Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/00030/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 April & 20 June 2017	**On 31 July 2017**

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR ABDILAHI AHMED
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr I Jarvis, Senior Presenting Officer
For the Respondent: Ms R Toal, Ms V Easty and Ms M Sirikanda, instructed by Duncan Lewis & Co Solicitors

DECISION AND REASONS

A: Issue of Jurisdiction

Introduction

1. The SSHD appeals to the Upper Tribunal against a decision of the First-tier Tribunal (FtT Judge Nightingale) allowing an appeal by Mr Ahmed ("the claimant") on Article 3 ECHR grounds.

2. I initially heard submissions from the parties relating to the issue of whether the First-tier Tribunal's ("FtT's") decision contained an error of law capable of affecting the outcome of the appeal such that it ought to be set aside. When drawing up my decision in this regard I observed that it was potentially the case that the FtT had no jurisdiction to hear the appeal at all. This not having been a point previously raised, I invited further submissions on the issue. Subsequent both to this invitation and to the written response thereto, but prior to a decision having been made, the Upper Tribunal reported its decision in Nkomo (Deportation: 2014 rights of appeal) [2016] UKUT 00285 (Vice President and Upper Tribunal Judge Martin). Both parties thereafter requested a further hearing in order to ventilate, what turned out to be, their joint position as to the relevance of the decision in Nkomo.

Claimant's history in the UK

3. The claimant's history in the United Kingdom is of some importance.

4. The claimant, born 17 May 1980, arrived in the United Kingdom on 13 October 1995. He was granted leave to enter until 20 January 1997, which was subsequently extended until 20 January 2000. His mother (and three dependants) had already arrived in the United Kingdom in June 1989. The claimant was granted indefinite leave to remain on 16 March 2000. An application for British citizenship was refused on 3 May 2002 as a consequence the claimant's convictions in February 2001 for theft and drug possession.

5. On 4 June 2004, the Secretary of State for the Home Department ("SSHD") notified the claimant of his liability to deportation as a consequence of his conviction on 25 October 2004 for robbery, for which he received a sentence of three years' imprisonment. This conviction was preceded not only by those convictions referred to in paragraph 4 above, but also by convictions for being drunk and disorderly (which led to a fine on 14 June 2002), and possession of a class A drug and failing to surrender to bail – which led to further fines being imposed on 27 October 2003. On 4 June 2004, the claimant was once again notified of his liability to deportation.

6. The claimant made an asylum claim shortly thereafter, but did not attend his asylum interview. His claim was subsequently refused on non-compliance grounds on 18 September 2007. A deportation order was signed in the claimant's name on 11 December 2007, but not served on him until he was arrested on 19 August 2008 by which time he had accumulated convictions for a further five offences - the most significant of which was a conviction on 19 June 2008 for attempted theft for which the claimant received a three-month term of imprisonment.

7. This deportation order was declared 'invalid' by the Asylum and Immigration Tribunal in a decision of 23 March 2009 and withdrawn by the Secretary of State on 2 June 2009. On the same date the SSHD took a further decision to make a deportation order. This was followed by the claimant being convicted, on 3 June 2009, of causing grievous bodily harm, for which he was handed a sentence of 30 months' imprisonment.

8. The claimant brought an appeal to the Asylum and Immigration Tribunal against the decision to make a deportation order. That appeal was allowed on 13 November 2009 and, although reconsideration was ordered by Senior Immigration Judge Storey, Upper Tribunal Judge Latter subsequently allowed the claimant's appeal on Article 3 grounds in a decision dated 25 March 2011.

9. The next relevant event occurred on 27 April 2013, when the claimant was sentenced to eight weeks' imprisonment for common assault and, concurrently, to eight weeks' imprisonment for failing to surrender to custody at an appointed time. Thereafter, on 31 October 2014, the claimant was sentenced to twelve months' imprisonment for affray and to a concurrent term of three months' imprisonment for theft.

10. On 4 February 2015, the SSHD wrote the claimant notifying him of his liability to deportation pursuant to "*…section 32(5) of the UK Borders Act 2007*". This notice invited submissions from the claimant within 20 days as to why he should not be deported. The claimant responded in undated representations to the effect that deportation would lead to a breach of his human rights.

11. A deportation order was subsequently signed in the claimant's name on 25 March 2015 and, on the following day, the SSHD made a "*Decision to Refuse a Human Rights Claim*".

12. The claimant appealed to the FtT by way of a notice dated 27 March 2015. The section of the appeal notice requiring the claimant to identify the decision under appeal, was left blank.

Legal background

Appeal Rights

13. Rights of appeal against immigration decisions are governed by Part 5 of the Nationality, Immigration and Asylum Act 2002. The types of decision which can be the subject of appeal are, and have been since the coming into force of that Act, set out in section 82 thereof.

14. Prior to its amendment by section 15 of the Immigration Act 2014, section 82 read:

> "**82. Rights of appeal: general**
>
> (1) Where an immigration decision is made in respect of a person he may appeal to the Tribunal.
>
> (2) In this part 'immigration decision' means –
>
> …
>
> (j) a decision to make a deportation order under section 5(1) of that Act [Immigration Act 1971]
>
> …

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

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

I shall refer to these as the "**old appeal provisions**".

15. After the amendment section 82 brought about by the 2014 Act, the decisions against which applicants have a right of appeal to the FtT are identified exhaustively in the following terms ("**new appeal provisions**"):

"**82. Right of appeal to the Tribunal**

(1) A person ('P') may appeal to the Tribunal where –
  (a) the Secretary of State has decided to refuse a protection claim made by P,
  (b) the Secretary of State has decided to refuse a human rights claim made by P, or
  (c) the Secretary of State has decided to revoke P's protection status.

