to be his adoptive mother, in common with her daughter and also his grandmother, all of whom were his "adoptive mothers".

(c) In his oral evidence the Appellant told me that in fact the explosion has occurred when he was 10 years old. His parents had not in fact been killed in the mortar attack but had fled and he and they had never been reunited and sometimes he said they had been killed and sometimes he said they were alive because at different times this is the information he had been given. The information he had was unreliable and up until now he had never been provided with any reliable information as to whether they were alive or dead. In terms of the discrepancy in his own evidence as to when the mortar attack had happened the difference in the times was explained by his own inability to recall things because of memory difficulties arising from damage to the brain from the explosion or the post-traumatic stress disorder. In terms of the discrepancy with what he said and what his aunt said he told me that he had never really discussed the position with his aunt, and any differences that had arisen between their accounts could be explained by her own memory problems.

(d) The Appellant's failed to call his aunt or her daughter, who herself is now in this country, or his grandmother, who is also apparently present in the United Kingdom, (although having had her application to remain as an extended family member similarly refused, her status is unclear).

(e) The evidence that the Appellant's home was specifically targeted amounts to a bare assertion that that was what was told to him by neighbours at the time. The only basis for the assertion is his stated

> recollection. I also note that, whilst not determinative of the issue, there was no mention of the Appellant's clan causing difficulties so as to provide any reason for targeting the family in the account provided by family members to the previous judge."

21. Then at para 23 Judge Davidge again dealt with the medical report of Dr Longman and concluded that it provides "little assistance" in assessing credibility for the following reasons:

> "23. Whilst the medical evidence establishes that there is a real risk that the Appellant's scars were the result of his being exposed to an explosion, whether resulting from a bomb or a mortar attack, at some point beyond 6 months in the past, I find that the report provides little assistance in terms of the credibility of the account as to the circumstances in the incident. The diagnosis of PTSD does not provide sufficient explanation for the inconsistencies that have arisen in this account when looking at the evidence as a whole. The report does not provide any detailed analysis as to how the individual discrepancies that have arisen can be so explained. This is plainly not a case of an explanation obtaining clarity and definition over time against a backdrop of a medical condition which gives credence to such delayed telling and explanations, the incident which is at the core of the account was a single one, the discrepancies and vagueness of the account are not limited to internal issues of the Appellant's account of the incident but extend to information about his clan, parents and family but most significantly arise between his and other accounts given in a judicial setting."

22. At para 24, the Judge went on to take into account the fact that the appellant did not call any witnesses in relation to the factual circumstances surrounding his injuries or indeed in relation to his clan affiliations even though they were in the UK:

> "24. Following the approach of **TK Burundi** I find that there are witnesses that the Appellant could have been expected to call upon to provide evidence which would assist in the consideration of the factual circumstances surrounding injuries he has suffered, the position of his family, including the whereabouts of his parents, as well as his past residence in Somalia, journey to Ethiopia, current support available to him in Somalia, his ethnic tribal/clan background and affiliations. It is common sense that where one asserts gaps in one's own knowledge, as this Appellant does, including as to the chronology of his account, and the whereabouts of his parents and family members, many of which matters are, according to their evidence as relied upon by the previous judge, known to family members in the United Kingdom, but also in relation to his clan and tribal affiliations, his failure to call evidence is adverse. I am satisfied that in this case it represents an effort to limit the information available to this court and reduce the opportunity for the testing of his evidence."

23. The Judge made further reference to the absence of those witnesses at para 26, together with the fact that there was no objective evidence of the existence of the appellant's sub-sub clan, in reaching a finding at para 27 that he has not established that he is a member of a minority clan.

24. Then, having dealt with the appellant's claim under Article 15(c), at para 34 the Judge reached the following conclusion:

> "In short I find that the Appellant is not a reliable witness, and the evidence before me does not establish that there is any real risk that his account is true, or that he faces any real risk of persecution or harm requiring international protection on any of the grounds raised."

25. The substance of the appellant's challenge under this ground, reflected in Ms Elliott-Kelly's skeleton argument and oral submissions, is that the Judge made a "structural failing" (to borrow the words of Buxton LJ in Mibanga) by failing to take into account the expert evidence in assessing whether the discrepancies in the appellant's account and between his evidence and his relatives were such as to lead to an adverse credibility finding. The grounds do not, in substance, challenge the reasons of the Judge, in particular at para 23, that the medical evidence does not, in effect, provide an adequate explanation for the discrepancies. Nor do the grounds suggest that there were not discrepancies in the evidence.

