Upper Tribunal
(Immigration and Asylum Chamber)

Appeal number: DA / 01182 / 2012

THE IMMIGRATION ACTS

Heard at:	Field House	Determination promulgated
On	30 October 2014	On 19 January 2015

Before

The Honourable Mr. Justice Davis
Upper Tribunal Judge Gill

Between

Mr Hussein Omar Mohamed **Appellant**
(ANONYMITY ORDER NOT MADE)

And

The Secretary of State for the Home Department **Respondent**

Representation:

For the Appellant: Mr. A. Masood, of Aden & Co Solicitors
For the Respondent: Ms. S. Ong, Senior Home Office Presenting Officer.

DETERMINATION

1. The appellant is a national of Somalia. He had appealed to the First-tier Tribunal (FtT) against a refusal of the respondent dated 16 November 2012 (served on 21 November 2012) to revoke a deportation order made against him on 9 April 2008. The respondent's reasons for refusing to revoke the deportation order are set out in a letter dated 8 November 2012 (the "RFRTR"). The appeal was dismissed in a determination promulgated on 31 January 2013 (the "2013 determination") by a panel of the FtT (Judge Widdup and Dr. J.O. de Barros) on asylum grounds, humanitarian protection grounds and human rights grounds.

2. The appellant was granted permission to appeal by the FtT. By a determination dated 17 May 2013, Upper Tribunal Judge Latter set aside the 2013 determination. Our determination is therefore a re-making of the decision on the appellant's appeal against the respondent's refusal to revoke the deportation order.

3. There have been two previous determinations in the appellant's case. Following his claimed arrival in the United Kingdom on 21 December 2002, the appellant claimed asylum. His asylum claim was refused. His appeal was heard before Adjudicator Mr. H O Forrester who, in a determination promulgated on 21 April 2004 (the "2004 determination"), dismissed the appeal on asylum and human rights grounds. The appellant exhausted his appeal rights on 1 November 2004.

4. On 12 January 2006 at Isleworth Crown Court, the appellant was convicted of attempting to obtain a service by deception and was sentenced to nine months' imprisonment with a recommendation to be deported. A deportation decision in 2006 was withdrawn due to procedural errors.

5. On 9 April 2008, the respondent decided to make a deportation order. The appellant's appeal against this decision was dismissed in a determination promulgated on 5 August 2008 (the "2008 determination") by a panel of the Asylum and Immigration Tribunal (Immigration Judge Verity and Mr. C.P. O'Brian") (the "2008 panel").

6. No steps appear to have been taken by the respondent to proceed with the removal of the appellant who, through solicitors, made representations to the respondent on four occasions between November 2010 and November 2012. Those representations were rejected in the decision of 21 November 2012 to refuse to revoke the deportation order which is the subject of this appeal.

7. The issues in this case are:

   i. In relation to the asylum claim, the issues are limited to those set out below, for the reasons given at paras 21-22 and 28-29 below:

      a. whether the appellant would be safe in Mogadishu;
      b. if so, whether it would be unduly harsh to expect him to relocate to Mogadishu.

   ii. Whether he would suffer "serious harm" in Mogadishu within the meaning of para 339C of the Statement of Changes in the Immigration Rules HC 395 (as amended) (the "IRs"), i.e. whether he is entitled to subsidiary protection under the Qualification Directive (2004/83/EC) ("the Qualification Directive") (described as humanitarian protection in para 339C).

   iii. Whether his deportation to Mogadishu would be in breach of his rights under Article 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),

   iv. Whether his deportation would be in breach of his right to family life and private life under Article 8 of the ECHR.

The previous determinations

(a) The 2004 determination

8. Adjudicator Forrester found the appellant's evidence lacking in credibility. Nevertheless, he appeared to accept that the appellant was a member of the Awl Yahan subclan, part of the Ogaden clan which was itself part of the majority Darod population in Somalia. It was also accepted that he originated from Kismayo and that his family moved to a town called Raskanboni and lived there from September 2000 until October 2002.

9. Adjudicator Forrester rejected the appellant's evidence that he had to leave Somalia in 2002 because he was being forced to join a militia and he had no wish to fight. The Adjudicator states that "*the overall impression I formed of the appellant from his written testimony was of a lack of substance to his story*". The Adjudicator then made a number of adverse comments with regard to the appellant's claim and noted that his evidence was contradictory.

(b) The 2008 determination

10. The 2008 panel followed the guidance in Devaseelan (Second appeals – ECHR – Extra-Territorial Effect) Sri Lanka * [2002] UKIAT 00702 in relation to the findings of Adjudicator Forrester and considered the new evidence.

11. The 2008 panel found the Appellant lacking in credibility. In particular:

    i. It found that the Appellant gave evidence that was completely contradictory to the evidence he gave in the appeal before Adjudicator Forrester, in that, in his statements and interviews, he said that he was the only member of his family to have been targeted by militias in Somalia, whereas his oral evidence was that his younger brother was also being forced to join the militias.

    ii. It found that the appellant's oral evidence to the effect that after his earlier hearing he found out from his cousin in the United States of America (USA) that his entire family had fled Somalia after his father was killed was inconsistent with the fact that according to his evidence at his asylum interview (which took place in August 2003), he knew then that his family had fled Somalia and gone to Kenya in 2003.

12. The 2008 panel stated that it reached the conclusion that the appellant "*could not remember what he had said or to whom and was therefore becoming confused with his own stories*" and that, as such, it found him to be "*an unreliable witness and that his evidence was still lacking in credibility*".

13. The 2008 panel then considered the risk of the appellant returning to Mogadishu and concluded that he would be safe in Mogadishu. In the course of doing so, it

made further findings. We therefore quote paras 35-38 of the 2008 determination, which read as follows:

> "35. It is however the Appellant's case that he is a member of the Darod majority clan and that since the initial decision made against him with regard to asylum the situation has deteriorated in Somalia to such an extent that it would not be safe for him to return. He also draws attention to the fact that he would be perceived to be rich by Somali standards, having lived in a West European country for some years.
>
> 36. The new country guidance case with regard to Somalia is HH & Others (Mogadishu: armed conflict: risk) Somalia CG [2008] UKIAT 00022. In that decision the Tribunal concluded that neither the TFG/Ethiopians nor the Union of Islamic courts or its associates are targeting clans or groups and that although harm had been caused from time to time to civilians there was not any general indiscriminate violence. The Tribunal also concluded that clan support networks in Mogadishu, although strained, had not collapsed and that a person was not at real risk of serious harm as defined in paragraph 339C by reason only of his or her presence in a particular zone or area. At paragraph 6 of the summary in that case we note the following:
>
> > "A person from a majority clan or whose background discloses a significant degree of assimilation with or acceptance by a majority clan will in general be able to rely on that clan for support and assistance including at times of displacement as a result of security operations etc. Majority clans continue to have access to arms, albeit that their militias no longer control the city."
>
> 37. The Appellant himself is a young, fit, healthy male who belongs to a majority clan. Taking into account this new country guidance case I am *[sic]* not of the opinion that the Appellant would be targeted and that even if his presence in the community was noted, he would easily be able to rely on the clan network to support and defend him. We are not therefore of the opinion that the Appellant is at risk because of his clan membership. Nor do we accept that the Appellant would be targeted because he had come from a western European country. He may be able to return with some funds (which by Somali standards would be viewed as significant), but this would not make him any more vulnerable to attack than a reasonably well-off Somali who had continued to live in his home country throughout the period of unrest. The Tribunal have therefore concluded that the Appellant has never fulfilled the definition of a refugee at any time, and that he has not told the truth with regard to his situation in Somalia either at the original Tribunal hearing or at the present one.
>
> 38. With regard to Article 3 for the reasons we have already given this must stand and fall with the asylum claim. The Appellant is not at risk of persecution or of ill-treatment, torture or cruelty. It was put to the Tribunal that the Appellant might well find himself in an internal displacement camp upon his return to Somalia. Such camps are run to provide humanitarian assistance to the poor and vulnerable in Somalia. Irrespective of whether the Appellant has family in Somalia he is certainly not vulnerable (nor with his abilities to find money for the purchase of illegal passports) is he poor by Somali standards. The Tribunal formed the opinion that the Appellant was intelligent and manipulative and would always find a way to flourish even in the most adverse of conditions. We note for instance that although he claimed not to have been able to work whilst in the UK for the last five and a half years he later admitted to the Tribunal that he had worked illegally and had supported himself. The Tribunal therefore formed the opinion that the Appellant is the least likely candidate for an IDP camp and that as a young, fit male belonging to a majority clan and with some likely means of support bought from the UK he would be in a particularly strong position to find a place in clan society."

14. The findings of Adjudicator Forrester and the 2008 panel stand before us. We consider them in line with the guidance in Devaseelan. As at the dates of the hearings before Adjudicator Forrester and the 2008 panel, the evidence was that the appellant had no family in the United Kingdom. On 1 August 2012, the appellant

and a Ms Fous Abdi Salad entered into an Islamic marriage ceremony. Accordingly, the right to family life was relied upon for the first time before the 2013 panel.

(c) The relevance of the 2013 determination

15. The 2013 panel likewise found the appellant lacking in credibility, stating that his evidence was riddled with contradictions on important issues (para 32). Although this determination was set aside by Judge Latter, it is clear from the reasons that Judge Latter gave for finding that the 2013 panel had erred in law, that the errors were found to be in the assessment of the future risk, specifically, the safety of the appellant's return to Kismayo (his home area) and travel to Kismayo.

16. Accordingly, the 2013 panel's summary of the oral evidence given at the hearing before it is also before us, as we informed the parties at the commencement of the hearing. In addition, we asked Mr. Masood to deal with the 2013 panel's adverse assessment of credibility, if he thought it relevant to the appellant's appeal. He informed us that he did not wish to challenge the credibility assessment of the 2013 panel.

17. In assessing the future risk, the 2013 panel found that Al-Shabaab had been driven from Kismayo and that, whilst the appellant could not reasonably be expected to travel from Mogadishu Airport by road to Kismayo while Al-Shabaab controlled the roads south, he would not be at risk by using a commercial flight from Mogadishu to the airport in Kismayo. Thus, the 2013 panel found that the Appellant would not be required to pass through Al-Shabaab territory in order to reach Kismayo.

18. The decision of Judge Latter setting aside the determination of the 2013 panel is attached to this determination as Appendix A. In summary, Judge Latter considered that the 2013 panel had materially erred in law as follows:

    i. The applicable country guidance as at the date of the hearing before the 2013 panel was AMM and others (conflict; humanitarian crisis; FGM) Somalia CG [2011] UKUT 445. At the time of the hearing in AMM, Kismayo was under the control of Al-Shabaab. Kismayo was therefore not safe. The 2103 panel relied upon evidence before it that Al-Shabaab had been driven out of Kismayo in August-September 2012. However, the panel had failed to consider how durable the change was especially in the light of its reference to the situation being fluid and that areas of control could change on a monthly or even weekly basis.

    ii. It was also very unclear on what evidential basis the 2013 panel found that the appellant would be able to travel by air from Mogadishu to Kismayo. It was not clear that sufficient reasons had been given for this finding.

    iii. If Kismayo was unsafe or inaccessible, then the issue arose of whether the appellant could relocate to Mogadishu, an issue which the 2013 panel had not considered. It did not make a clear finding in the alternative whether the appellant could relocate in Mogadishu or elsewhere in Somalia.

    iv. In relation to family life, the 2013 panel had focused unduly on the fact that Ms Salad had only been told about the deportation order and the failed asylum claim after they had undertaken their Islamic marriage to each other,

although it accepted that she knew of his immigration status before the said marriage. It inferred that, if this was a genuine marriage based on love and affection, the appellant would have told Ms Salad about the deportation order and the failed asylum claim before the marriage and that he did not do so in case this dissuaded her from proceeding with the marriage.