(2) For the purposes of this Part -
  (a) a 'protection claim' is a claim made by a person ('P') that removal of P from the United Kingdom -
    (i) would breach the United Kingdom's obligations under the Refugee Convention, or
    (ii) would breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection;
  (b) P's protection claim is refused if the Secretary of State makes one or more of the following decisions -
    (i) that removal of P from the United Kingdom would not breach the United Kingdom's obligations under the Refugee Convention;
    (ii) that removal of P from the United Kingdom would not breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection;
  (c) a person has 'protection status' if the person has been granted leave to enter or remain in the United Kingdom as a refugee or as a person eligible for a grant of humanitarian protection;
  (d) 'humanitarian protection' is to be construed in accordance with the Immigration Rules;
  (e) 'refugee' has the same meaning as in the Refugee Convention…"

Commencement of the 2014 Act

16. Section 19 of the 2014 Act inserted, *inter alia*, section 117D into the 2002 Act as of 28 July 2014 (see: Immigration Act 2014 (Commencement No. 1, Transitory and Saving Provisions) Order 2014 (SI 2014/1820)) ("**Commencement Order 1**"). Section 117D(2) defines a 'foreign criminal' as being a person who is not a British citizen, who has been convicted in the United Kingdom of an offence and who has either been

sentenced to a period of imprisonment of at least 12 months, convicted of an offence that caused serious harm or is a persistent offender.

17. On 20 October 2014, article 2 of the Immigration Act 2014 (Commencement No. 3, Transitional and Saving Provisions) Order 2014 (SI 2014/2771) ("**Commencement Order 3**") brought into force the new appeal regime, subject to the saving provisions in articles 9, 10 and 11 thereof. Article 11 is not relevant for the purposes of this decision. Articles 9 and 10 read:

> "9. Notwithstanding the commencement of the relevant provisions [the new appeal provisions], the saved provisions [the old appeal provisions] continue to have effect, and the relevant provisions do not have effect, other than so far as they relate to the persons set out respectively in articles 10 and 11, unless article 11(2) or (3) applies."
>
> "10. The persons referred to in article 9 are –
>
> (a) a person ("P1") who becomes a foreign criminal within the definition in section 117D(2) of the 2002 Act on or after 20 October 2014; and
>
> (b) a person who is liable to deportation from the United Kingdom under section 3(5)(b) of the 1971 Act because they belong to the family of P1."

18. Commencement Order 3 was followed just a few weeks later by the Immigration Act 2014 (Transitional and Saving Provisions) Order 2014 (SI 2014/2928), ("**TSP Order 2014**"), which came into force on 10 November 2014. Article 2 to that Order reads as follows:

> "2(1). The saved provisions [the old appeals provisions] continue to have effect, and the relevant provisions [the new appeals provisions] do not have effect, other than –
>
> (a) in accordance with articles 9 – 10 and 11 of [Commencement Order 3];
>
> (b) in relation to a deportation decision made by the Secretary of State on or after 10 November 2014 in respect of –
>
> (i) a person ("P") who is a foreign criminal within the definition in section 117D(2) of the 2002 Act;
>
> (ii) a person who is liable to deportation from the United Kingdom under section 3(5)(b) of the 1971 Act because they belong to the family of P.
>
> (2) In this article, "a deportation decision" means a decision to make a deportation order, a decision to refuse to revoke a deportation order, or a decision made under section 32(5) of the UK Borders Act 2007"

19. The Immigration Act 2014 (Commencement No. 4, (Transitional and Saving Provisions and Amendment) Order 2015 (SI 2015/371), ("**Commencement Order 4**") had the effect of applying the new appeals provisions to all decisions made on or after 6 April 2015.

Discussion and Decision on issue of jurisdiction

20. As already identified, the parties jointly submitted that the FtT had jurisdiction to hear the claimant's appeal.

21. In summary, it was asserted by both parties that the decision of the SSHD of 26 March 2015 to refuse the claimant's human rights claim attracted a right of appeal to the FtT pursuant to the new appeal provisions.

22. The parties acknowledge that in making such submission it is inherently submitted that the reported decision of the Upper Tribunal in Nkomo (Deportation: 2014 rights of appeal: Zimbabwe) [2016] UKUT 285 (IAC) is wrong. In this regard, it was also observed that the Tribunal in Nkomo did not take into account the Upper Tribunal's earlier decision in Waqar v SSHD (Statutory appeals/paragraph 353) IJR [2015] UKUT 169 (UTJ Coker and UTJ Kebede) which, it is said, is inconsistent with the *ratio* in Nkomo, but consistent with the parties' submissions in the instant case.

23. I begin by identifying those matters which are uncontroversial:

    (i) The claimant did not become a foreign criminal within the meaning of section 117D(2) of the 2002 Act on or after 20 October 2014. This is because he was already a foreign criminal within the meaning of s117D(2) on that date. He became a foreign criminal on the coming into force of s117D(2) i.e. the 28 July 2014, because, *inter alia*, of his conviction on 3 June 2009 and the consequent sentence of 30 months' imprisonment;

    (ii) Commencement Order 3 only brought the new appeal provisions into force in respect of those persons who became foreign criminals on or after 20 October 2014;

    (iii) Had there been no further relevant legislation, the claimant would have been entitled to bring an appeal to the FtT, under the old appeal provisions, against both the decision of 4 February 2015 that section 32(5) of the 2007 Act applied to him, and that of 25 March 2015 to make a deportation order. That is so, because the claimant did not become a foreign criminal on or after 20 October 2014. He would, though, not have been entitled to appeal against the decision to refuse his human rights claim because he was not a 'person' to whom the new appeal provisions applied, and 'refusal of a human rights claim' was not a category of decision that could be appealed under the old appeal provisions.

24. However, on 10 November 2014 the TSP Order 2014 came into force. By article 2 thereof the new appeal provisions applied (i) *"in relation to a deportation decision"* (ii) made on or after 10 November 2014 and made (iii) in respect of any foreign criminal falling within the definition in section 117D(2) of the 2002 Act.