26. It is plain to me that the Judge's determination does not suffer from the "structural failing" that occurred in Mibanga. First, prior to making any finding on credibility the Judge set out the pertinent parts of the expert evidence dealing with the appellant's mental health, namely his PTSD and the effect that condition might have on recall or memory leading to discrepancies. Secondly, the Judge expressly stated in para 21 that she had "borne that medical evidence in mind" when considering the issue of credibility. Thirdly, having identified the discrepancies in the appellant's evidence at paragraph 22, the Judge expressly at para 23 went on to consider whether those discrepancies could be explained, in the light of the medical evidence, given the PTSD diagnosis and views of Dr Longman. She concluded that they could not. Fourthly, the Judge only expressly stated her finding in relation to the appellant's credibility at para 34 of her determination – some way after a consideration of the medical evidence and discrepancies in the appellant's evidence.

27. It is perhaps anodyne to state that a Judge in writing a determination has to start somewhere and end somewhere else. Here, the Judge started with the medical evidence and ended with her conclusion on credibility. In between those two points, she considered the appellant's evidence and the discrepancies she identified in that evidence and then evaluated those discrepancies against the medical evidence which was relied upon to explain them. She also considered the absence of supporting witnesses based in the UK who could have provided relevant evidence on the events relied upon by the appellant and his clan background.

28. In my judgement, this was not a case where the Judge failed to assess the appellant's credibility, and in particular, his evidence, without regard to the medical evidence

concerning his mental health. Whether in structure or form, the Judge's determination cannot on any fair reading be seen as treating the medical evidence as an "add-on" and its assessment a separate exercise from considering and reaching findings in respect of the appellant's credibility.

29. As I have said, Ms Elliott-Kelly did not directly challenge the Judge's reasoning in para 23 that led the Judge, despite the medical evidence, to find significant discrepancies in the appellant's account which extended not only to the claimed incident of the bombing of his house but also as to his clan, parents and family and "significantly" between his account and that of family members given in a judicial setting. That latter reference is, of course, a reference to evidence given in an earlier appeal hearing dealing with a refusal of an EEA family permit. In my judgement, the Judge was entitled to conclude that the evidence of Dr Longman, herself not a psychiatrist but who had diagnosed the appellant as suffering from PTSD, did not provide an adequate explanation for the significant discrepancies in the appellant's evidence and between his evidence and other family members.

30. Ms Elliott-Kelly's skeleton argument refers at paragraph 21 to "Joint Presidential Guidance Note No 2010: Child, Vulnerable Adult and Sensitive Appellant Guidance". Ms Elliott-Kelly made no further reference to this guidance in her oral submissions. Reference in the skeleton argument is made to paras 14 and 15 of the Guidance which, it is said, "deal(s) with assessment of evidence". No further elaboration is offered. I see no basis for concluding that Judge Davidge was other than aware that the appellant was a vulnerable adult, given the diagnosis of PTSD, and that the events had occurred when he was a young child. In the absence of any elaboration of this ground, I cannot see how it adds to the submission which I have already rejected.

31. For these reasons, ground 3 is rejected.

Ground 4: Article 3

32. Ms Elliott-Kelly submitted that the Judge had failed properly to consider whether the appellant would be at real risk of inhuman and degrading treatment on return because she had failed to consider the views of Dr Longman, in particular at paras 7.5.2 (set out above) that the appellant was not "robust enough for him to be able to seek appropriate psychological help in Somalia" and that he was "particularly [at] risk of exploitation or ill-treatment by others" and further, at para 7.3.3 he was "likely [to] need treatment for his PTSD". It is not entirely clear how this issue was put to the Judge by the appellant's (then) Counsel. At paragraph 9 of her determination, the Judge sets out the clarification given by Counsel to her of the issues live in the appeal:

> "I clarified with Mr Paxton the issues which were live before me. Mr Paxton indicated that whilst the ground of appeal in respect of asylum was not withdrawn formally he did not intend to pursue it in evidence or by way of submissions before me. The case was vulnerability on return in the context of Article 15(c). In clarification he set out that whilst, in light of the Appellant having left Somalia a considerable period after 2008 when Al-Shabaab controlled area since, in combination with the short time that he had been in the United

> Kingdom, the hurdles to requiring international protection on Article 3 or humanitarian protection grounds in respect of Al-Shabaab were such that he could not establish it. Rather the force of the Appellant's case was that the fact of suffering from post traumatic stress disorder and the vulnerabilities in terms of an inability to work that followed, as well as the absence of support in Somalia, which would place him in an displaced persons camp which was sufficient to establish a need for international protection in the context of the country guidance case of AMM."