Assessment of what the issues are in this case

19. Through no fault of her own, Ms. Ong informed us that she was not as prepared as she would have liked, as the case papers were only given to her late. She was therefore unable to inform us, without taking instructions from the respondent's policy unit, whether the respondent continued to maintain her position in para 22 of the RFRTR, that the appellant was excluded from humanitarian protection by virtue of para 339D of the Statement of Changes in the Immigration Rules HC 395 (as amended) (the "IRs") because he had committed a "serious crime" within the meaning of para 339D. Para 339D reads:

> "339D. A person is excluded from a grant of humanitarian protection under paragraph 339C where the Secretary of State is satisfied that:
>
> (i) there are serious reasons for considering that he has committed a crime against peace, a war crime, a crime against humanity, **or any other serious crime** or instigated or otherwise participated in such crimes;
>
> (ii) …;
>
> (iii) …; or
>
> (iv) ..."

(our emphasis)

20. This was most unfortunate, given that nearly two years have elapsed since the date of the RFRTR.

21. Unfortunately, Ms. Ong's difficulties did not end there. She informed us that it was also necessary for her to take instructions from the respondent's policy unit as to:

i. whether Kismayo was safe and, if so, the evidence relied upon to support that contention;

ii. (in relation to the Article 8 claim) whether the respondent maintained her position at para 38 of the RFRTR that para 398(c) of the IRs applies because the appellant did not have family in the United Kingdom.

22. We decided not to exercise our discretion to adjourn the hearing to enable Ms. Ong to take instructions, given that the respondent had had ample time to prepare for the hearing. These were issues that were obvious. It was plain from the determination of Judge Latter that this resumed hearing could not proceed without the respondent being ready the address the issue mentioned at our para 21(i). The issues raised at paras 22 and 38 of the RFRTR were the respondent's own case as there had been two previous hearings (one before the 2013 panel and one before Judge Latter). Even a short adjournment was likely to lead to the case not being

completed or other cases in the list being adjourned to another day. This was an old appeal, first lodged in the year 2012. We therefore proceeded to deal with the issues:

(a) Whether the appellant is excluded from humanitarian protection by para 339D

23. At the hearing, we indicated our view that the appellant was not excluded from humanitarian protection under para 339D. We will now give our reasons for our finding.

24. In AS (s.55 "exclusion" certificate - process) Sri Lanka [2013] UKUT 00571), the Upper Tribunal decided that, whilst the issue of exclusion in relation to asylum did not need to be decided at the commencement of a hearing, the effect of s.55 of the Immigration, Asylum and Nationality Act 2006 is to require the Tribunal in its written determination to decide exclusion from asylum first before proceeding to address other heads of claim. Importantly, the Upper Tribunal went on to say that the exclusion criteria for humanitarian protection in para 339D was very similar to Article 1F(a) and that therefore a Tribunal should also decide on exclusion from humanitarian protection first before substantive consideration of that claim notwithstanding that there was no statutory provision akin to s.55.

25. What constitutes a "serious crime" for the purposes of para 339D was settled in R (Mayaya) v SSHD (C4/2011/3273Z), on appeal from the judgment of Cranston J in [2011] EWHC (Admin). The mere fact that an individual has received a 12-month sentence cannot in itself amount to a "serious crime" for the purposes of exclusion from humanitarian protection. Following the judgment in R (Mayaya) and the Court of Appeal's judgment in AH (Algeria) v SSHD [2012] EWCA Civ 395, the respondent re-issued her Humanitarian Protection Policy on 15 May 2013, which (insofar as relevant) reads:

> " 5.1 Exclusion criteria
>
> • A person will not be eligible for a grant of Humanitarian Protection if he is excluded from it because one of the following provisions in paragraph 339D of the Immigration Rules apply:
>
> (i) there are serious reasons for considering that he has committed a crime against peace, a war crime, a crime against humanity, or any other serious crime or instigated or otherwise participated in such crimes;
>
> …
>
> • This is to be interpreted in a manner consistent with the policy on Exclusion under Article 1F of the Geneva Convention. A "serious crime" for the purpose of exclusion from Humanitarian Protection was previously interpreted to mean one for which a custodial sentence of at least twelve months had been imposed in the United Kingdom, but *it is now accepted that a 12 month sentence (or more) should not alone determine the seriousness of the offence for exclusion purposes*.
>
> • In the Court of Appeal's judgment in AH (Algeria) v Secretary of State for the Home Department [2012] EWCA Civ 395, Lord Justice Ward noted (paragraph 54) that "Sentence is, of course, a material factor but it is not a benchmark. In deciding whether the crime is serious enough to justify his loss of protection, *the Tribunal must take all facts and matters into account, with regard to the nature of the crime, the part played by the accused in its commission, any mitigating or aggravating features and the eventual penalty imposed*."
>
> •*The sentence must therefore be considered together with the nature of the crime, the actual harm inflicted, and whether most jurisdictions would consider it a serious crime.* Examples of

"serious" crimes include *murder, rape, arson, and armed robbery*. Other offences which might be regarded as "serious" include those which are accompanied by the *use of deadly weapons, involve serious injury to persons, or if there is evidence of serious habitual criminal conduct*. Other crimes, though not accompanied by violence, such as large-scale fraud, may also be regarded as "serious" for the purposes of exclusion."

26. In AH (Algeria), the Court of Appeal said as follows (at paras 50-54):

> "50. Being an international convention, [the Geneva Convention] must be given an autonomous meaning. They are ordinary words and should be given their ordinary universal meaning. "Crime" surely means any illegal act punishable at law.
>
> 51. Furthermore, in my judgment, "serious" needs no further qualification. Where further qualification is required, the Convention gives it: compare Article 1F(b) with Article 33.2 which refers to "a refugee … who, having been convicted by a final judgment of a *particularly* serious crime, constitutes a danger to the community of that country", with the emphasis added by me. The same distinction is drawn in the EU Qualification Directive 2004/83/EC between Article 17 ("committed a serious crime") and Article 21 ("convicted … of a particularly serious crime").
>
> 52. Although an ordinary word, "serious" has shades of meaning and the appropriate colour is given by the context in which the word is used. What may be serious for one purpose may not be serious for another. The context here is that the crime which the refugee has committed must be serious enough to justify the withholding of the protection he would otherwise enjoy as a person having a well-founded fear of persecution and owing to such fear is unwilling to avail himself of the protection of the country of his nationality or to return to the country of his former habitual residence. This seems to be the view of the Grand Chamber in *Bundesrepublik Deutschland v B (C-57/09) and D (C-101/09)*[2011] Imm. A.R. 190 expressed with regard to Articles 12(2)(b) and (c) of the European Directive but, it seems to me, equally apposite for the Geneva Convention:
>
> > "108. Exclusion from refugee status on one of the grounds laid down in Article 12(2)(b) or (c) of Directive 2004/83 … is linked to the seriousness of the acts committed, which must be of such a degree that the person concerned cannot legitimately claim the protection attaching to refugee status under Article 2(d) of that Directive."
>
> 53. Beyond that I would not go. Like Lord Brown of Eaton-under-Heywood at paragraph 39 of *JS (Sri Lanka)*,
>
> > "It would not, I think, be helpful to expatiate upon Article 1F's reference to there being "serious reasons for considering" the asylum-seeker to have committed a war crime."
>
> 54. I certainly do not find it helpful to determine the level of seriousness by the precise sentence of imprisonment that may have been imposed upon the accused. Sentence is, of course, a material factor but it is not a benchmark. In deciding whether the crime is serious enough to justify his loss of protection, the Tribunal must take all facts and matters into account, with regard to the nature of the crime, the part played by the accused in its commission, any mitigating or aggravating features and the eventual penalty imposed. I would leave that decision to the good sense of the Tribunal."

27. The appellant committed his offence when he attempted to board an aeroplane bound for Canada using false documents. Offences involving the use of false documents of identity (which the appellant's offence involved) are serious because they undermine the economy and make borders insecure but the issue is whether the appellant's offence is "serious" within the meaning of para 339D. Whilst we do not rely upon the length of his nine-month sentence as a benchmark, it is a material factor. Given the limited information we have about the crime and in all of the

circumstances, we have concluded that the crime is not a "serious crime" within the meaning of para 339D. The appellant is therefore not excluded from humanitarian protection.

(b) Safety in Kismayo and safety of travel to Kismayo

28. As stated above, at the time of the hearing in the country guidance case of AMM, Kismayo was not safe because it was under the control of Al-Shabaab. In the more recent country guidance case of MOJ & Ors (Return to Mogadishu) Somalia CG [2014] UKUT 00442 (IAC), the Upper Tribunal stated (see, for example, para (i) of the "Country guidance" section of the headnote) that the country guidance issues addressed in MOJ were not identical to those engaged with by the Tribunal in AMM and that where country guidance was given in AMM in respect of issues not addressed in MOJ, the guidance provided in AMM shall continue to have effect.

29. As the Upper Tribunal did not deal with safety in Kismayo, the guidance in relation to Kismayo in the AMM case applies. However, the 2013 panel had evidence that Al-Shabaab had been driven out of Kismayo in August-September 2012. Given that Ms. Ong did not have any instructions or evidence to adduce on these issues, we decided that the material before us would not enable us to make findings about the safety of Kismayo and the safety of travel to Kismayo. We therefore decided that the issues in relation to the asylum ground, the humanitarian protection ground and Article 3 of the ECHR would be limited to the risk in Mogadishu and, in the case of the asylum ground, whether it would be unduly harsh for the appellant to relocate to Mogadishu.

The evidence since the 2004 and 2008 determinations

(a) The witness statements

30. The appellant has made two witness statements, the first dated 15 January 2013 and the second dated 27 October 2014. In both, he states that he cannot live safely in any part of Somalia. In both, he maintains that he would be at serious risk of serious harm from Al-Shabaab and various other militia groups controlling Somalia. In the second statement, he states that Al-Shabaab are still active in Mogadishu, Kismayo and other parts of Somalia and that there are bombings and civilian casualties almost every day. He does not agree with the religious and political beliefs of Al-Shabaab.

31. The appellant said that, as a returnee from the West, he would be perceived as someone who has Westernised and has breached the so-called religious code of conduct of Al-Shabaab. He has no known family members in Somalia who could protect him or provide him with any support. He is not connected to any powerful people in Somalia.

32. In his second statement, the appellant said, further, that he has no support network in Somalia. He would not be able to find employment in Somalia. He does not belong to a category of middleclass people or professional persons. He has no home to which he could return in Somalia. If he were to return to Somalia, he would have to live in extremely difficult and harsh circumstances.

33. The appellant said that he met Ms Salad who has indefinite leave to remain (ILR). They were married in an Islamic marriage ceremony on 1 August 2012. They could not register their marriage under English law because he does not have status.

34. The appellant's Islamic marriage certificate has been submitted to the Tribunal. He has a DVD of his Islamic wedding ceremony and photographs of his wedding. He has submitted documents confirming cohabitation and residence at the same addresses. Given that he has no status in the United Kingdom, he is unable to produce bank statements or other formal documents in his name. In his second witness statement, the appellant said that he does voluntary work for a charity. Correspondence with that charity and with the Home Office has been submitted as proof of cohabitation. There is also documentary evidence from his doctor's surgery. He and Ms Salad are registered at the same surgery.

35. The appellant said he is unable to return to Somalia to make an entry clearance application because there is no British Embassy in Somalia. It would be unduly harsh and disproportionate to expect him to return to Somalia to make an entry clearance application.

36. In his second statement, the appellant also states that he has a strong private in the United Kingdom, having lived here for 12 years. He has learnt the English language and he has integrated with the local culture and society. He has a reference letter from the charity where he does voluntary work.

37. Ms Salad has also submitted two witness statements, the first dated 15 January 2013 and the second dated 24 October 2014. In both, she said that she came to the United Kingdom in January 2004 as an asylum seeker. She was granted ILR in 2009. After her arrival in the United Kingdom, she had no contact with her ex-husband, Mohamed Khadar, from whom she obtained a divorce through family members. She does not have any documents to confirm her divorce.

38. Ms Salad met the appellant on 5 April 2012. She married him in an Islamic marriage ceremony on 1 August 2012. They are in a genuine and subsisting marital relationship.