25. A deportation decision is defined in article 2(2) of the TSP Order 2014 as being *"a decision to make a deportation order, a decision to refuse to revoke a deportation order, or a decision made under section 32(5) of the 2007 Act."*

26. In so far as the decisions made by the SSHD in the instant case are concerned, it is clear that those made on 4 February 2015 (a decision made under section 32(5)) and 25 March 2015 (a decision to make a deportation order), display the three necessary features required by article 2(1)(b) of the TSP Order 2014 so as to make the new appeal provisions applicable in relation to them. The new appeals provisions do not provide for a right of appeal against such a category of decisions and, consequently, the claimant did not have a right of appeal against them.

27. This then leaves consideration of the SSHD's decision of 26 March 2015 to "refuse a human rights claim". It is in relation to this decision that the parties submit that I should depart from the rationale in Nkomo and deploy the reasoning that underpinned the decision in Waqar.

28. In short, it is submitted that although the decision to refuse a human rights claim is not of itself a deportation decision (as defined in article 2(2) of the TSP Order 2014), it is a decision made *"in relation to a deportation decision"*, thus meeting the requirements of article 2(1)(b) of the TSP Order 2014.

29. I now turn to the two reported decisions referred to by the parties. The first, Waqar, is a decision on an application for judicial review. The applicant (Mr Waqar) was convicted of five counts of rape in 2008 and sentenced to four years' detention in a Young Offenders Institute. A deportation order was signed in his name on 25 June 2014, but he subsequently made an application to revoke that order in reliance on human rights grounds. That application was rejected by the SSHD in decisions of 14 November 2014 and 28 November 2014, the SSHD also concluding that the human rights representations did not meet the requirements of paragraph 353 of the Immigration Rules and thus were not to be treated as a 'fresh [human rights] claim'.

30. The applicant challenged the aforementioned decisions by way of judicial review, contending that paragraph 353 of the Immigration Rules had been subsumed within the new appeal provisions and, consequently, that the rejection of the human rights claim by the SSHD was a decision which could be appealed to the FtT under the new appeal provisions. That contention was rejected by the Upper Tribunal; it being concluded that the applicant had not made a human rights *claim*. - the human rights representations were not to be treated as a claim because they did not meet the requirements set out in paragraph 353 of the Rules and, therefore, did not acquire the status of *a claim.* Consequently, the SSHD's decision did not amount to a refusal of a human rights claim and did not attract a right of appeal pursuant to the new appeal provisions.

31. The transcript of Judge Coker's decision on the oral application for permission to apply for judicial review is attached at Annex A of the panel's decision on the substantive judicial review. It is here that consideration is given to Commencement Order 3 and the TSP Order 2014, in the context of a submission that the old appeal

provisions applied and that, as a consequence, the applicant was entitled to bring an appeal against the SSHD's decision to refuse to revoke a deportation order (which was a category of decision that could be appealed under the old appeal provisions). Judge Coker rejected this submission as unarguable, observing that (i) the fact of the applicant's conviction and sentence in 2008 meant that he did not become a foreign criminal as defined in section 117D of the 2002 Act on or after 20 October 2014 because he was already a foreign offender by that date and (ii) the effect of article 2 of the TSP Order 2014 was to bring the new appeal provisions into force in relation to the decision refusing to revoke the deportation order.

32. As to whether the decision to refuse a human rights claim could be appealed pursuant to the new appeal provisions, Judge Coker concluded:

> "23. I am satisfied that it is arguable that the 2014 Act as it amends the 2002 Act may mean that if a human rights claim is raised it must, unless certified, attract a right of appeal and that paragraph 353 does not operate as a gateway to an appeal right. It is arguable that the applicant has a right of appeal against a decision to refuse his human rights claim."

33. At the substantive judicial review hearing consideration was limited to the issue of the relevance of paragraph 353 in the context of the new appeal provisions.

34. Returning to the instant case, both parties submitted that in order for the consideration of the applicability of paragraph 353 to be relevant to the outcome in Waqar, the Tribunal must have accepted that the decision to refuse the human rights claim was made in relation to a deportation decision, otherwise the new appeal provisions would not have operated on the decision under challenge, irrespective of the correct application of paragraph 353.

35. Whilst I see force in this submission I draw little assistance from the decision in Waqar. Neither the terms of the substantive decision, nor judge Coker's decision granting permission, provide any indication that the judges minds were exercised by the interpretation and application of article 2 of the TSP Order 2014. Whilst I accept that the hearing proceeded on the basis that a right of appeal would be available if it could be established that the applicant had made a human rights claim, there is no reasoned analysis identifying why this should be so. With the greatest respect to the Tribunal, it was only asked to adjudicate on the application and relevance of paragraph 353, which is exactly what it did.

36. Moving on to the decision in Nkomo. The appellant therein, having previously been recognised as a refugee and granted indefinite leave to remain, was sentenced to a term of 10 years' imprisonment on 4 December 2009. On 8 May 2012, the SSHD wrote to him, *inter alia*, disclosing her intention to remove him from the United Kingdom. The appellant made extensive human rights submissions in response.

37. Thereafter the SSHD: (i) made a decision headed "Cessation of Refugee Status" issued on 30 October 2014; (ii) signed a deportation order in the appellant's name on

21 November 2014 and (iii) made a "Decision to refuse a protection claim and/or a human rights claim", which was served on the appellant on 24 November 2014.

38. The appellant appealed to the FtT, but that appeal was dismissed after substantive consideration. The appellant thereafter obtained permission to appeal to the Upper Tribunal. At the hearing which followed the Upper Tribunal raised, of its own volition, the issue of jurisdiction i.e. whether the appellant had a right of appeal to the FtT against any of the aforementioned decisions. There hearing was not to enable the parties to reflect on this issue, with the consequence that the Tribunal thereafter "*received little help from the parties*" [1].