33. First, it is apparent that the appellant did not pursue with vigour, or at all, that as a result of a fear of Al-Shabaab he was a refugee or that he was at risk of serious ill-treatment contrary to Article 3 or Art 15(b) of the Qualification Directive. The appellant did rely upon Article 15(c) based upon his vulnerability. I will return to this shortly. Further, he relied upon his vulnerability and his inability to work which would, it was submitted, require him to live in an IDP and so require international protection. That was, in all likelihood, a reliance upon Article 3 of the ECHR.

34. The Judge dealt with this issue at paragraphs 29-33 where she concluded that there was no real risk that the appellant would be required to live in an IDP camp or otherwise be destitute. The Judge's reasons were as follows:

> "29. Mr Paxton submitted that the Appellant would have to relocate to an Internally Displaced Persons' camp. The submission is based on the fact that the Appellant would have no support network or likelihood of obtaining employment. I reject that submission on both counts. The Appellant has not produced medical evidence that he is not fit for work.
>
> 30. Counsel relies on a finding made by the judge in 2010:
>
> (i) "Notwithstanding the lack of evidence of the extent of his injuries, there is sufficient evidence to show that he is a vulnerable person, being blind in one eye and having residual head injury problems. He requires constant medical attention… it would be too much to expect neighbours to look after him, on behalf of his aunt/adoptive mother".
>
> 31. I find that that takes the matter no further, it is a finding made on the basis of the balance of probabilities, and on the evidence of the sponsoring family members who did not attend before me. The submission simply ignores the evidence that the Appellant has not provided evidence of having received in the UK constant medical attention in the context of any severe head injury, there is no medical evidence of his being unfit to work, a position which is not determined by his either being blind in one eye or having scars consistent with having been exposed to an explosion, or with a diagnosis of post-traumatic stress disorder. The Appellant's own evidence is that he is independent of his family in the United Kingdom that they do not provide him with any physical care and attention, although he is in regular telephone contact with them.

> 32. I have no reliable evidence of the extent of the Appellant's family in Somalia or elsewhere or the support available to him in Somalia, nor of what property and assets are available to him there. I find it inconceivable that an aunt who travelled all the way to Ethiopia to go to collect him, and two cousins, one of whom is in full-time work as a staff nurse and indicated in February 2013 her readiness to support the Appellant, and the other who is a qualified teacher and again asserts financial capability to support the Appellant in her letter of 10th February 2013, would make such support contingent upon the Appellant's residence in the United Kingdom. I find the notion of failing to support this Appellant in Somalia an entirely different prospect from arranging the families living conditions here so as to maximise claims on public funds.
>
> 33. For all the reason above I find there is no risk that the Appellant does not have a support network in Somalia or that he would be forced to live in a displaced persons' camp or be otherwise destitute."

35. The Judge had, of course, previously set out the views of Dr Longman at paragraphs 14-20 of her determination. Despite Dr Longman's comment at para 7.3.3 that the appellant "requires further assessment and will likely need treatment for his PTSD", there was no evidence before the Judge, and none was brought to my attention, that the appellant has indeed been further assessed or is receiving any treatment for his PTSD. That is despite the fact that he has lived in the UK since 2009. Likewise, there was no evidence that the appellant would be unable to work as Judge Davidge points out in paragraph 31. The evidence of Dr Longman that the appellant would not be "robust enough" to see appropriate psychological help in Somalia and was "highly vulnerable" and "particularly [at] risk of exploitation or ill-treatment by others", had to be placed against the evidence that the appellant was, since reaching 18, living independently of his family in the UK who did not provide any physical care or attention for him. Even without the Judge's finding that the appellant had not established a lack of affiliations or connections with Mogadishu, the Judge's finding that it was not established that there was a real risk that the appellant would have to live in an IDP is entirely consistent with the country guidance decision of AMM. There at para 2 of the head note under the heading "Country Guidance: Mogadishu" it is stated:

> "The armed conflict in Mogadishu does not, however, pose a real risk of Article 3 harm in respect of any person in that city, regardless of circumstances. The humanitarian crisis is southern and central Somalia has led to a declaration of famine in IDP camps in Mogidishu; but a returnee from the United Kingdom who is fit for work or has family connections maybe able to avoid having to live in such a camp. A returnee may, nevertheless, face a real risk of Article 3 harm, by reason of his/her vulnerability." (my emphasis).