39. In both statements, Ms Salad said that the appellant cannot return to Somalia as his life would be in danger in Somalia. It would be unduly harsh and disproportionate to expect him to return to Somalia as they have a strong family life together in the United Kingdom. If he were to return to Somalia, they would lose their family life because she would be unable to join him in Somalia. She herself would not be safe in Somalia. She is settled in the United Kingdom and has a right to enjoy her family life with her husband in the United Kingdom. She is part of British society and cannot reasonably be expected to live with her husband in Somalia or any other country.

40. In her second statement, Ms Salad expanded upon the difficulties she said she and the appellant would experience if he were to return to Somalia. She said she had ILR and is entitled to apply for naturalisation as she has had ILR for nearly 5 years. She said it would be unjust to require her to accompany the appellant to Somalia because she has a life in the United Kingdom. She had received education and undertaken professional courses in the United Kingdom. She has worked and

receiving training as a care worker and a support worker in the United Kingdom. She completed her last contract of employment in August 2014 and is looking for another job. There is no life in Somalia. There are casualties almost every day. The prospects of employment in Somalia are very limited.

41. In her second witness statement, Ms Salad said that she and the appellant love each other very much and that they cannot think about living without each other. She does not want to lose him. She referred to the documentary evidence to establish cohabitation that had been submitted. She referred to the fact that the 2013 panel did not believe that she and the appellant had a genuine relationship due to the fact that the appellant had not told her about the deportation order made against him, although she knew about his immigration status. She explained this by saying that she was not deterred from marrying the appellant although she knew he did not have immigration status because their marriage was a genuine one. It was not a marriage of convenience.

42. There is a witness statement from a Mr. Mohamed Farah Shire dated 28 October 2014. In his statement, he said he is a British citizen. He lives and works in the United Kingdom. He has known the appellant since 2002. The appellant is one of his good friends. They are both from Kismayo.

43. Mr Shire confirmed that the appellant and Ms Salad were married on 1 August 2012 in a mosque. He attended their wedding and he was a witness to the marriage. He has visited the appellant and Ms Salad three times since their wedding They have also visited him and his family many times. They are good family friends. They have also been in regular contact over the telephone.

44. Mr Shire said that, to his knowledge, the appellant and Ms Salad have been living together in the United Kingdom and that they are in a genuine and subsisting marital relationship.

(b) Oral evidence before the 2013 panel

45. We informed the parties at the commencement of the hearing that the evidence given at the hearing before the 2013 panel was before us. A summary of that evidence is given at paras 16-24 of the 2013 determination, which we now set out:

> "16. The Appellant gave evidence and was assisted by an interpreter. No difficulties arose during the hearing.
>
> 17. He confirmed that the contents of his witness statement were true. In cross-examination he was asked if he had informed the Home Office of his marriage. He said that he had told his lawyer. His lawyer had told the Home Office towards the end of October. He had married on 1st August and the delay of almost three months was because they were busy preparing and waiting for the decision.
>
> 18. He had met his wife at a house in Heston. Their relationship began on 12th April 2012. She is from the south of Somalia, from Qoqane which is not far from Kismayo. When asked what she would do if he was returned to Somalia he said she would be devastated. He supposed she would come after him. She knows it is dangerous. They have discussed this and she has said he cannot go there. She has no relatives in Somalia. They are in Kenya. He did not know what had happened to his family. He last saw them in 2002. He had made enquiries but had no news.

22. The Appellant's wife then gave evidence in English. She has indefinite leave to remain. She was given this because her claim for asylum was one of the legacy cases.

23. In cross-examination she produced her travel document. She has not applied for a British passport. She had met the Appellant in Heston. She was aware of the deportation order when she got married. She then said that she was told of it after the marriage. She was told of the unsuccessful asylum claim after the marriage. Before the marriage he said he did not have any immigration status. Afterwards he told her everything. She is from Qoqane which is in Kismayo. It is not safe for her to return. She had claimed asylum in 2004 but the claim was refused. She said that her father is dead and her mother is in a refugee camp. At this point she started to give evidence through the interpreter. The Appellant had told her that his father was dead. He had family in Somalia. He had not tried to trace his family.

24. In answer to our questions she said that to get a divorce from her first husband her family had had to contact her husband's family. She had married her first husband at a traditional ceremony. She had decided to marry the Appellant because she liked him. She liked his personality and fell in love with him."

(c) Oral evidence before us

46. The appellant gave evidence though an interpreter in the Somali language. He confirmed that his statements were read to him and he adopted them.

47. In cross-examination, the appellant said he knew that he has no family in Somalia because his relatives in the USA told him in 2003 that his family fled to Kenya and were in a refugee camp in Kenya.

48. He has one cousin and two aunts in the USA. They went to the USA in 1988. He maintains contact with them by telephone. They knew he was in the United Kingdom because "the clan is an address" and everybody knows where people are. People can be traced easily. His cousin in the USA was told by people in a refugee camp in Kenya that his immediate family had fled to Kenya. Asked how he knew that his family were still in Kenya, he said his cousin was told that they are in a refugee camp.

49. The appellant said that he has tried to contact his immediate family in the refugee camp in Kenya but unfortunately he has not been able to contact them. Asked how he has tried, he said he asked people who come from Kenya. He has also contacted Somali relatives in the USA. He has contacted BBC Somali radio in Kenya. He has also asked some Somali television stations to make announcements during their broadcasting of programmes.

50. He has no contact with any relatives in Somalia. He does not know where they are and he does not know where to contact with them.

51. The appellant said Ms Salad's family members have fled to Kenya. Her family in Kenya are her mother and her siblings. She is in contact with them by telephone. She speaks to them whenever she wants to do so.

52. Asked how many siblings Ms Salad has, he said she has six siblings, i.e. there were seven children including herself. She had three brothers and three sisters, so four girls in total.

53. The appellant and Ms Salad met on 1 April 2012 and decided to get married in the middle of July 2012. Asked who proposed, he said they both did. They both suggested that they get married.

54. He met Ms Salad in a house in Heston. An old man named Muhamud Jama Dirir, who was not feeling well, lived in the house. He used to visit the old man, as did Ms Salad. They started talking to each other. The old man was Ms Salad's "distant grandfather". He came to meet the man in some Somali restaurants several years ago.

55. The appellant and Ms Salad moved in together after their Islamic marriage ceremony in August 2012. Prior to then, neither of them had a house. They therefore moved into her aunt's house in Slough. The address was 10, Chalvey Park, Slough. Before moving into this address, the appellant lived at 111, Havelock Rd, Southall, with his friend named Abdi Majid.

56. Asked where Ms Salad was living prior to their moving in together, he said, at first, that she was living with her aunt at 10 Chalvey Park and then said that she had also told him that she was living in Southall before that.

57. The appellant said that at present, he and Ms Salad lived at 162 Wellington Street, which is a four-bedroom house. The accommodation is shared. He and Ms Salad live in room no. 2. There are two rooms on the ground floor and two rooms on the first room. He and Ms Salad have the second room on the ground floor. The other occupants of the property are an old elderly white man and two African ladies.

58. Asked how many people attended his wedding, he said the "Nikah" ceremony took place at the mosque. There were five people present in total: the "imam" of the mosque, the appellant, Ms Salad, Ms Salad's friend named Falhado and the man in court on the hearing day who was the appellant's friend. There was a ladies' party in the evening. Asked why Ms Salad's aunt did not attend the wedding, he said that ladies do not attend at mosques; they went to the ladies party in the evening. There were up to one hundred ladies at the ladies party which was held at Diamond Hall. The photographs were not in the bundle but were available at the hearing.

59. The appellant said that Ms Salad has been unemployed for the last two months. She does care work. The job she had was a temporary one and came to an end. She worked through an agency. Asked how she was supported financially, he said she had some savings and is looking for a job now. She supports the appellant from her savings.

60. The appellant started assisting the charity, Intercontinental Charity Organisation (letters at pages 44-49) in October 2013. He decided to became involved with them because he was unable to work and unable to study due to his status.

61. Asked what he does for the charity, the appellant said he helps people who come in who do not know the language. He also does something with the computer and the

projects. He goes there once every two or three weeks; sometimes, once in a few days and sometimes once a month. Whenever they need him, he goes to help them. He chose this particular charity because it is associated with Somali communities.

62. In re-examination, the appellant clarified that Ms Salad has three sisters and three brothers. He clarified that a total of five people, including himself, Ms Salad and the "imam" attended the "Nikah" ceremony at the mosque. His friend and Ms Salad's friend were the other two people.

63. In answer to our questions, the appellant said he could not live in Mogadishu. He is not from Mogadishu. Mogadishu has not been safe since 1991. Al-Shabaab are always killing people. There are so many militias. Even the majority clans are still fighting each other. If they knew his clan, they would kill him. His clan is Ogaden.

64. Asked whether the Ogaden is part of the Darod clan, he said the clan in control in Mogadishu is the Hawiye. The Hawiye is the majority clan in Mogadishu. As member of the Darod clan, he would not be safe from the Hawiye.

65. Asked if there were any other reasons why he could not live in Mogadishu, the appellant said that the Al-Shabaab are still fighting in Mogadishu. They tried to assassinate the President. They exploded the Parliament. Every day there are casualties.

66. In addition, the appellant said that he does not have family in Mogadishu. He has been in the United Kingdom for a long time. He left Somalia when he was a child. He does not know anyone in Mogadishu. He does not have a house in Mogadishu. He would not know where to go.

67. Asked why he would not be able to obtain a job in Mogadishu, he said he would not even know where to start. If he goes to Mogadishu, he will be recognised as someone who has come from the West. There are gangs that will kill him. He will be identified easily.

68. The appellant said Ms Salad could not go with him to Mogadishu for the same reasons. She came to the United Kingdom when she was young. She has no family in Somalia. Women are being raped in Somalia, especially the pretty women. Ms Salad is pretty. Al-Shabaab are forcing women to marry by force. They can marry four wives each.

69. The appellant said that he did not try to contact his family in Somalia after he arrived in the United Kingdom in December 2002. His family does not know where he is. Asked again whether he had tried to contact his family after arriving in the United Kingdom, he said he had tried.

70. We asked the appellant why it had not been possible to trace his family in Kenya through Ms Salad and her family in Kenya given his evidence, firstly, that it is possible to trace people very easily through the Somali community; secondly, his evidence that his cousin in the USA had had contact with someone who knew they were in a refugee camp; and, thirdly, his evidence that Ms Salad was in contact with

her family in Kenya. The appellant said that he had asked Ms Salad to find his family but they could not. There was no trace of them.

71. The second witness was Ms Salad who adopted her witness statements as her examination-in-chief.

72. In cross-examination, she said she has no family in Somalia today. Her family moved to Kenya. Asked what family she has in Kenya, she said: "*My mother and my sisters. We are seven siblings. Two died. I have four sisters including me".* She also has an aunt in Kenya.

73. She does not speak to her family much; just once every two or 3 months. They live in a refugee camp in Afdab town. She does not remember when they moved there. It was a long time ago. When she herself left Somalia in 2004, they were still in Somalia. She found out through a friend that they had moved to Kenya.

74. Ms Salad said that the appellant does not have any relatives in Somalia. She knows that because he told her so. The appellant has "*seven siblings, five sisters and two brothers including him*", and his mother. His father died in 2003

75. Ms Salad said that the appellant has no idea at all of the whereabouts of his family. He has not asked her to ask her family in Kenya to make enquiries about their whereabouts. She is not aware of any attempts that the appellant has made to try and contact his family.

76. Ms Salad met the appellant in her uncle's house in Heston on 5 April 2012. The appellant used to visit her uncle whose names was Mohamed Geel and she too used to visit her uncle because he was sick. Asked if Mohamed Geel was her uncle's full name, she said: "*Not that I am aware of".* No one introduced her and the appellant. They just met at her uncle's home.

77. The appellant and Ms Salad moved in together after they went through the "Nikah" ceremony. Before that, she lived at 10 Chalvey Park and the appellant lived in Southall with friends. The "Nikah" ceremony was attended by five people in total, including the appellant, Ms Salad and the "imam". There was also a woman's wedding attended by one hundred people.