39. The headnote to Nkomo reads as follows:

> "The No 3 Commencement Order of the 2014 Act, SI 2014/2771, extends the new appeals provisions to identified persons, but the amendment of it in SI 2014/2928 further extends those provisions to identified decisions.
>
> In consequence, a person against whom a deportation decision was made in the period 10 November 2014 – 5 April 2015 may have no right of appeal if the decisions actually made carry rights of appeal only under the new appeals provisions. (Note: A further change was made to the commencement provision with effect from 2 March 2015, which did not fall for consideration on the facts of this case.)"

40. As a statement of law this headnote is uncontroversial. It is the application of legal principle to the facts in Nkomo which discloses a reasoning process that the instant parties assert to be in error, with particular focus laid on the rationale deployed to justify the conclusion that the SSHD's decision of 24 November 2014 – to refuse a protection claim and a human rights claim – was not to be treated as a decision which attracts the benefit of the new appeal provisions. Such reasoning is to be found in paragraphs 18 and 22 of Nkomo:

> "18. Thus the new appeal provisions from 10 November 2014 now applied not only to foreign criminals, but also 'in relation to' deportation decisions made against both old and new foreign criminals. There is no doubt about the purpose of that addition. Under the old provisions, a decision to make a deportation order does not carry a right of appeal. The effect of [Commencement Order 3] was that deportation decisions made in respect of those within section 117D(2) definition carried, for the future, no right of appeal. What that order clearly did not do, however, was to add old foreign criminals to the category of persons to whom the new appeals provisions applied. Articles 9 to 11 of the No. 3 Commencement Order extend the new provisions to two categories of person; the subsequent order extends the appeals provisions only to a category of decision.
>
> ...
>
> 22. As we have explained, the appellant, being an old foreign criminal, is not a person to whom the new appeals provisions applied in the period before 6 April 2015, save insofar as related to a deportation decision. The letter makes and notifies decisions of a sort that would be appealable under the new appeals provisions, and sets out in respect of two of them the rights of appeal which would exist under the new appeals

> provisions; but it fails to observe that the new appeals provisions do not apply to the appellant in respect of decisions in those categories. We cannot of course say that the Secretary of State was not entitled to make the decisions that she did. None of them was, however, a decision carrying a right of appeal under the old appeals provisions; and the new appeals provisions did not apply. It follows that the appellant had no right of appeal against the decisions communicated in the letter of 24 November 2014. There was no right of appeal against the deportation order, because, by virtue of SI 2014/2928, the new appeals provisions applied to it; there was no right of appeal against the other decisions, because the new appeals provisions did not apply to them. The First-tier Tribunal had no jurisdiction to hear his appeals."

41. It is apparent from the terms of paragraph 22 that the Tribunal must have concluded that the SSHD's decisions to refuse a protection claim and refuse a human rights claim were not decisions made *'in relation to a deportation decision'*.

42. When considering the ambit of the phrase *"in relation to a deportation decision"* in article 2(1)(b) of the TSP Order 2014 it is important to view the Order in its proper context. The Introductory Text to the TSP Order 2014 identifies why it was brought in to force:

> "This Statutory Instrument has been made in consequence of defects in [Commencement Order 3]…"

43. The Explanatory Note to the TSP Order 2014 further identifies that:

> "…This Order expands the circumstances in which the relevant provisions [the new appeal provisions] have effect…"

44. The defect in Commencement Order 3 referred to in the Introductory Text to the TSP Order 2014 is plain, it is the failure of article 10(a) to bite on decisions made by SSHD in so far as they relate to persons who became foreign criminals prior to 20 October 2014 (i.e. old foreign criminals) - thus leaving a different scheme of appeal rights for old foreign criminals to that which applied to new foreign criminals. The intention of the TSP Order 2014 was to remedy this defect by expanding the circumstances to which the new appeals provisions applied.

45. This aim could easily have been achieved by amending article 10(a) of Commencement Order 3 so as to leave it reading as follows: *"a person (P1) who is a foreign criminal within the definition in section 117D(2) of the 2002 Act."* This would have had the effect of bringing parity between the appeal provisions for new foreign criminals and those for old foreign criminals.

46. For reasons, which are not at all obvious Parliament chose not to bring parity between the two categories of foreign criminals, instead, restricting the effect of the new appeal provisions to old foreign criminals so that had effect only *"in relation to a deportation decision"*.

47. Given the known intention behind the introduction of the TSP Order 2014 there is substantial force in the parties' submission that the phrase *"in relation to a deportation*

decision" should not be read restrictively. I also accept the submission that the words "*in relation to*" in article 2(1)(b) of the TSP Order 2014 support the conclusion that the draftsperson intended the category of decision upon which the new appeal provisions bite, for old foreign criminals, is wider than simply "deportation decisions" - as defined in article 2(2) of the TSP Order 2014.

48. In the instant case the claimant's human rights' claim was made in direct response to the SSHD notifying him of his liability to deportation. Any doubts about that are dispelled by the terms of first 2 paragraphs of the decision of 26 March 2015, which read:

> "We wrote to you on 4 February 2015 and notified you that section 32(5) of the UK Borders Act 2007 requires that a deportation order be made against you unless you can demonstrate that you fall within any of the specified exceptions set out in section 33 of that Act. Your deportation is required by section 32(5) unless an exception applies because you are a foreign criminal who has been sentenced to a period of imprisonment of at least 12 months and as such your deportation is conducive to the public good.
>
> In response to that decision, your undated submitted representations setting out why you should not be deported. Your representations have been considered below. …"

49. The decision of 26 March 2015 then considers the claimant's human rights representations, *inter alia,* through the lens of the immigration rules relating to deportation decisions and then concludes as follows:

> "As explained above, your human rights claim has been refused. Therefore, the decision to deport you pursuant to section 5(1) of the Immigration Act 1971 is maintained.
>
> As explained above, your human rights claim has been refused. As such it is not accepted that you fall within any of the exceptions to deportation at section 33 of the UK Borders Act 2007. Therefore, section 32(5) of the same Act requires the Secretary of State to make a deportation order against you. A deportation order has been made against you and it is enclosed with this decision."