36 In my judgement, given the Judge's factual finding it was entirely open to her to conclude that the appellant had failed to establish that he was at real risk of living in an IDP camp or of being destitute so as to engage Article 3 on his return to Mogadishu.

37 For these reasons, I reject ground 4.

Ground 5: Unfairness

38 The basis of this ground is that the Judge raised, for the first time, in her determination the question of whether the appellant was a member of the Bandhabo tribe, sub-clan Bahar Sufi and sub-sub-clan Ahmed Nur on the basis that there was no objective evidence of the existence of that "particular minority clan". Ms Elliott-Kelly submitted that this was unfair as the respondent had not disputed the existence of the Bandhabo clan and sub-clan but rather had concluded that the appellant had not established that he was a member of that clan. It was unfair of the Judge to raise this issue for the first time in the determination which did not allow the appellant "time to gather evidence and make submissions in respect of the existence of the clan" (see para 28 of the skeleton argument). The Judge's reasoning is at paragraphs 26-27 of her determination as follows:

> "26. In respect of the Appellant's clan membership I pause to note that he has not provided any evidence save bare assertion of his membership of a minor clan. The Appellant claims that he is of the Bandhabow race or ethnicity, that his sub-tribe is Bahar Sufi and that his sub-sub-tribe if Ahmed Nur. There is no objective evidence of the existence of that particular minority clan and, taking account of the huge Somalian diaspora in the United Kingdom the Appellant's failure to call evidence to substantiate his claim does not assist him. The failure to call his own relatives to provide the information that he accepts he does not know is an issue I have already deal with.
>
> 27. In short I find that he has not established that he is a member of a minority clan and in particular that he has not established that he is a member of a minority clan to the point that because of lack of affiliations or connections he would either be persecuted or vulnerable on return to Mogadishu."

39 As this issue had not been raised by the respondent either in the refusal letter or at the hearing, it was prima facia unfair of the Judge to take into account the absence of objective evidence demonstrating the existence of the appellant's claimed sub-clan. The Judge's point must, I think, relate to the sub-clan as this experienced Judge could not conceivably have thought that the principal clan, Bandhabo did not exist. Mr Richards submitted that the Judge had not simply relied upon the absence of any objective evidence but also on the appellant's lack of knowledge of his clan and the adverse view that the Judge had taken in relation to the appellant's evidence in general, including the failure of any family members to give evidence to support his claim.

40. Ms Elliott-Kelly did not draw my attention to any background evidence, nor is any referred to in the grounds or her skeleton, which does identify the existence of the sub-clan to which the appellant claims to belong. In my judgment, the absence of any objective evidence is only one aspect of the Judge's reasoning that led her to conclude that the appellant had not established that he was a member of a minority clan. She

was entitled to take into account that the appellant had provided no supporting evidence from a number of family members or others who, lived in the UK to support his claim. It does not appear to have been challenged before the Judge, nor was it before me, that the appellant's only knowledge of his clan was the three clan names and that they eat a particular sweet and as a business they sew clothes (see para 16-19 of the refusal letter). In addition, there was the Judge's reasons relating to the appellant's credibility in respect of the claimed incident of the bombing of his home set out at para 22 of the determination. Taking these matters into account, I am satisfied that the appellant was not prejudiced in any material way. In my judgment, the Judge would have reached just the same conclusion even if she had not taken into account the absence of any objective evidence supporting the existence of his claimed sub- and sub-sub-clan.