78. The property where she and the appellant live is a four-bedroom property. There are two people who live upstairs. She and the appellant live downstairs and there is someone else who lives downstairs. They share the bathroom and the kitchen.

79. Ms Salad is looking for a job at present She has been out of work since August 2014. She supports herself and the appellant from her savings. He does not have any other forms of support.

80. The appellant started doing voluntary work at the charity in August 2013. Asked what work he does at the charity, Ms Salad said he just helps there. Asked how often he works there, she said he goes whenever they send a letter asking him to do so. This happens about once a month. She does not know why he chose to be involved with this particular charity.

81. Ms Salad said that the appellant cannot return to Mogadishu because it is a dangerous country. Asked if she would return to Mogadishu with him if his appeal was unsuccessful, she said, without hesitation: "Y*es I would because he is my husband".*

82. In re-examination, Ms Salad said that two siblings who had died were both brothers.

83. Mr Shire then gave evidence. He adopted his witness statement. There were no questions in cross-examination.

Assessment

Burden and standard of proof

84. We have had regard to the provisions of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 and related IRs.

85. It has been accepted that the appellant is from Kismayo. In AMM, the Tribunal found that Kismayo was not safe. As explained at paras 21-22 and 28-29 above, Ms. Ong was unable to point us to any evidence to persuade us to take different view. We therefore find that it is reasonably likely that, if returned to Kismayo, the appellant would be subjected to persecution contrary to the Geneva Convention.

86. In relation to his asylum claim, it is for the appellant to show that he has a subjective fear of persecution for a Geneva Convention reason in Mogadishu and that his fear is well-founded. The assessment of whether his fear is well-founded must be based on the evidence as a whole, going to past, present and future and be assessed to the low standard of a reasonable likelihood. If, and only if, the appellant would be safe in Mogadishu, it will be necessary for us to consider whether it would be unduly harsh for him to relocate to Mogadishu, the burden of proof again resting on him.

87. In relation to his claim to subsidiary protection or humanitarian protection, it is for the appellant to show that there are substantial grounds for disbelieving that, if returned to Mogadishu, he would face a real risk of suffering serious harm as defined in Article 15 of the Qualification Directive/ para 339C of the IRs.

88. It is for the appellant to show that there are substantial grounds for believing that his deportation to Mogadishu would expose him to inhuman or degrading treatment, in breach of his rights under Article 3.

89. It is for the appellant to show that he has established family and/or private life in the United Kingdom within the meaning of Article 8(1) and that his deportation would amount to an interference with his right to family and private life. If that is established, it is for the respondent to show that the decision is in accordance with the law. The deportation decision must be proportionate to the legitimate aim(s) sought to be achieved (in this case, immigration control and, more importantly, the prevention of crime).

90. In relation to Article 8, we deal below with the interplay between para 390, 390A, 398, 399 and 399A of the IRs; ss.117B, 117C and 117D of the Immigration Act 2014 (the "2014 Act"); Appendix FM and para 276ADE of the IRs; the respondent's

policy guidance for the consideration of Article 8 claims outside the IRs; and recent cases, for example, R (Nagre) v SSHD [2013] EWHC 720 (Admin) and MM (Lebanon) and Others v SSHD [2014] EWCA Civ 985.

91. We stress that our findings of fact are made on the basis of the whole of the evidence before us.

The Devaseelan guidance and assessment of the evidence

92. In line with the guidance in Devaseelan, the findings of Adjudicator Forrester and the 2008 panel are a starting point. Both did not find the appellant credible. The 2008 panel considered the appellant's evidence that he did not know the whereabouts of his family. It considered his evidence that his cousin had informed him since the hearing of his first appeal (in 2004) that his family had fled to Kenya. It considered that this evidence was not consistent with his evidence at his original interview (held on 27 August 2003, question 97) which showed that he knew then they had gone to Kenya. It found that the appellant could not remember what he had said or to whom and was therefore becoming confused "with his stories" (para 34). At para 37, it found that the appellant had not told the truth with regard to his situation in Somalia either at the hearing before the Adjudicator Forrester or at the hearing before it.

93. It is clear from para 41 of Devaseelan that, if the appellant is seeking to rely upon facts that are not materially different from those put to Adjudicator Forrester or the 2008 panel, and proposes to support the claim by what is in essence the same evidence as that available to the appellant at the previous hearing(s), we should regard the issues as settled by the previous determination(s) and make findings in line with them rather than allowing the matter to be re-litigated.

94. Para 41 of Devaseelan therefore applies to the evidence that the appellant gave himself about the whereabouts of his family, evidence which was rejected by the 2013 panel.

95. However, given that Ms Salad has given evidence about his family and that her evidence was not available to the 2008 panel, we consider afresh the evidence (including the appellant's) about the whereabouts of his family.

96. As will be seen from our assessment below, the evidence that Ms Salad gave about the whereabouts of the appellant's family went not only to that issue but also the genuineness of the relationship between them.

97. Before the 2013 panel (see para 18 of its determination quoted at our para 45 above), the appellant said that he did not know what had happened to his family and that he had made enquiries but had no news of them. This is inconsistent with the evidence he gave to the 2008 panel and to us that his cousin had told him in 2003 that his family had fled to Kenya and were living in a refugee camp. No attempt was made at the hearing before us to explain this discrepancy, notwithstanding the fact this was a clear opportunity for him to do so.

98. The evidence that both gave before us was particularly damning. When asked to explain how his cousin knew that he was in the United Kingdom, he said that "*the*

clan is an address", everybody knows where people are and people can be traced easily. Indeed, according to his evidence, such was the ability to find people through the clan network that the news reached his cousin in the USA that his (the appellant's) family were in a refugee camp in Kenya. In the light of this evidence, we did not find it credible that he was unable to locate his family in Kenya.

99. This is especially so, given his evidence that he has even contacted BBC Somali radio and asked some Somali television stations to make announcements during their broadcasting. It was not clarified whether he was referring to Somali television stations in Somalia or in Kenya. However, more important was the discrepancy between his evidence that he had asked Ms Salad to find his family and her evidence that he had not asked her to ask her family in Kenya to make enquiries about their whereabouts.

100. If the appellant's evidence about the efforts he had made by contacting BBC Somali radio and Somali television stations to find his family is true, the evidence of Ms Salad's evidence that she was not aware of any attempts that the appellant had made to try and contact his family goes against the evidence of both that they have a genuine and subsisting relationship. We found it incredible that, if there was a genuine relationship between them, Ms Salad would be unaware of efforts the appellant had made to find his family. If there was a genuine relationship between the appellant and Ms Salad, we are of the firm view that Ms Salad would have been eager to use the presence of her family in Kenya to help the appellant locate his family.

101. We formed the view that Ms Salad does not know of the evidence that the appellant gave at the hearing before the 2013 panel, to the effect that he had tried to contact his family.

102. There are many documents that show that Ms Salad lives at 162, Wellington Street. There are some documents in the appellant's name at that address. We allow for the fact that, as he does not have immigration status in the United Kingdom, it will be impossible for him to adduce bank statements and such documents. We have noted that there are documents in Ms Salad's name at 10, Chalvey Park which do support the evidence that both gave, that after their Islamic wedding ceremony in August 2012, they moved in together to live at 10, Chalvey Park. There is one document dated 12 November 2012 from the Home Office addressed to the appellant at 10, Chalvey Park (A34). All these documents support their credibility.

103. The fact that the Islamic "marriage certificate" also gives the address of 10 Chalvey Park is consistent with the evidence described in the preceding paragraph and their evidence at the hearing.

104. Ms Ong submitted that the evidence both gave about the number of siblings each had was inconsistent. The appellant and Ms Salad were both asked about the number of siblings Ms Salad had. We acknowledge that there was some confusion about the evidence both gave in this respect. In our view, this was adequately cleared up in re-examination by Mr Masood.

105. However, when Ms Salad was asked about the number of siblings the appellant had, she said that he had "*seven siblings, five sisters and two brothers including*

him" (para 75 above). It is simply impossible to reconcile this with the details he gave of his siblings at his "Bio-data information" section of his screening interview dated 21 December 2002, a copy of which Ms Ong submitted at the commencement of the hearing. According to this, he had four brothers (born, respectively, in 1984, 1990, 1992 and 1994) and two sisters (born, respectively, in 1987 and 1989).

106. Both the appellant and Ms Salad said that there were five people present at the marriage ceremony, this being the "imam", the appellant's friend (Mr Shire), Ms Salad's friend and themselves. The appellant said that Ms Salad's friend was called "Falhado". However, the marriage certificate (A21) gives the name of two witnesses. The first is Mr Shire. The name of the second witness is given as: "Abdikadir Mohamed Kahin". There is no mention of the name "Falhado".

107. Ms Salad was asked at the hearing whether she would accompany the appellant to Somalia, if his appeal was unsuccessful. She said, without hesitation and with a smile on her face, expressing none of the concerns she has expressed in his witness statements (see our paras 39-41 above): "*Yes I would because he is my husband*". Mr Masood sought to rely on this evidence to say that this shows that the relationship was a genuine one.

108. However, it is impossible to reconcile her oral evidence in this regard with her two witness statements, the second of which was signed less than a week before the hearing before us. The question whether an individual is willing to leave all that he or she may have built up in the United Kingdom over the years is surely a matter of some moment not only for the individual in question but also for both partners. If there was a genuine relationship between them, it is wholly lacking in credibility that, up until less than a week before the hearing, Ms Salad had firmly expressed her view that, if the appellant had to leave the United Kingdom, their family life would be severed because she would be unable to join him in Somalia, and at the hearing, that she would follow him to Somalia without mentioning at all the concerns she had expressed in her witness statements (summarised at our paras 39-40 above). We were driven to the conclusion that the statements were written for her to put her signature to, and that she has no recollection of what she is said in those statements because the sentiments expressed therein do not mean anything to her. She simply forgot what she was meant to say at the hearing before us.

109. We have taken into account the evidence of Mr Shire. He says he attended the marriage ceremony and we were told that a DVD was available for us to see at the hearing. There is no issue that such a ceremony took place. We were told that photographs of the ladies' party in the evening are available for us to inspect. There are some photographs in the bundle. There is no issue about whether such a party took place.

110. We have taken into account the fact that the property at 162 Wellington Street is a multiple-occupancy property. The appellant and Ms Salad both said that they shared the second room on the ground floor. Mr Shire said that he has visited the appellant and Ms Salad three times since the marriage ceremony and they have visited him and his family many times. We take his evidence into account in assessing the overall credibility of the witnesses and in making our findings of fact.

111. Both the appellant and Ms Salad said that Ms Salad supports the appellant from her savings. There is no evidence of any such savings. We have been given very few banks statements. These are at A80-86 and relate to a Halifax account in the name of Ms Salad, for the periods from 13 September 2012 to 4 October 2012, 5 October 2012 to 2 November 2012 and from 13 December 2012 to 8 January 2013. Her credit balance never exceeded £ 147.73 and the account went into overdraft on five or six occasions. The following letters from the Halifax Bank to Ms Salad show that her finances were also in a poor state in September and October 2014:

    i. a letter dated 15 September 2014 (p58) stating that the bank had decided not to make a payment of £37.94 to EE & T-Mobile because the payment would have caused her account to go over her "Planned Overdraft" limit; and

    ii. a letter dated 13 October 2014 (p57) stating that the bank required her to repay the amount of her unplanned overdraft of £166.98 within two days, failing which the administration of the account would pass to the bank's "Collections Centre".

112. We do not take into account against the appellant's and Ms Salad's credibility the fact that he said that he met Ms Salad at the house of her "*distant grandfather*" named Muhamud Jama Dirir and she said that they met at the house of her uncle named Mohammed Geel. The way in which one person is related to another can be quite a complex issue in some cultures and does not always translate well. Likewise, it is easy for mistakes to be made when names are translated. Depending on how one pronounces "Geel" - whether the "G" is accentuated and whether the "l" is silent, the pronunciation could be similar to "Dirir" if the middle 'r' is silent. There is no such scope in relation to whether "Falhado" is the same person as "Abdikadir Mohamed Kahin".