50. In other words, the claimant's human rights claim was considered as part of the SSHD's determination of issue of whether he should be deported, and its refusal clearly informed the SSHD's assessment of whether a deportation order should be made. In such circumstances, and given what I have said above, in my view the decision to refuse the claimant's human rights claim was made *in relation to* the "deportation decision" made by the SSHD. This reading of article 2(2)(b) of the TSP Order 2014 does not requiring a straining of the language therein, and does not sit at odds with the stated intention behind the bringing into force of that provision.

51. Consequently, I conclude that the claimant did have a right of appeal to the FtT against the SSHD's decision of 26 March 2015 to refuse his human rights claim.

B: Setting aside of the FtT's decision

52. Having accepted that the FtT had jurisdiction to determine the appeal, I must now go on and consider whether its decision contains an error of law capable of affecting the outcome of such appeal.

53. It is to be recalled that the claimant has come before the immigration tribunals on a previous occasion, culminating in a decision of 25 March 2011 by Upper Tribunal Judge Latter allowing his appeal on Article 3 ECHR grounds.

54. The terms of Judge Latter's decision have assumed great significance in this appeal and, in particular, paragraphs 20 and 21 thereof, which read as follows:

> "20. In the light of the fact that there is a reasonable degree of likelihood that the appellant came from Mogadishu I am satisfied in light of the current country guidance in AM and AM that returning him there would expose him to a real risk of serious harm such as to engage Article 3. There is no basis in the evidence for a finding that he falls within one of the exceptional categories of those who can live in relative safety in Mogadishu. I am not satisfied that there is any other area where he would go in Somalia where he would be reasonably safe and which would not cause undue harshness. There was no evidence of substance that he has any relatives or contacts in any part of Somalia, having now been living in the UK since he was 14. He has never returned there and has little if any prospect of finding housing or employment and more significantly it is unlikely, after such a long period of absence, that he would be able to look to other clan members for support. In summary, I am not satisfied that internal relocation would be a viable option.
>
> 21. There can be no real doubt that the appellant's record of offending merited deportation but in the light of the evidence before me I find to the lower standard of proof that he is from Mogadishu and the current country guidance shows a real risk that returning him there would lead to a breach of Article 3. For this reason, the appeal must be allowed."

55. Moving on to consider the decision of the FtT under appeal, the core findings therein are to be found in paragraph 53 onwards. Having first referred to the starred determination of Devaseelan, the FtT identified the following seven features of Judge Latter's decision:

> "• There is a reasonable degree of likelihood the appellant did come from Mogadishu.
>
> • The appellant's clan membership is Darod, Majaertin sub-clan. All close family have now left Somalia.
>
> • There was no evidence of substance that the appellant had any relatives or contacts in any part of Somalia.
>
> • The appellant had been living in the UK since he was 14.

- The appellant had never returned to Somalia and had little if any prospect of finding housing or employment.

- It was unlikely, after such a long period of absence, that the appellant would be able to look to other clan members for support.

- The country guidance of AM & AM showed that returning the appellant to Mogadishu would expose him to a real risk of serious harm such as to engage Article 3."

56. At paragraph 54 of its decision the FtT say:

> "The above comprise the key findings made by Upper Tribunal Judge Latter and neither representative has sought to persuade me that it would be proper to revisit any of these findings save for the assessment to the change of circumstances in Mogadishu as set out in the MOJ country guidance case."

57. The FtT's subsequent conclusions can be distilled as follows:

(i) The situation in Mogadishu appears, from MOJ & Ors (Return to Mogadishu) Somalia CG [2014] UKUT 00442 (IAC), to now be almost the exact opposite of that identified in AM & AM. The change of circumstances in Mogadishu merits the revisiting of the question of risk on return for this claimant [55];

(ii) Although the claimant has not lived in Mogadishu since the age of 14, there is no reason to suspect that he would not be able to acquire the knowledge of the areas and establishments that are likely to be targeted by Al Shabaab attacks reasonably soon after his return [56];

(iii) The claimant is from the majority Darod clan. He would not be assisted by his clan members upon return [57 & 59]

(iv) It has been accepted that there is no nuclear family for this claimant in Mogadishu [57];

(v) The claimant has no family to call upon in Mogadishu [59];

(vi) It is extremely unlikely that the claimant would have available to him any remittances from any family member living abroad [60];

(vii) There is no real prospect of the claimant securing access to employment or housing in Mogadishu [61];

(viii) There is a real risk that the claimant will face the prospect of living in circumstances falling below that which is acceptable in humanitarian protection terms. Notwithstanding the change of circumstances, as set out in MOJ, the claimant makes out his case on Article 3 ECHR grounds.