41. For these reasons, I reject ground 5.

Ground 1: Failing to apply *AMM*

42. Ms Elliott-Kelly submitted that the Judge had erred in law by failing to apply AMM which, she submitted, established that the appellant would be at real risk of harm falling within Article 15(c) if returned to Mogadishu. The Judge could only depart from AMM if there was cogent evidence subsequent to that case which justified a departure from it. Ms Elliott-Kelly submitted that the Judge had failed to give cogent reasons and to set out the relevant background evidence upon which she relied to depart from AMM on the basis that "the reduction in violence" acknowledged in AMM, now established a "durable" change in Mogadishu. Ms Elliott-Kelly accepted that the more recent country guidance decision in MOJ and Others (Return to Mogadishu) CG [2014] UKUT 00042 (IAC) recognised that there had been a change of circumstances such that there was now less likely to be an Article 15(c) claim on return to Mogadishu but, she submitted, that decision was not relevant to the Judge's assessment of risk as the relevant country guidance case at the time of decision was AMM.

43. In AMM, the Upper Tribunal recognised that despite the withdrawal in early August 2011 of Al-Shabaab forces from most of Mogadishu, there remained a general real risk of Article 15(c) harm for the majority of those returning to Mogadishu after a significant period of time abroad (see, in particular [358]). The Upper Tribunal recognised (at [357]) that there may be a:

> "category of middle class or professional persons in Mogadishu who can live to a reasonable standard, in circumstances where the Article 15(c) risk, which exists for the great majority of the population does not apply…into this category we would place those who by reason of their connections with "powerful actors" such as the TGF/AMISOM will be able to avoid the generalised risk."

44. It will be necessary to return to this excepted category to the general risk under Art 15(c) under Ground 2. For the present, it is important to note that the Upper Tribunal in AMM rejected the view that there was, as yet, a "durable change of circumstance

which would justify a finding that there was no Article 15(c) risk to the majority of those returning to Mogadishu. At [345] the Upper Tribunal noted that:

> "Any assessment that material circumstances have changed, will need to demonstrate that 'such changes are well established evidentially and durable'."

45. That is a reference to the withdrawal of Al-Shabaab and the effect that has on the Article 15(c) risk to the general population of Mogadishu. The Judge dealt with this aspect of AMM at para 28 as follows:

> "With regard to the Section 15(c) argument, Mr Paxton acknowledged that whilst in November 2011 it was too early to say that the reduction in violence following the Al-Shabaab's withdrawal from Mogadishu was durable, he could put no evidence of significant quality and weight before me to show that in fact the position had subsequently deteriorated. I am satisfied that as at the date of July 2014 the reduction in violence is established as being durable. With regard to the Appellant himself I note that he lived without difficulty in an Al-Shabaab controlled area prior to his leaving Somalia to go to Ethiopia and I am satisfied that as a result he would not be at any real risk from Al-Shabaab on return now. His presence in the west has been of a short duration and I am satisfied that given the recentness of his experience he would not stand out as being "westernised".

46. Mr Richards submitted that the Judge had not, in fact, departed from AMM. What the Judge had decided, Mr Richards submitted, was that the reduction in violence following Al-Shabaab's withdrawal from Mogadishu, which the Upper Tribunal in AMM had considered would, if durable, have removed a generalised risk under Article 15(c) had in fact become durable because the appellant's Counsel had produced "no evidence" that the position had "subsequently deteriorated" since AMM. In other words, Mr Richards submitted that the Judge had, in fact, followed AMM.

47. Whilst Mr Richards' submission has some attraction, ultimately, I do not accept it. In finding that the reduction in violence recognised by AMM as resulting from the withdrawal of Al-Shabaab had become "durable", the Judge was in effect departing from the guidance in AMM that there was a risk to the majority of the population under Article 15(c) on the evidence before the Tribunal in AMM. As the Tribunal itself recognised at [345]:

> "Any assessment that material circumstances have changed, will need to demonstrate that 'such changes are well established evidentially and durable'."

48. At [363] the Tribunal foreshadowed the approach that should be followed in subsequent cases as follows:

> "Before leaving the issue of Article 15(c) in Mogadishu, it is necessary to say something with an eye to the use that will be made of our country guidance findings in the next few weeks and months. In assessing cases before them, judicial fact-finders will have to decide whether the evidence is the same or similar to that before us (Practice Direction 12). To the extent it is not, they are

> not required to regard our findings as authoritative. As we have emphasised, it is simply not possible on the evidence before us to state that the changes resulting from Al-Shabaab's withdrawal from Mogadishu is sufficiently durable. Far too much is presently contingent. As time passes, however, it may well be that the judicial fact-finders are able to conclude that the necessary element of durability has been satisfied. How, if at all, that impacts on the assessment of risk on return will, of course, depend on all the other evidence."