Findings of fact

113. We found the appellant, Ms Salad and Mr Shire completely lacked credibility. On the whole of the evidence and bearing in mind the burden and standard of proof, we make the following findings fact:

    i. We reject the appellant's evidence that his family are not in Somalia.

    ii. We reject his evidence that he has no one in Mogadishu.

    iii. We reject the evidence that the appellant and Ms Salad have a genuine and subsisting marital relationship. We find that the Islamic marriage ceremony they have both undergone is a charade, entered into for the sole purpose of deceiving the immigration authorities. If they both live at 162, Wellington Street, we reject the evidence that they cohabit in the sense that they live in the same room as husband and wife.

    iv. We reject the evidence of the appellant and Ms Salad that Ms Salad supports the appellant financially. It follows that he is being supported by himself and/or by some means that he has chosen not to share with us.

v. There is no credible evidence before us to persuade us to depart from the finding of the 2013 panel that the appellant is young, fit and healthy male (para 37 of the 2013 determination). There is no credible evidence before us to persuade us to depart from its findings (at para 38) that the appellant is "*certainly not vulnerable*" and that he is intelligent and manipulative.

Assessment of the asylum claim, humanitarian protection claim and Article 3 claim

114. Mr Masood asked us to bear in mind that the country guidance case of MOJ is under appeal. We do not accept that the mere fact that MOJ is under appeal means that it should not be applied (see SG (Iraq) v SSHD [2012] EWCA Civ 940; in particular, paras 62-71). Mr Masood also relied upon the background material in his bundle in submitting that Mogadishu was not safe for the appellant.

115. Before we turn to that material, we will remind ourselves of the country guidance in MOJ. We must, of course look to the case as a whole. However, for present purposes, we quote the relevant part of the head note, which reads:

"(i) 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.

(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 or 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 of 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:

- 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."

116. The appellant said in his witness statements and at the hearing that he would not be safe in Mogadishu. In oral evidence, he said that the clan in control in Mogadishu is the Hawiye and that he would not be safe from the Hawiye, as he is a member of the Darod clan.

117. MOJ makes it clear that, on the evidence that was before the Upper Tribunal in that case, there was no longer a real risk of clan-based violence in Mogadishu. Our attention was not drawn to any material in appellant's bundle entitled "Latest Country Information" (the "country bundle") that referred to any clan-based violence in Mogadishu. To the contrary, we found, at pages 123 and 24 of the country bundle, the following in the report of the Danish Immigration Service/Landinfo dated 12 March 2014 (the "Danish report") and entitled: "*Update on security and protection issues in Mogadishu and South-Central Somalia*":

[p123] "2. Protection and livelihood issues in Mogadishu

> 2.1 Clan affiliation and protection
>
> Regarding clan identity and security an international agency (A) explained that there are fewer warlords than previously, but clan identity is still very important.
>
> According to the international agency (A) there is no one in Mogadishu who is at risk of attacks or persecution only because of his or her clan affiliation.
>
> … Protection is not dependent on one's clan affiliation."
>
> [p124] Asked to comment on the importance of clan protection in Mogadishu today, a Somali NGO in Mogadishu explained that people do not need the protection of their clan any longer, but if the government should collapse, the situation would change and people would once again need the protection of their clan. However, as of today no one is killed because of one's clan affiliation."

(our emphasis)

118. We therefore apply the country guidance in MOJ in relation to the appellant's alleged fear of clan-based persecution in Mogadishu. We find that there is no real risk at he will be subjected to such violence in Mogadishu. His alleged fear of persecution from the Hawiye in Mogadishu is not well-founded.

119. The appellant also asserts a fear of Al-Shabaab in Mogadishu. Mr Masood submitted that Al-Shabaab had not been driven out of Mogadishu entirely. He took us to his "key passages index" which is at pages 196-209 of the country bundle. Before we quote extracts from the full reports, we should make the general point that there were more than just a few documents in the appellant's country bundle which were reports that were considered by the Tribunal in MOJ. For example:

    i. The Amnesty International Report dated 26 September 2013 (p167-171) entitled: "*Mogadishu cannot qualify as an Internal Flight Alternative"* was document 153 on page 224 of MOJ;

    ii. The Amnesty International Report dated 15 May 2013 (p172-178) entitled: "*Returns to South and Central Somalia: A Violation of International Law"* was document number 335 on page 234;

    iii. The Human Rights Watch "dispatch" dated 19 November 2013 (p179) entitled: "*Deported to Danger in Somalia"* was document number 78 on page 220; and

    iv. The Human Rights Watch "Memo to the Hague" dated 27 November 2013 (p180-181) entitled: "*Somalia is not safe*" was document number 67 on page 219.

120. We did not find it at all helpful for the appellant to include in the bundle documents that had already been considered by the Tribunal in MOJ. It is not for the Upper Tribunal to trawl through the country bundle and separate those documents that have already been considered in MOJ and those that have not.

121. Of the documents that were not before the Tribunal in MOJ, we stress that we have considered all of the material. The following are but a selection of quotes from the full reports in the country bundle:

Amnesty International, Netherlands: "*Forced Returns to South and Central Somalia, including to Al-Shabaab areas: A blatant violation of international law*", 23/10/2014 (p4-13):

> [p4] "Amnesty International stated in May 2013 that forced returns to south and central Somalia amount to a violation of international law. In October 2014, Amnesty International is gravely concerned about continued attempts by the Dutch government to effect such forced returns.
>
> [p5] Generalised violence in south and central Somalia
>
> Somalia remains a country experiencing a non-international armed conflict. In 2013, Somalia had the highest level of conflict events in Africa. Armed clashes take place outside of Mogadishu and in rural areas of south central Somalia. Fragile security gains in Mogadishu are short-lived. Though al-Shabaab no longer controls parts of Mogadishu, it engages in guerrilla warfare routinely using improvised explosive devices (IEDs) and carrying out grenade and suicide attacks. Despite the ongoing lack of a civilian casualty tracking system, it is widely documented that military operations result in civilian casualties, with civilians killed and wounded in crossfire during armed clashes, through IEDs as well as grenade and suicide attacks.
>
> There has been a reported increase in al-Shabaab's targeting of civilians since the Kenyan incursion to Somalia in 2011, which continues to play out in 2014. Violence against civilians seems to increase during periods when territories are contested – both prior to a change of control of territory when people are accused and punished by al-Shabaab for allegedly spying, as well as following the SFG gaining control of territory. In both instances, retaliatory attacks are carried out by al-Shabaab in which civilians are deliberately targeted."

The UNHCR: "*UNHCR urges continued protection for asylum seekers from Southern and Central Somalia*", 28/01/2014 (p20-21):

> [p20] "UNHCR has released updated guidelines on the international protection needs of people fleeing Southern and Central Somalia. Although security has improved in some parts of Southern and Central Somalia, armed conflict continues. Widespread insecurity and human rights abuses continue to compel Somalis to leave their country. More than 42,000 Somalis sought asylum in neighbouring countries and elsewhere in 2013.
>
> We are appealing to all states to uphold their international obligations with regard to no forced returns, or non-refoulement. Somali nationals should not be forcibly returned to Somalia unless the returning state is convinced that the persons involved would not be at risk of persecution.
>
> Southern and Central Somalia remains a very dangerous place. While there are no complete statistics on conflict-related casualties, data compiled by ACLED, a research group, shows there were more casualties in 2012 and early 2013 than in 2011. Monthly fatalities fluctuated between 100 and 600 people. In June 2013, fierce fighting resulted in 314 casualties in Kismayo alone. Civilians are at risk of being killed or wounded in crossfire between government forces and Al-Shabaab militants as well as by bomb attacks and as bystanders in targeted attacks. Even in Mogadishu, nominally under government control with the backing of the African Union Mission in Somalia (AMISOM), Al-Shabaab has repeatedly demonstrated its ability to stage deadly attacks."

Human Rights Watch World Report 2014: "*Somalia*", 21/01/2014 (p74-77):

> [p74] **"**Civilians continue to suffer human rights abuses as the new Somali government struggled to extend its control beyond the capital, Mogadishu, and to some key towns in south-central Somalia in 2013. Parties to Somalia's long-running armed conflict were responsible for

serious violations of international law, abuses include indiscriminate attacks, sexual violence, and arbitrary arrests and detention.

The Islamist armed group Al-Shabaab maintains control of much of southern Somalia, and the group increased attacks on high-profile civilian locales in Mogadishu, including the courthouse, a popular restaurant, and the United Nations compound, killing scores of civilians. Those fighting against Al-Shabaab – a combination of Somali government armed forces, the African Union Mission in Somalia (AMISOM), Ethiopian government troops, and allied militias – have also committed abuses.

Civilians were killed and wounded by crossfire, including during infighting between government soldiers over control of roadblocks."

The Danish report: p101-157

[106] "1.1 Security in Mogadishu and its outskirts

UNDSS explained that the outskirts of Mogadishu remain prone to different types of guerrilla and terrorist attacks. There are still some hit and run actions against AMISON positions in Daynile, Hurriwa and Dharkenley. But these are probably carried out by groups staying there rather than movements of al-Shabaab fighters coming from other areas of Somalia.

An international NGO (C) explained that security must be seen at two levels. There is a general security situation which affects everyone in Somalia. This situation is due to the fact that the government is not in full control and in addition there are internal political issues which are causing specific challenges. However, the security situation has improved since April 2013 in certain areas of S/C Somalia.

The international NGO (C) stated that on the other hand, there are the security related issues which directly affect all government people, government affiliates, international employees, contractors who deal with the international community and UN staff as well as many others. As long as al-Shabaab is around this security situation will continue. Although al-Shabaab is not in control of any part of Mogadishu it can still reach all over the city. Thus, there are no safe places in Mogadishu. This situation is not going to change unless the government strengthens security. The targeted killings continue and there are criminal actions as well.

[p107] AI reported on 26 September 2013 that "Al-Shabaab have faced internal divisions and infighting since the beginning of the year [2013], which has resulted in scores of deaths".

[p108] 1.2 Influence of al-Shabaab in Mogadishu

Regarding security developments in Mogadishu the UNDSS explained that overall there has been an improvement in terms of the Somali forces expanding their reach in Mogadishu, but the city remains very fragmented. Even if there are Somali forces and police, at the level of the district the DC with his militia still has the power, and it depends on him if he collaborates with the government or if he is the government. According to UNDSS these militias are technically not clan-militias since there is a certain clan mix, but in reality they are clan-based. However, these militias are to be seen as security forces rather than clan militias.

[p109] A Somali NGO in Mogadishu explained that the staffs of NGOs, INGOs and other international organizations fear al-Shabaab because they are perceived by it as activists and anti al-Shabaab.

The Somali NGO in Mogadishu explained that al-Shabaab is threatening international organisations, but since al-Shabaab withdrew from Mogadishu in August 2011, it no longer has strongholds or specific territories it controls in Mogadishu. Al-Shabaab members and sympathizers are however still present in the city, but not as a regular military force. The NGO also stated that people no longer support al-Shabaab because it is a terrorist movement and it is killing people indiscriminately.

> Regarding al-Shahaab a well-informed journalist in Mogadishu explained that it is very weak and spread out. This is the reason why it has intensified its attacks. These attacks were very bad during the Ramadan, i.e. in August 2013. The biggest problems is al-Shabaab's suicide bombers, as they present a serious threat to the people of Mogadishu."
>
> (our emphasis)

122. It is to be noted that, whilst the material in general continued to portray the fact that there were attacks by Al-Shabaab in Mogadishu, the Danish report as well as the Amnesty International report dated 23 October 2014 (p5 of the country bundle) and the UNHCR report dated 28 January 2013 (p20) make it plain that it is still the case that Al-Shabaab does not have any strongholds or territories that it controls in Mogadishu. Accordingly, it is still correct to say that the withdrawal of Al-Shabaab from Mogadishu is complete.