58. I begin my consideration by reminding myself of the Immigration Appeal Tribunal's guidance in Devaseelan:

> "37. … the first Adjudicator's determination stands (unchallenged or not successfully challenged) as an assessment of claim the appellant was then making at the time of that determination. It is not binding on the second Adjudicator; but on the other hand, the second Adjudicator is not hearing an appeal against it. As an assessment of the matters that were before the first Adjudicator it should simply be regarded as unquestioned. It may be built upon and as a result the outcome of the hearing before the second Adjudicator may be quite different from what might have been expected from a reading of the first determination only but it is not the second Adjudicator's role to consider arguments intended to undermine the first Adjudicator's determination…
>
> 40. We now pass to matters that could have been before the first Adjudicator but were not. …
>
> iv) Facts personal to the appellant that were not brought to the attention of the first Adjudicator, although they were relevant to the issues before him, should be treated by the second Adjudicator with the greatest circumspection. An appellant who seeks, in a later appeal, to add to the available facts in an effort to obtain a more favourable outcome is properly regarded with suspicion from the point of view of credibility. (Although considerations of credibility will not be relevant in cases where the existence of the additional factors beyond dispute). It must be borne in mind that the first Adjudicator's determination was made at a time closer to the events alleged and in terms of both the fact finding and general credibility assessment would tend to have the advantage. For this reason, the adduction of such facts should not usually lead to any reconsideration of the conclusions reached by the first Adjudicator.
>
> v) Evidence of other facts – country evidence – may not suffer from the same concerns as to credibility, but should be treated with caution. The reason is different from that in (iv), evidence dating from before the determination of the first Adjudicator might well have been relevant if it been tendered to him: but it was not, and he made his determination without it. <u>The situation in the appellant's own country at the time of that determination is very unlikely to be relevant in deciding whether the appellant's removal at the time of the second Adjudicator's determination would breach his human rights. Those representing the appellant would be better advised to assemble up-to-date evidence than to rely on evidence which is (ex-hypothesi) now rather dated</u>." (my emphasis)

59. It is the application of these principles, in the context of the change in circumstances in Somalia since Judge Latter's decision, that forms the foundation of the SSHD's grounds – with the focus being trained on two particular aspects of the FtT's conclusions: (i) the ability of the claimant to obtain support from the Darod clan upon return, and (ii) the ability of the claimant to secure employment upon return.

60. Taking these in turn, in relation to the former (i.e. clan support) Judge Latter concluded, in light of the background situation at that time as identified through the

country guidance decision in AM & AM (armed conflict: risk categories) Somalia CG [2008] UKAIT 00091, that:

> "It is unlikely, after such a long period of absence, that he would be able to look to other clan members for support"

61. AM & AM identified the potential for clan protection for returning Somali nationals but cautioned, *inter alia*, as follows:

> "[155] …the effect of displacement appears to reduce the ability of IDPs to count on protection from their own clan. Clan protection depends normally on living inside the traditional area of the clan (Danish Report, 329). Thus, for example, although (according to the first BIA Report) most IDPs from Mogadishu are from the majority Hawiye clan (and at January 2008 around 82% were said to have migrated to areas of southern Somalia that are in dire need (COIS, 28.13)), displacement means that a person cannot automatically be protected by his or her clan. In the process of moving, it appears that IDPs can face violence and intimidation even from fellow-clan members. And once they have arrived at a location, even when it is one inside a traditional area for that person's clan, the pressure of numbers and scarce resources can mean that newcomers may not be supported or absorbed by the local community…
>
> [160] …those who lack recent experience of living in Somalia appear more likely to have difficulty dealing with the changed environment in which clan loyalties have to some extent fractured (Nairobi evidence); persons returning to their home area from the UK may be perceived as having relative wealth and be more susceptible to extortion, abduction and the like as a result…"

62. The country guidance decision in MOJ is distinctly more positive on this issue - the eighth point of its head note stating:

> "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."

63. The relevance of clan membership was dealt with in more detail within paragraphs 337 to 343 of MOJ, the following being said at paragraph 343:

> "We understand that to mean that while there was no guarantee that help would be available from clan members outside the close family network of returnee, at least there is more likelihood of such a request being accommodated than if made to those unconnected by the bond of clan membership. That is, perhaps, wholly unsurprising. However, it should be noted that in the UNHCR January 2014 Report the view is expressed that a returnee might be rather more confident to receiving help from his clan, if not a minority clan member."

64. Faced with this change of circumstances, the FtT concluded as follows:

> "…There has been nothing on the evidence before me which indicates that the [claimant's] clan, the Darod, would now seek to assist him on return to Mogadishu, even though they have no knowledge of him, where there was a clear finding from Judge Latter that they would not have done so in 2011. …" [57]

> "…Judge Latter also particularly found that it was unlikely after such a long period of absence that the [claimant] would be able to look to other clan members for support. Once again, I can find no reason to go behind this finding. I therefore accept that he has no clan associations to call upon in Mogadishu. …" [59]

65. In my conclusion, the FtT's rationale does not lawfully address the issue of the potential for the claimant to obtain assistance from his fellow clan members upon return. The FtT's error is it failure to put Judge Latter's conclusions in their proper context by undertaking an analysis of the circumstances in Mogadishu that prevailed at the time his decision was reached. Absent such an analysis, the consequences of any change in the circumstances cannot be properly identified.

66. As to second limb of the SSHD's challenge, again I conclude the FtT erred as asserted.

67. At paragraph 61 of its decision the FtT said as follows:

> "This [claimant's] particular circumstances are such that he has taken little advantage of all of the many opportunities and privileges he has been provided with in the United Kingdom. Further, he has not been in Somalia since he was 14 and the findings of Upper Tribunal Judge Latter are that the appellant has no family or clan support. I can find no reason as to why anyone would remit any money to this appellant and there is, already, a finding of fact that he has no real prospect of securing access to employment or housing in Mogadishu."

68. UTJ Latter had concluded:

> "…[The claimant] has never returned there and has little if any prospect of finding housing or employment…"

69. That conclusion was reached in the context of the following findings in AM & AM:

> "…On the present evidence we consider that Mogadishu is no longer safe as a place to live for the great majority of its citizens. We do not rule out that notwithstanding the above there may be certain individuals who on the facts may be considered to be able to live safely in the city, for example if they are likely to have close connections with powerful actors in Mogadishu, such as prominent businessmen or senior figures in the insurgency or in powerful criminal gangs. However, barring cases of this kind, we consider that in the case of persons found to come from Mogadishu who are returnees from the UK, they would face on return to live there a real risk of persecution or serious harm and it is reasonably likely, if they tried staying there, that they would soon be forced to leave or that they would decide not to try and live there in the first place. …"

70. The change in economic circumstances in Mogadishu since the decision in AM & AM has been significant – highlighted in the following passages from MOJ [paragraph 344 onwards]:

> "…the economic revival of Mogadishu can be described only as remarkable…
>
> …it is beyond doubt that there has been huge inward investment, large-scale construction projects and vibrant business activity. ...
>
> There is evidence before the Tribunal, identified by Dr Mullen, to the effect that returnees from the West may have an advantage in seeking employment in Mogadishu over citizens who have remained in the city throughout. This is said to be because such returnees are likely to be better educated and considered more resourceful and therefore more attractive as potential employees, especially where the employer himself or herself has returned to the diaspora to invest in a new business. …"

71. It was incumbent on the FtT, pursuant to the guidance in Devaseelan, to take Judge Latter's conclusions as the starting point for its consideration of the Article 3 ECHR claim. Having done so it was required to go on and determine for itself whether the claimant's deportation would lead to a breach of Article 3, given the circumstances that currently prevail in Somalia and, in particular, in light of the significant change to the circumstances in Mogadishu that has occurred since Judge Latter's decision.

72. In light of the circumstances prevailing in Mogadishu in March 2011, Judge Latter's conclusions as to the likelihood of the claimant obtaining employment and/or housing were unsurprising. Time has, however, moved on and in the intervening period there has been a dramatic change to the economic and security situation in Mogadishu.

73. The issue that the FtT was required to address was whether the positive changes in the economic and security situation in Mogadishu nevertheless left the claimant in a position in which he would be living in circumstances, if returned there, that would breach Article 3 ECHR. An integral part of that consideration ought to have been an assessment, as against both the circumstances currently prevailing in Mogadishu (as identified in MOJ) and the claimant's known personal circumstances, of whether the claimant would be able to secure employment.

74. It was incumbent on the FtT to provide sufficient reasons for its conclusions in this regard such that the losing party (in this case the SSHD) could understand why she had lost. Given the circumstances in Mogadishu, as highlighted in MOJ (and set out above) I accept Mr Jarvis' submission that those reasons cannot be readily ascertained from the FtT's decision. Whilst the FtT was not required to give reasons for reasons, it was required to engage with the evidence to a sufficient extent that its rationale could be understood. In my conclusion, it did not do so.

75. For these reasons, I set aside the FtT's decision to allow the appeal on the Article 3 ECHR ground. The parties agreed that it was appropriate for the re-making of the decision to be undertaken in the Upper Tribunal.

C: Remaking of Decision

Introduction

76. For the purposes of the re-making of the decision the parties, combined, produced 91 pages of written submissions, over 2200 pages of background documentation relating to the circumstances Somalia and made nearly one day of oral submissions – all of which I have considered.

Grounds

77. Mr Toal indicated that the claimant now pursues only the claim that his deportation would lead to a breach of Article 3 ECHR. He confirmed, in particular, that the claimant did not seek to pursue his appeal on the alternative basis that his deportation would breach Article 8 ECHR.

Preliminary Issue

78. At the outset of the hearing of 20 June Mr Toal sought an adjournment of the proceedings for the reasons, which were not expanded upon by Mr Toal, identified in the following terms in an e-mail sent to the Tribunal on 19 June by the claimant's solicitor:

> "The appellant has indicated in a telephone call last week that he is a member of the Madhiban clan, rather than a member of the Majeerteen. The appellant is currently detained at HMP Wandsworth and can only make outgoing calls. We are yet to have the contact details from the appellant as to who informed him that he was a member of the Madhiban clan, and we would therefore request more time to take instructions on this issue, as it is the issue of clan support that is crucial to the appeal before the Tribunal.
>
> In light of the client's indication of a change of clan to what was recorded previously, we now feel that due process requires the appellant should be produced in order to allow him to explain to the Tribunal regarding this change of information."

79. Mr Jarvis objected to the application on the basis of the late hour of the change by the claimant of his asserted clan membership.

80. Having carefully considered the circumstances of the case as a whole, and taken full account of the terms of rule 2 of the 2008 Procedure Rules, I concluded that it was not in the interests of justice to adjourn the hearing of the appeal, nor does fairness dictate that it should be so adjourned.

81. The claimant notified the UK authorities as long ago as 2009 (see paragraph 38 of the decision of Immigration Judge Pullan of 23 March 2009) that he was from the Majeerteen clan. This evidence was said to have been provided to the claimant by his mother. I observe that the claimant's mother gave evidence later in 2009 before Immigration Judge Hodgkinson and there was nothing in that evidence which indicated that she believed the claimant was not of the clan that he had previously

identified. The claimant has subsequently maintained that he is a member to the Majeerteen on numerous occasions, both to the SSHD and to the Tribunal. There have been numerous hearings before the Upper Tribunal, and the appeal is now of considerable vintage. It was not until a week prior to the date listed for hearing that the claimant contacted his solicitors to assert that he had now been informed that he is from Madhiban clan. There is no information as to why the solicitors waited until the day before the hearing to inform the Tribunal of this development, nor is there an indication as to who provided the claimant with this information, but I infer from the material before me that it was not the claimant's mother. As I have already stated, looking at all the circumstances before me, including, but not limited to, those circumstances identified immediately above, I concluded at the hearing that it was not in the interests of justice to grant an adjournment and to prolong the determination of this appeal any further.

Country Guidance

82. The most recent Country Guidance decision relating to the risks to returnees in Mogadishu is MOJ & Others, the headnote to 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."

Claimant's history in the United Kingdom

83. I next turn to claimant's history in the United Kingdom. This is set out in broad terms in paragraphs 3 to 12 above. At this stage I need do no more than re-iterate that the claimant arrived in the United Kingdom in October 1995, aged just 15.

84. The one further feature of the claimant's history in the UK that it is necessary to identify at this stage is the sentence of twelve weeks' imprisonment he received on 25 February 2017, having been convicted of theft. On the expiry of the claimant's criminal sentence (8 April 2017) he was detained under immigration powers and he was still in immigration detention as of the date of the hearing before the Upper Tribunal.