49. The country guidance in AMM, of course, included that for the majority of returnees to Mogadishu they would be at risk of harm contrary to Article 15(c). It is clear to me that the Upper Tribunal regarded it as crucial, in any future case, for a judicial fact-finder to consider the evidence, decide whether it was the "same or similar" and if it was not to determine whether that impacted upon the country guidance in AMM such as to justify a different finding. There was before the Judge background evidence in the appellant's bundle and which was referred to in the refusal letter at paras 39-49. In my judgement it was incumbent upon the Judge to consider this evidence, to make findings in relation to the current situation in Mogadishu, including whether it reflected a durable change of circumstances since the decision in AMM. It was not, in my view, sufficient for the Judge to state that the appellant had been unable to identify any background material which showed that the position had "subsequently deteriorated". The Judge's failure to grapple with the background evidence and make appropriate findings was, in my judgement, an error of law.

50. Mr Richards invited me, if that was my view, nevertheless not to set aside the First-tier Tribunal's decision in relation to Article 15(c). He submitted that, in the light of the more recent country guidance decision in MOJ and Others, the appellant would necessarily fail to establish his claim under Article 15(c) and therefore no useful purpose was served in setting aside the decision.

51. Ms Elliott-Kelly submitted that even in the light of MOJ and Others, there remained factual issues which the First-tier Tribunal had not determined or had not been fully canvassed before the First-tier Tribunal such that the appeal should be remitted for a further hearing.

52. It will be convenient to deal with this issue and these submissions when considering Ground 2, where it also arises, and to which I now turn.

Ground 2: The Application of *AMM*

53. Ms Elliott-Kelly submitted that the Judge had, in any event, failed properly to apply AMM. She submitted that on the basis of AMM there was a general risk of Article 15(c) harm to returnees unless they were connected with powerful actors or belonged to a category of middle class or professional persons. She submitted that there was no evidence that the appellant had such connections and it had been accepted in the appellant's earlier EEA appeal in August 2010 that he had no relatives in Mogadishu.

54. Mr Richards submitted that the Judge had fully considered the appellant's circumstances on return to Mogadishu and, given her adverse credibility finding, was

entitled to find that the appellant had failed to establish that he had no "support available to him" in Somalia. In particular, the Judge was entitled to find that his family would provide financial support to him from the UK.

55. I have already set out above, the Judge's findings at paras 31-32. In my judgement, given (as I have found earlier) that the Judge's adverse credibility finding is legally sustainable, the Judge was entitled to find that the appellant has not established that he had no family in Somalia who could provide a "support network" and that he could be financially supported from the UK. Whether or not that brought the appellant within the excepted category recognised in Mogadishu of a person: "connected with powerful actors or belonging to a category of middle class or professional persons, who can live to a reasonable standard in circumstances where the Article 15(c) risk, which exists for the great majority of the population, does not apply, was not a matter decided by the Judge. That was because, of course, she found that there was no Article 15(c) risk to the appellant because the changes, noted in AMM, had become "durable".

56. Therefore, to the extent that AMM had to be applied by the Judge, she fell into error by failing to consider whether the appellant's circumstances fell within the excepted category.

57. That, however, leads back to the issue which I left open when considering Ground 1, namely whether no purpose would be served by setting aside the First-tier Tribunal's decision in respect of Article 15(c) because the appellant, even on the findings made by the Judge, could not succeed under the new country guidance of MOJ and Others.

58. In MOJ and Others the Upper Tribunal considered that the up to date evidence justified a change in the country guidance since AMM and Others. The guidance is summarised at paras (ii)-(xii) of the head note as follows:

> "(ii) Generally a person who is "an ordinary civilian" (i.e. not associated with the security forces; any aspect of government or official administration or any NGO or international organisation) on returning to Mogadishu after a period of absence will face no real risk of persecution or risk of harm such as to require protection under Article 3 of the ECHR or Article 15(c) of the Qualification Directive. In particular, he will not be at real risk simply on account of having lived in a European location for a period of time of being viewed with suspicion either by the authorities as a possible supporter of Al Shabaab or by Al Shabaab as an apostate of someone whose Islamic integrity has been compromised by living in a Western country.
>
> (iii) There has been durable change in the sense that the Al Shabaab withdrawal from Mogadishu is complete and there is no real prospect of a re-established presence within the city. That was not the case at the time of the country guidance given by the Tribunal in AMM.
>
> (iv) The level of civilian casualties, excluding non-military casualties that clearly fall within Al Shabaab target groups such as politicians, police

officers, government officials and those associated with NGOs and international organisations, cannot be precisely established by the statistical evidence which is incomplete and unreliable. However, it is established by the evidence considered as a whole that there has been a reduction in the level of civilian casualties since 2011, largely due to the cessation of confrontational warfare within the city and Al Shabaab's resort to asymmetrical warfare on carefully selected targets. The present level of casualties does not amount to a sufficient risk to ordinary civilians such as to represent an Article 15(c) risk.