123. In relation to the appellant's fear of being caught up in Al-Shabaab attacks or being targeted by the Al-Shabaab, we find, having considered the country bundle as a whole, that the material relied upon on the appellant's behalf does not justify departing from the country guidance in MOJ. Accordingly, we find that there is no real risk of the appellant being persecuted by the Al-Shabaab in Mogadishu.

124. The appellant asserted that he would be recognised in Mogadishu as someone who has come from the West and that he will be easily identified. The Tribunal in MOJ did not regard this as a risk factor that was reasonably likely in Mogadishu. The evidence in the country bundle is not such as to persuade us to depart from the guidance in MOJ in this respect.

125. As to the reasonableness of internal relocation to Mogadishu, it is clear from MOJ that relocation for a person who belongs to a minority clan and who does not originate from Mogadishu will have to be assessed very carefully. We must consider whether the appellant will have a means of establishing a home and some form of ongoing support in the absence of which there will be a real risk of his having no alternative but to live in makeshift accommodation within an IDP camp and thus having to live in conditions that will fall below acceptable humanitarian standards (Article 15(c)). The Upper Tribunal in MOJ did not consider that relocation to Mogadishu would be unduly harsh in general for the purposes of the Geneva Convention for persons relocating to Mogadishu if there is no reasonable likelihood that they will be forced to live in IDP camps.

126. We have set out at para 115 above the head note from MOJ concerning internal relocation to Mogadishu. To state the obvious, this guidance was drawn from the evidence that was before the Upper Tribunal. For example, at para 214, the Tribunal referred to evidence from the UNHCR in a report published on 25 September 2013 as follows:

> "214. The respondent points to a shift in the position of UNHCR as a stark illustration of the improvement in security conditions in Mogadishu. Having intervened in the AMM appeal, the view of UNHCR was then that all civilians were at risk of indiscriminate violence, by reason only of their presence there. However, recent statements by UNHCR demonstrate that its view, based on sources rather than direct assessment, has changed from one of there being a blanket risk to "all civilians" to the need for a more individualised risk assessment. The following is the conclusion reached in a report published on 25 September 2013 "UNHCR

guidance on the application of the internal flight or relocation alternative, particularly in respect of Mogadishu, Somalia":

> **"Conclusion**
> 27. In light of the overall situation in **South Central Somalia (outside Mogadishu)**, UNHCR considers that, on the whole, an IFA or IRA would not be relevant or reasonable given, in particular, the existence of widespread violence and prevalent human rights violations, the physical risks and legal or physical barriers encountered in reaching other areas, as well as the serious difficulties faced in accessing basic services and ensuring economic survival in a situation of displacement.
>
> 28. With regard to **Mogadishu**, the personal circumstances of an individual need to be carefully assessed. UNHCR considers an IFA/IRA as reasonable only where the individual can expect to benefit from meaningful nuclear and/or extended family support and clan protection mechanisms in the area of prospective relocation. When assessing the reasonableness of an IFA/IRA in Mogadishu in an individual case, it should be kept in mind that the traditional extended family and community structures of Somali society no longer constitute as strong a protection and coping mechanism in Mogadishu as they did in the past. Additionally, whether the members of the traditional networks are able to genuinely offer support to the applicant in practice also needs to be evaluated, especially given the fragile and complex situation in Mogadishu at present.
>
> 29. For the following categories of Somalis, UNHCR would consider that an IFA/IRA will not be reasonably available in the absence of meaningful nuclear and/or extended family support and functioning clan protection: unaccompanied children or adolescents at risk of forced recruitment and other grave violations; young males at risk of being considered Al Shabaab sympathizers and therefore facing harassment from government security forces; elderly people; people with physical or mental disabilities; single women and female single heads of households with no male protection and especially originating from minority clans. In any other exceptional cases, in which the application of an IFA/IRA in Mogadishu is considered even in the absence of meaningful family or clan support to the individual, the person would need to have access to infrastructure and livelihood opportunities and to other meaningful protection and support mechanisms, taking into account the state institutions' limited ability to provide security and meaningful protection."

127. The appellant is from the Darod clan. If he relocates to Mogadishu, he will be a member of a minority clan because the Hawiye are the majority in Mogadishu. We therefore considered the appellant's country bundle carefully to ascertain whether the evidence concerning the situation of an individual who is relocating to Mogadishu where his clan is in the minority now justified departing from the guidance in MOJ. In other words, whether the living conditions of such individuals in Mogadishu are such that they can now more readily show that it would be unduly harsh for them to relocate the Mogadishu or whether they are more likely than was the case when MOJ was decided, to find themselves in an IDP camp.

128. We found that the evidence in the appellant's country bundle was not significantly different. For example, the Danish report had a useful section entitled: *"Needs in order to settle or reestablish [sic] in Mogadishu*". This refers (at p127) to the UNHCR stressing that individuals will need access to clan protection for security and nuclear family for livelihood support and that it was emphasised by UNHCR that a person's extended family will not be able to provide sufficient support in Mogadishu. Page 127 also states:

> "… an international NGO (A) explained that …if you are not from Mogadishu you would need sufficient funds. Education and skills and a cash grant in order to start up business would also be an advantage, and local NGOs could also assist.

> … the international NGO (A) explained that these NGOs have limited resources and cannot assist a huge number of people in need. In a Mogadishu context however the basic condition is the support of the immediate family."

129. Section 2.3 of the Danish report, which is entitled: "*Internal Flight Alternative/Relocation*", relies entirely upon two documents that were considered in MOJ: the Amnesty International Report dated 26 September 2013 that we have already mentioned and a UNHCR report dated 17 January 2014 entitled: "*International Protection Considerations with regard to people fleeing Southern and Central Somalia*" which is document number 40 on page 218 of MOJ.

130. In our judgment, the evidence before us does not justify departing from the guidance in MOJ. We therefore apply the guidance in MOJ in deciding whether it would be unduly harsh to expect the appellant to relocate to Mogadishu and whether there is a reasonable likelihood of his being forced to go to an IDP camp. The guidance in the head note should of course be read in conjunction with the guidance in the body of the determination, which began at para 407. Of particular relevance in this case are the following:

> "419. … we heard evidence that the cost of the journey that brings a Somali citizen, irregularly, to Europe would be between $15,000 and $25,000 which the person concerned had been able to raise before departure or which was raised on his behalf.
>
> 423. Two observations might be made about financial considerations. Financial assistance from the Home Office may be available to voluntary returnees, in the form of a grant of up to £1,500, and may of significant assistance to a returnee. Second, if an individual was able to raise the level of funds necessary to pay for a journey to Europe arranged by an agent, it may be difficult for him to assert that he now has no access to financial resources unless he is able to explain what has changed and why, especially if he has been found not to be credible in the factual account he advanced in his appeal hearing.

Mogadishu as a destination for internal relocation.

424. 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. Large numbers of Somali citizens have moved to Mogadishu where, as we have seen there is now freedom of movement and no clan based discrimination. Such a person seeking to settle in Mogadishu but who has not previously lived there would be able to do so provided he had either some form of social support network, which might be in the form of membership of a majority clan or having relatives living in the city, or having access to funds such as would be required to establish accommodation and a means of on-going support. That might be in terms of continuing remittances or securing a livelihood, based on employment or self employment.

425. 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."

131. We have said above in our findings that we reject the appellant's evidence that he has no one in Mogadishu. We have rejected the evidence that he and Ms Salad are in a genuine relationship. We have found that he is being supported by himself and/or by some means he has chosen not to share with us. He is young, fit, healthy, intelligent and manipulative.

132. The appellant arranged his travel to the United Kingdom through at least two agents, according to para 8.4 of the determination of Adjudicator Forrester. Para 8.4 of that determination also records that the appellant took US$3,500 from his father's home. The fact that his father had such a sum of money which just happened to be in the house when he went to get the money tells one something about his financial resources and those of his family. He has chosen not to reveal to the Upper Tribunal the whereabouts of his family.

133. At the hearing before the 2008 panel (para 15 of the 2008 determination), the appellant maintained that the US$3,500 represented some of his fathers savings. In relation to the crime he committed in 2006, he said that he had paid £300 for the ticket to Canada and £400 for a false passport. He said that this money had been sent to him by his aunt in the USA. He admitted to the 2008 panel that he had worked in the United Kingdom.

134. On the whole of the evidence and bearing in mind the burden and standard of proof, we find that it would not be unduly harsh to expect the appellant to relocate to Mogadishu. It is not reasonably likely that he will not have access to funds such as would be required to establish accommodation and a means of on-going support. It is not reasonably likely that he will find himself in an IDP camp.

135. Accordingly, we dismiss his appeal on asylum grounds and on humanitarian protection grounds.

136. For all of the above reasons, there is no real risk that the appellant will be subjected to treatment in breach of his rights under Article 3 in Mogadishu.

The applicable regime in relation to the Article 8 claim

137. Paras 390 and 390A of the IRs provide:

> "Revocation of deportation order
>
> 390. An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:
> (i) the grounds on which the order was made;
> (ii) any representations made in support of revocation;
> (iii) the interests of the community, including the maintenance of an effective immigration control;
> (iv) the interests of the applicant, including any compassionate circumstances.
>
> 390A. Where paragraph 398 applies the Secretary of State will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other factors."

138. Accordingly, pursuant to para 390A, the first issue is to decide whether the regime set out para 398, 399 and 399A of the IRs applies. This would only be the case if one of the sub-paragraphs of para 398 applied. Para 398 provides:

> "398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
>
> (a) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
>
> (b) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or
>
> (c) the deportation of the person from the UK is conducive to the public good because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law,
>
> the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors."

139. We have no hesitation in rejecting the argument at para 38 of the RFRTR, that para 398(c) applies just because (as at the date of the decision to refuse to revoke the deportation order) the appellant did not have family in the United Kingdom. In our view, that is an irrational interpretation of para 398. In our judgment, it is clear that, in cases where the individual receives a sentence of less than 12 months, the regime in para 398, 399 and 399A only applies if the individual's offending has caused serious harm or if the individual is a persistent offender. We therefore assess for ourselves whether para 398 applies.

140. The appellant plainly does not fall within para 398(a) or (b). In our view, the offence of which he had been convicted was not one that could be said to have caused "serious harm", although in saying so we emphasise that we do not minimise in any way the seriousness of his conviction. We rely on the same reasons we gave in relation to whether the appellant's conviction was a "serious crime" for the purposes of para 339D, although we recognise that "serious crime" and "serious harm" are

not synonymous in meaning. The appellant is plainly not a persistent offender, as the conviction in January 2006 is the only conviction as far as we are aware.

141. Accordingly, although this is a deportation case, the regime set out in paras 398, 399 and 399A does not apply in assessing the appellant's Article 8 claim.

142. Mr. Masood accepted that the appellant did not satisfy the requirements of Appendix FM in relation to the right to family life because he did not satisfy the suitability requirement as he is the subject of a deportation order. We have found that the appellant's relationship with Ms Salad is not a genuine and subsisting marital relationship. We have found that the Islamic marriage ceremony they have both undergone is a charade, entered into for the sole purpose of deceiving the immigration authorities. It follows that we find that the appellant has not established family life within Article 8(1). We find that this finding is an additional, also determinative, reason why he does not qualify under Appendix FM. It follows that the submission in the appellant's skeleton argument, about it being disproportionate to expect the appellant to return to Somalia to make an entry clearance in order to re-join Ms Salad in the United Kingdom, is irrelevant.

143. As to private life, para 276ADE(vi) of the IRs provides (insofar as relevant):

> "276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:
>
> (i) …
> (ii) …; and
> (iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or
> (iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or (v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or
> (vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK."

144. The appellant has been living in the United Kingdom since his claimed arrival on 21 December 2002, i.e. 12 years ago. Mr. Masood accepted that the appellant did not satisfy the requirements of para 276ADE in relation to the right to private life because he does not satisfy the relevant requirements as to continuous residence. However, this means that it is also accepted on the appellant's behalf that he does not satisfy the requirement in para 276ADE(vi) that there would be very significant obstacles to his integration into Somalia. In any event, we find that there will not be very significant obstacles to his integration in Mogadishu, for the reasons given at paras 131-133 above.