(v) It is open to an ordinary citizen of Mogadishu to reduce further still his personal exposure to the risk of "collateral damage" in being caught up in an Al Shabaab attack that was not targeted at him by avoiding areas and establishments that are clearly identifiable as likely Al Shabaab targets, and it is not unreasonable for him to do so.

(vi) There is no real risk to forced recruitment to Al Shabaab for civilian citizens of Mogadishu, including for recent returnees from the West.

(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:

i. Circumstances in Mogadishu before departure;

ii. Length of absence from Mogadishu;

iii. Family or clan associations to call upon in Mogadishu;

iv. Access to financial resources;

v. Prospects of securing a livelihood, whether that be employment or self employment;

vi. Availability of remittances from abroad;

vii. Means of support during the time spent in the United Kingdom;

viii. 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 be e 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.

59. First, this guidance recognises that the change of circumstances identified in AMM has become "durable" such that "an ordinary citizen" on return to Mogadishu no longer faces a real risk of harm contrary to Article 15(c) of the Qualification Directive. Secondly, the significance of clan membership has changed and there is no longer clan violence or discrimination or discriminatory treatment directed, in particular, against minority clan members. Thirdly, where an individual returns to Mogadishu without any nuclear family or close relative to assist in his reestablishment on return, any risk to him must take account of all the circumstances set out in a non-exclusive list at para (ix). Fourthly, the economic circumstances of an individual who has no clan or family support or those who would not be in receipt of remittances from abroad and who have no real prospect of securing access to a livelihood on return are such that he will face conditions likely to require humanitarian protection.

60. In this appeal, the appellant is from Mogadishu. Even after the claimed bomb attack on his home, the appellant lived in a village near Mogadishu without any adverse attention from Al-Shabaab. He has been in the UK since 2011 and has, therefore, as the Judge found not become "westernised". The Judge found that the appellant had not established that he was from a minority clan or that he had no support network available to him in Somalia. The Judge found that he was likely to obtain employment and, in any event, his family in the UK (who had previously supported him in the UK)

could continue to support him by remittances from the UK. Whilst in the UK, since becoming an adult, the appellant has lived independently of his family and is not provided with any physical care and attention from them. Despite the expert evidence's prediction that he would require treatment for his PTSD, there is no evidence that the appellant has been receiving treatment since his arrival in the UK in 2011. The expert opinion that he is vulnerable and would be particularly at risk of exploitation or ill-treatment by others is not borne out by his experiences in the UK. There is no evidence that, since living independently, he has encountered any such problems.

61. Taking all these factors into account, in my judgment, the appellant simply cannot succeed in establishing that on return to Mogadishu he would be at risk of treatment contrary to Article 15(c) of the Qualification Directive or, indeed, Article 3 of the ECHR applying the country guidance now in force in MOJ and Others.

62. Where the Upper Tribunal finds that the decision of the First-tier Tribunal involved the "making of an error of law on a point of law" the Upper Tribunal "may (but need not) set aside the decision of the First-tier Tribunal" (see s.12(2)(a) of the Tribunals, Courts and Enforcement Act 2007). Where, as here, any remaking of the decision would inevitably lead to the same decision being made, no useful purpose is served by setting aside the First-tier Tribunal's decision despite the error of law. Consequently, despite the errors of law identified under Grounds 1 and 2, it is not appropriate to set aside the First-tier Tribunal's decision dismissing the appellant's appeal under Article 15(c) and Article 3 of the ECHR.

Decision

63. For these reasons, the decision of the First-tier Tribunal to dismiss the appellant's appeal on asylum and humanitarian protection grounds and under Articles 3 and 8 of the ECHR stands.

Signed

A Grubb
Judge of the Upper Tribunal

Date: **16 January 2015**