145. We therefore need to decide whether it is necessary to consider the position outside the IRs. If it is, there is guidance issued by the Secretary of State for the consideration of Article 8 outside the IRs. The precise wording of the guidance has not been produced to us. We therefore take the version that was before the court in Nagre, which reads:

"**3.2.7d Exceptional circumstances**

Where the applicant does not meet the requirements of the rules refusal of the application will normally be appropriate. However, leave can be granted outside the rules where exceptional circumstances apply. Consideration of exceptional circumstances applies to applications for leave to remain and leave to enter. "Exceptional" does not mean "unusual" or "unique". Whilst all cases are to some extent unique, those unique factors do not generally render them exceptional. For example, a case is not exceptional just because the criteria set out in EX.1 of Appendix FM have been missed by a small margin. Instead, "exceptional" means circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate. That is likely to be the case only very rarely.

In determining whether there are exceptional circumstances, the decision maker must consider all relevant factors, such as:

(a) The circumstances around the applicant's entry to the UK and the proportion of the time they have been in the UK legally as opposed to illegally. Did they form their relationship with their partner at a time when they had no immigration status or this was precarious? Family life which involves the application putting down roots in the UK in the full knowledge that their stay here is unlawful or precarious, should be given less weight, when balanced against the factors weighing in favour of removal, than family life formed by a person lawfully present in the UK.

(b) Cumulative factors should be considered. For example, where the applicant has family members in the UK but their family life does not provide a basis for stay and they have a significant private life in the UK. Although under the rules family life and private life are considered separately, when considering whether there are exceptional circumstances private and family life can be taken into account.

If the applicant falls to be granted because exceptional circumstances apply in their case, they may be granted leave outside the rules for a period of 30 months and on a 10 year route to settlement."

146. In Nagre, Sales J (as he then was) said (para 30):

> "…if, after the process of applying the new rules and finding that the claim for leave to remain under them fails, the relevant official or tribunal judge considers it is clear that the consideration under the Rules has fully addressed any family life or private life issues arising under Article 8, it would be sufficient simply to say that; they would not have to go on, in addition, to consider the case separately from the Rules. If there is no arguable case that there may be good grounds for granting leave to remain outside the Rules by reference to Article 8, there would be no point in introducing full separate consideration of Article 8 again after having reached a decision on application of the Rules."

147. Any assessment of the applicant's private life claim outwith para 276ADE must take account of the provisions of s.117A-D of the 2014 Act. These provisions are important. They provide:

"117A Application of this Part

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—
  (a) breaches a person's right to respect for private and family life under Article 8, and
  (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard—
  (a) in all cases, to the considerations listed in section 117B, and
  (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
(a) are less of a burden on taxpayers, and
(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
(a) are not a burden on taxpayers, and
(b) are better able to integrate into society.

(4) Little weight should be given to—
(a) a private life, or
(b) a relationship formed with a qualifying partner,
that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
(a) the person has a genuine and subsisting parental relationship with a qualifying child, and
(b) it would not be reasonable to expect the child to leave the United Kingdom."

117C Article 8: additional considerations in cases involving foreign criminals

…

117D Interpretation of this Part

(2) In this Part, "foreign criminal" means a person –
(a) who is not a British citizen,
(b) who has been convicted in the United Kingdom of an offence, and
(c) who –
(i) has been sentenced to a period of imprisonment of at least 12 months,
(ii) has been convicted of an offence that has caused serious harm, or
(iii) is a persistent offender."

148. As we said at the hearing, s.117C does not apply because the appellant does not fall within the definition of "foreign criminal" in s.117D(2). This is because:

i. He does not come within section 117D(c)(i) because he received a sentence of 9 month's imprisonment.

ii. As far as we are aware, the conviction in January 2006 is the only crime he has committed. On that basis, he does not come within s.117D(2)(c)(iii).

iii. As for s.117D(2)(c)(ii), the sentence that he received reflects not only the serious of the crime itself but also the seriousness of the harm caused by the crime. Whilst an offence of attempting to obtain a service by deception

causes harm, the offence is not such that it caused "serious harm" within the meaning of s.117D(2)(ii), in our judgment.

149. Following Nagre, we consider first whether it is necessary to consider the appellant's Article 8 outside the IRs.

150. The length of residence has been implicitly accounted for in the requirement in para 276ADE(vi). His situation in Mogadishu has been considered in reaching the finding that there are not very significant obstacles to his integration in Mogadishu.

151. That leaves his evidence that he arrived in the United Kingdom as a child; that he has learnt the English language; that he began voluntary work with the Intercontinental Charity Organisation in January 2013 and that he has worked in the United Kingdom according to the evidence he gave to the 2008 panel. We assess this evidence outside the IRs as follows:

i. The appellant did not arrive in the United Kingdom as a child. He arrived at the age of 21 years.

ii. His work for the charity is some evidence of integration with society in the United Kingdom. However, he has only done this work for a period of about a year. In addition, given his evidence that the organisation is associated with Somali communities, any such integration is more limited than if, for example, the organisation had multi-cultural links. Furthermore, there is no reason why he will not be able to involve himself in voluntary work in Mogadishu.

iii. The appellant says he has learnt the English language but he found it necessary to give evidence through an interpreter. Furthermore, there is no evidence that he has passed any English language tests. As we do not have any evidence that the appellant is able to speak English and as we did not find him a reliable witness, he cannot avail himself of s.117B(2) of the 2014 Act. In any event, any skill he has gained in speaking English amounts to limited evidence only of integration.

iv. The appellant has worked in the United Kingdom but there is little evidence of the quality of any private life established. Overall, there is indeed scant evidence about the quality of the appellant's private life. On the whole of the evidence, we find that the quality of his private life is shallow indeed.

v. We have found that the appellant has not been supported by Ms Salad. If he is working to support himself, such work is illegal. We have no evidence upon which to make any finding as to whether s.117B(3) is in his favour.

vi. The appellant has never had leave to be in the United Kingdom. He entered illegally, pursued a false asylum claim and then entered into a bogus marriage in order to deceive the immigration authorities.

152. There is significant public interest in the deportation of those who have committed crimes. Notwithstanding the fact that the appellant's crime was not a serious crime and that it was not one that caused serious harm, there is nevertheless significant

public interest in deterrence. There is also significant public interest in this case, having regard to para 151.vi. above. Balancing the appellant's personal circumstances cumulatively (including the assessment under the IRs as to whether there are very significant obstacles to his integration in Mogadishu) against the interests of the state and applying s.117A-B, we find that his deportation as a consequence of the refusal to revoke the deportation order would not be disproportionate

153. For all of these reasons, we find that there are no exceptional circumstances within the meaning of the respondent's guidance. We stress that, in using the phrase "exceptional circumstances", we are not applying exceptionality as a test. We are merely acknowledging that the general rule in a deportation case, including one that does not fall within para 398 of the IRs, is that the public interest is in the individual being deported.

154. On 11 November 2014, we received a document from the appellant's representatives entitled: "*Brief Note by appellant's representative*" in which Mr Masood argues that, as the IRs do not cover the appellant's position and given para 134 of the judgment in MM (Lebanon), the five-step approach explained at para 17 of Razgar v SSHD [2004] UKHL 27 should be followed. In relation to the respondent's guidance, which provides for leave to be granted outside the IRs in the exercise of the residual discretion only if there are exceptional circumstances, he submits, firstly, that the application of an exceptionality test is contrary to the guidance in Huang v SSHD [2007] UKHL 1 and, secondly, that the respondent's decision would result in unjustifiably harsh consequences for the appellant and his wife/partner such that refusal (presumably to revoke the deportation order) would be not be proportionate.

155. Although it was said that a copy of the "Brief Note" was sent to the Presenting Officers' Unit, we have not received any response from Ms Ong. We did not consider it necessary to invite her submissions. We respond to the "Brief Note" as follows:

i. Both in oral submissions before us and in the "Brief Note", Mr Masood appeared to think that the fact that the appellant did not satisfy the requirements for leave under the IRs of itself meant that his Article 8 claim fell to be determined outwith the IRs in line with the step-by-step approach in Razgar, to all intents and purposes as if the IRs did not exist. We consider this to be misconceived. In the appellant's case, there *was* a rule which applied, i.e. para 276ADE. The fact that he did not satisfy para 276ADE did not obviate the need to begin assessing his Article 8 claim by considering the requirements under the IRs before deciding whether it is necessary to consider his Article 8 claim outwith the IRs and, if so, proceeding to do so.

ii. The submission that the Secretary of State's guidance applies an "exceptionality test" contrary to Huang ignores the Court of Appeal's judgment in MF (Nigeria) v SSHD [2013] EWCA Civ 1192 and the Upper Tribunal's determination in Kabia (MF: para 398 - "exceptional circumstances") [2013] UKUT 569 (IAC) to the effect that the fact that para 398/the Secretary of State's guidance (as the case may be) refers to

"*exceptional circumstances*" does not mean that the exceptionality test is being applied.

iii. There is nothing of any substance in the remainder of the "Brief Note". It will be obvious from our reasoning that our finding that there are no exceptional circumstances under the Secretary of State's guidance flows from our conclusion on the balancing exercise we have conducted in relation to proportionality in line with domestic and Strasbourg jurisprudence and pursuant to s.117A-B. Accordingly, para 134 of MM (Lebanon) does not assist the appellant.

156. Finally, we should say that we took the submissions in the "Brief Note" into account in assessing this case, notwithstanding that we have only responded to it in terms at the end of our determination.

Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law that that it fell to be set aside. We have re-made the decision on the appellant's appeal against the respondent's decision. Our decision is that his appeal is dismissed on asylum grounds, humanitarian protection grounds and human rights grounds.

Upper Tribunal Judge Gill Date: 9 January 2015

APPENDIX A

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01182/2012

THE IMMIGRATION ACTS

Heard at Field House
On 10 April 2013

Determination Promulgated

……

Before

UPPER TRIBUNAL JUDGE LATTER

Between

HUSSEIN OMAR MOHAMED

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Masood of Aden & Co Solicitors
For the Respondent: Mr S Allen, Home Office Presenting Officer

DECISION AND DIRECTIONS

1. This is an appeal against a decision of the First-tier Tribunal (Judge Widdup and Dr O J de Barros) dismissing the appellant's appeal against the respondent's decision of 21 November 2012 refusing to revoke a deportation order.

Background

2. The background to this appeal can briefly be summarised as follows. The appellant claims to have entered the UK in December 2002. He applied for asylum but his claim was rejected. His appeal was unsuccessful and his appeal rights became exhausted on 1 November 2004. On 12 January 2006 he was convicted of attempting to obtain a service by deception, the use of a false passport so that he could leave the UK for Canada. He was sentenced to nine months' imprisonment and the court recommended deportation.

3. The appellant was notified of a decision to make a deportation order but this was withdrawn because of procedural errors. On 9 April 2008 a fresh decision was made. The appellant appealed against this decision but his appeal was dismissed on 5 August 2008. Subsequently further representations were made on his behalf and on 21 December 2012 a decision was made refusing to revoke the deportation order.

The Hearing before the First-tier Tribunal

4. At the hearing before the First-tier Tribunal it was argued that the appellant would be at risk on return to Somalia from Al-Shabaab and other militant groups controlling the country and that as a returnee from the West he would be perceived as someone who had breached their religious code. He also relied on his private and family life with his wife following his marriage on 1 August 2012.

The Findings of the First-tier Tribunal

5. The Tribunal took into account the previous determinations firstly, by Mr H O Forrester, Adjudicator, following a hearing on 14 April 2004 against the original refusal of asylum and secondly, by the AIT (IJ Verity and Mr C P O'Brian) against the decision to make a deportation order on 4 August 2008. It accepted in the light of the previous findings that the appellant was from Kismayo, from a majority clan and that he was not therefore at risk as a result of his clan membership. It described his evidence in support of his new claim as likewise riddled with contradictions on important issues and found him to be wholly lacking in credibility, setting out a number of examples of the contradictions in his evidence in [33].

6. Looking at the situation in Somalia, it found, based on the information contained in the Political Geography Now (PGN) December 2012 report, that there was an area around Mogadishu and Afgoye which had been liberated from Al-Shabaab, who had also been expelled from Kismayo in the south. It accepted that Al-Shabaab controlled the roads south of Mogadishu to Kismayo and commented that the map showed the situation as it was very recently, the situation appeared to be fluid and a map showing areas of control in one month might well be very different months or even weeks later [34]. It also took into account the report that Al-Shabaab was

continuing to lose territory gradually after government and allied forces captured its main stronghold two months before.

7. The panel went on to consider the country guidance in AMM and Others (Conflict; humanitarian crisis; refugees; FGM) Somalia CG [2011] UKUT 445. It found that the appellant would be returned to Mogadishu Airport; he could not reasonably be expected to travel by road to Kismayo while Al-Shabaab controlled the roads south; he would not be at risk using a commercial flight from Mogadishu to the airport in Kismayo, page 9 of the background evidence bundle referring to the bombing of the airport in December 2011. It said that the appellant had not addressed that issue but had concentrated his attentions on the difficulties he would face in Afgoye, put forward as a place where he could relocate internally, or in travelling by road to Kismayo.

8. It said that in doing so the appellant had not considered the best and most obvious means of access to his home area by air. It rejected a submission made on his behalf that he would have to pass through Al-Shabaab territory to reach Kismayo. It took into account the respondent's submission that the appellant could relocate to Afgoye, saying that might also be an option for the appellant if circumstances there had improved but in [602] of AMM the Tribunal had pointed to the need for evidence that an appellant could achieve the lifestyle of the better-off inhabitants of the Afgoye Corridor and there was no evidence to that effect, although it had noted the AIT's decision that the appellant was not vulnerable or poor by Somali standards.

9. It then considered Article 8. It accepted the evidence of the appellant's wife that she knew of his status before the wedding but was only told of the deportation order and the failed asylum claim afterwards. It commented that the appellant's marriage in August 2012 was at a time when on his own evidence he was awaiting the outcome of his application to revoke the deportation order and as a result of the marriage, he was able to claim that he had established a family life in the UK. It accepted the respondent's submission that this was a marriage of convenience in the sense that the appellant married in order to reinforce his claims in this application. It found that his wife was aware of his lack of status before the marriage but he chose only to tell her of the deportation order and failed asylum claim after the marriage and inferred that if this were a genuine marriage based on love and affection, he would have told her before but did not do so in case that dissuaded her from proceeding with the marriage [41].

10. The Tribunal, therefore, found that he did not have a family life within Article 8(1) but alternatively, his wife was a Somali from Kismayo who had married him knowing his lack of status in the UK. If the marriage was genuine, which it did not accept, there had been no interference with the appellant's family life as, if it was reasonable to expect the appellant to relocate within Somalia to Kismayo, it was reasonable to expect his wife to accompany him there. If Article 8 was engaged the Tribunal found the respondent's decision was lawful and for a legitimate aim, the pursuit of a policy of immigration control and the deportation of those who had

committed a serious offence. The appellant had lived in the UK since 2002 but since 2004 when his appeal rights were exhausted, he had had no lawful status. His wife had been granted indefinite leave to remain but her own asylum claim was dismissed and her grant of leave to remain was made under the legacy policy. The appellant had social and cultural ties with Somalia where he had lived until he was 23 and the panel did not accept that he had no family in Kismayo. It described the appellant as a fit young man who was a member of a majority clan and his interests were outweighed by the public interest. The respondent's decision to deport was proportionate.

The Grounds and Submissions

11. The grounds argue firstly that the Tribunal was wrong not to follow the country guidance in AMM as there was insufficiently cogent evidence for taking a different view. The Tribunal relied on extremely limited information in the PGN map and report, which showed that Al-Shabaab still controlled vast areas of Somalia including the route by road from Mogadishu to Kismayo. Secondly, it is argued that the Tribunal erred by finding that the appellant would be able to take a commercial flight from Mogadishu to Kismayo simply because there was an airport there despite noting that the background evidence referred to the bombing of the airport in December 2011. There was no evidence to suggest that the airport in Kismayo was operational whereas previous Somali country guidance cases had proceeded on the basis that only Mogadishu Airport was operational. Thirdly, it is argued that the Tribunal failed to appreciate that as the appellant had no recent experience of living in Somalia having arrived in the UK in December 2002, his position clearly fell within [598] of AMM and he would therefore be at risk from Al-Shabaab. Finally, the grounds challenge the findings about whether the appellant's relationship with his wife was genuine and subsisting. The reason given by the panel for not accepting the relationship was solely that the appellant's wife had not known about the deportation order and him being a failed asylum seeker until after the marriage. It is argued that there was no rational basis for this inference and that the panel failed to give proper weight to the evidence from the appellant's wife that this was a genuine marriage.

12. Mr Masood adopted these grounds in his submissions. He referred to the judgment of the Court of Appeal in SG (Iraq) v Secretary of State [2012] EWCA Civ 940 and in particular to [47] where Stanley Burnton LJ confirmed that decision makers and Tribunal judges were required to take country guidance determinations into account and to follow them unless "very strong grounds supported by cogent evidence" were adduced justifying their not doing so. The evidence in the PGN map and report was extremely limited and not enough to justify not following AMM. He argued that there was no evidence at all of flights from Mogadishu to Kismayo and the Tribunal had been wrong simply to make that assumption. The appellant in his circumstances was someone who had no recent experience of living in Somalia and for this reason alone would be at real risk on return. There had been good evidence that the

marriage between the appellant and his wife was subsisting and no adequate basis for the Tribunal to find that it was not genuine.

13. Mr Allen submitted that the Tribunal had not erred in law. It was entitled to take the view that the situation had changed since AMM was issued in 2011. There was clear evidence that Mogadishu and Kismayo were no longer under the control of Al-Shabaab. Such a change had been anticipated in AMM [363] and the Tribunal was entitled to take the view that the change was durable. Therefore, this was not simply a case of the Tribunal relying on one piece of evidence: it was evidence confirming the change anticipated in AMM. In these circumstances, it had been open to the Tribunal to depart from the country guidance. In any event, he submitted that any question of relocation to Kismayo was predicted on there being an article 15(c) risk in Mogadishu but if there was no such risk the issue of relocation and travel to Kismayo ceased to be relevant. So far as the question of air travel to Kismayo was concerned, he submitted that the inference which could properly be drawn from AMM at [606] was that there were commercial flights. The Tribunal's findings on Article 8 had been open to the panel for the reasons given. The Tribunal had not simply found that Article 8 was not engaged but had gone on to consider what the position would be in the alternative and had been entitled to find that removal would be proportionate.

Assessment of the Issues

14. The issue before me at this stage of the appeal is whether the Tribunal erred in law such that its decision should be set aside. The first issue is whether it erred in law by departing from the country guidance in AMM. It is common ground that country guidance determinations must be followed in the absence of proper reasons for departing from them. The Senior President's Practice Direction at 12.4 says:

> "Because of the principles that like cases should be treated in like manner, any failure to follow a clear, apparently applicable country guidance case or to show why it does not apply to the case in question is likely to be regarded as grounds for appeal on a point of law."

Mr Masood relies on [47] of SG (Iraq) where Stanley Burnton LJ said that Tribunal judges were required to follow country guidance determinations unless very strong grounds supported by cogent evidence were adduced to justify their not doing so. His submission is that the evidence in the PGN map and report was not sufficient whereas Mr Allen argues that that information should not be looked at in isolation as it confirmed that a durable change had taken place as anticipated in AMM. At [363] the Tribunal said:

> "363. 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 are sufficiently durable. Far too much is presently contingent. As time passes, however, it may well be that 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."

15. The Tribunal set out its findings about the situation in Somalia [34] as follows:

> "34. We find as a fact based on the information contained in the December 2012 PGN map that there is an area around Mogadishu and Afgoye which has been liberated from Al-Shabaab and that Al-Shabaab have been expelled from Kismayo in the south. We accept the background evidence that Al-Shabaab controlled the road south from Mogadishu to Kismayo at that time. While we accept that this map shows the situation as it was very recently we also take into account that the situation appears to be fluid and that a map showing areas of control in one month might well be very different months or even weeks later. We have taken into account that the text which accompanies the map states that Al-Shabaab has continued to lose territory gradually since government allied forces captured its main stronghold two months earlier also that evidence is dated 13 December 2012 whereas the guidance in AMM dates back to 2011"

16. The appellant's home area is Kismayo and therefore the first issue to consider was whether he would be at real risk of serious harm there or of generalised violence under article 15(c). At the time of the hearing in AMM Kismayo was under the control of Al-Shabaab. The evidence before the Tribunal in the present appeal was that Al-Shabaab had been driven out of Kismayo in August–September 2012, the PGN report indicating that it were no longer in control of Kismayo but the Tribunal did not consider how durable that change was particularly in the light of its reference to the situation being fluid and that areas of control could change on a monthly or even weekly basis. The Tribunal, following the guidance in HH and others [2010] EWCA Civ 426, then considered in [35] and [36] how the appellant could access Kismayo. It accepted that it would not be possible by road from Mogadishu but found that there was no reason why he could not use a commercial flight from Mogadishu to Kismayo. However, the issue of how an appellant will reach his home area presupposes a sustainable finding that that area is safe. It is also very unclear on what evidential basis the Tribunal found that the appellant would be able to travel by air from Mogadishu to Kismayo and I am not satisfied that sufficient reasons were given for this finding.

17. The submission on behalf of the respondent (as recorded at [26]) was that the appellant would be returned to Mogadishu and could travel through government controlled territory to Afgoye. On behalf of the appellant it was argued [29] that the situation was generally unsafe in Mogadishu in the light of AMM and the question was whether he could relocate to Afgoye or safely get through to Kismayo. If Kismayo is unsafe or inaccessible for the appellant, the issue then arises of whether

he can relocate in Mogadishu in the light of the changes referred to by the Tribunal since the decision in AMM but this issue does not appear to have been considered by the Tribunal as opposed to whether he could move into the Afgoye Corridor. In so far as the Tribunal considered the issue of internal relocation, the submissions and decision appear to focus on Afgoye. In [38] the Tribunal referred to [602] of AMM and the need for evidence that the appellant could achieve the lifestyle of the better off inhabitants of the Afgoye corridor, commenting that there was no evidence to that effect although it noted the decision of the AIT that the appellant was not vulnerable or poor by Somali standards. The Tribunal therefore did not make a clear finding in the alternative that the appellant would be able to relocate in Afgoye and it did not consider whether he could relocate in Mogadishu or elsewhere in Somalia.

18. For these reasons I am satisfied that the Tribunal erred in law by failing to make clear findings on whether the change in Kismayo had been durable, whether he could travel there without risk and whether he could relocate without undue hardship in Mogadishu, Afgoye or elsewhere and further, the lack of adequate reasons raises a real doubt as to whether all the relevant factors were taken into account when reaching the conclusion that the appellant was not entitled to protection on asylum, humanitarian protection or Article 3 grounds.

19. I am also satisfied that the Tribunal erred in law in its assessment of whether the appellant has family life in the UK. I accept the submission that it has focused unduly on his wife's knowledge about the extent of his lack of status before the marriage as opposed to him being a failed asylum seeker and subject to a deportation order which apparently she only learnt about after the marriage. The nature and quality of family life within Article 8(1) inevitably impacts on the assessment of proportionality under Article 8(2).

20. I find that the errors of law are such that the determination should be set aside. The appellant's representatives have made submissions by a letter dated 9 April 2012 as to how the appeal should proceed if an error of law was found. A number of issues are raised which require further submissions and for this reason the appeal will be relisted for further directions.

Signed Date: 17 May 2013

Upper Tribunal Judge Latter