Matters not in dispute

85. The following matters of fact are no longer in dispute:

(a) the claimant is from Mogadishu in Somalia, born 17 May 1980;

(b) he has no family (which is not used in this context to include clan members) in Mogadishu, all of his close family members having left Somalia;

(c) he left Somalia, and moved to Kenya, in 1993 or 1994;

(d) he arrived in the United Kingdom in October 1995

(e) were he to return to Somalia it would be *"extremely unlikely that [he] would have available to him any remittances from any family member living abroad"* (FtT Nightingale's decision at [60]);

(f) he has had no more than a few weeks' employment in the United Kingdom.

Matters in dispute

86. The issues in dispute, other than the key issue of whether the claimant will be subjected to Article 3 ill-treatment if returned to Mogadishu, can be categorised into the following, each of which I will consider in more detail below:

(i) The legal threshold to be applied to the Article 3 consideration;

(ii) The claimant's clan membership;

(iii) What, if any, funds will the claimant have available to him at the point of return to Mogadishu?

(iv) Will the claimant be required to live in an IDP camp?

The threshold for the Article 3 consideration

87. The 26 pages of written submissions Mr Toal provided on this issue have as their target the Tribunal's consideration of the circumstances in IDP camps in Somalia.

88. The submissions are captured in summary in the following passage, found at paragraph 3(f) of the claimant's *"Further Submissions"*;

> "at the previous hearing the [claimant's] case was put entirely on the basis that his circumstances in an IDP camp would be extreme or exceptional in the *N v UK* sense. However, he now also contends as well or in the alternative that his case falls within the *MSS* paradigm. That is because the dire humanitarian conditions in which he would have to live result from failure by the Somali government to discharge its obligations under international and domestic law to IDPs who are recognised as a particularly vulnerable group."

89. Article 3 of the Human Rights Convention provides:

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

90. The prohibition under Article 3 is absolute and there can never be a justification for acts that breach that provision [Chahal v United Kingdom (1996) 23 EHRR 413].

91. Ill-treatment must attain a minimum level of severity if it is to engage Article 3. 'Inhuman' treatment is conduct that causes sufficient mental and/or physical suffering to attain the minimum standard of severity. Its infliction need not be deliberate. 'Degrading' treatment can be described as conduct which arouses feelings of fear, anguish and inferiority such as to humiliate or debase the individual and

must, once again, reach a minimum level of severity. The assessment is relative, depending on all the circumstances of the case, including the duration of the treatment, its physical and mental effects, and the age, sex, vulnerability and the state of health of the individual [Hilal v United Kingdom (Application No. 45276/99) and Ireland v United Kingdom (1978) 2 EHRR 25].

92. Contracting States to the Human Rights Convention have the right to control the entry, residence and removal of 'aliens'. However, Article 3 applies so as to impose an obligation on a Contracting State not to remove an individual where substantial grounds have been shown for believing that the person concerned faces a real risk in the country to which he or she is to be removed of being subjected to treatment prohibited by Article 3 [Soering v United Kingdom [1989] 11 EHRR 439].

93. In N v United Kingdom (2008) 47 EHRR 423 the Strasbourg court observed, under the heading "*General principles regarding Article 3 and expulsion*":

> "Article 3 principally applies to prevent expulsion where the risk of ill treatment in the receiving country emanates from intentionally inflicted acts of the public authorities or from non-state bodies when the authorities are unable to afford the applicant the appropriate protection" [30].

94. This principle of law is also embedded into domestic jurisprudence. For example, in his decision in Bagdanavicius [2005] UKHL 38; [2005] 2 AC 668, Lord Brown said, at paragraph 24:

> "The plain fact is that the argument throughout has been bedevilled by a failure to grasp the distinction in non-state agent cases between on the one hand the risk of serious harm and on the other hand the risk of treatment contrary to article 3. In cases where the risk "emanates from intentionally inflicted acts of the public authorities in the receiving country" (the language of para 49 of *D v United Kingdom* 24 EHRR 423, 447) one can use those terms interchangeably: the intentionally inflicted acts would without more constitute the proscribed treatment. Where, however, the risk emanates from non-state bodies, that is not so: any harm inflicted by non-state agents will not constitute article 3 ill-treatment unless in addition the state has failed to provide reasonable protection."

95. The application of Article 3 is not, however, limited to such circumstances. There is sufficient flexibility to address applications in contexts where:

> "…the source of the risk of the proscribed treatment in the receiving country stemmed from factors which could not engage either directly or indirectly the responsibility of the public authorities of that country" [N v United Kingdom at paragraph 31].

96. The nature of the circumstances that attract the protection of Article 3, but do not engage either directly or indirectly the responsibility of the public authorities of the receiving state, has been the subject of extensive, although not exhaustive, domestic and Strasbourg authority.

97. In D v United Kingdom (1997) 24 EHRR 42 the Strasbourg court was concerned with an individual who had been arrested after arriving in the United Kingdom without leave to enter and with a large quantity of cocaine in his possession. D was charged, prosecuted and convicted. Whilst in prison he was diagnosed with HIV/AIDS. Immediately before his release the Secretary of State gave directions for his removal to his home country, St Kitts.

98. The court noted that the principle that Article 3 could be violated in expulsion cases had been applied only in cases where the risk to the individual of being subjected to any of the proscribed forms of treatment emanated from *"intentionally inflicted acts of the public authorities in the receiving country or from those of non-State bodies in that country when the authorities there are unable to afford him appropriate protection."* It went on to say, at paragraph 49:

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

99. The court held that D's removal to St Kitts would be a violation of Article 3 because he was "in the advanced stages of a terminal and incurable illness" [51]; and the abrupt withdrawal of the healthcare and support he was receiving in this country would entail *"the most dramatic consequences for him"* in that *"removal will hasten his death"* (at paragraph 52). In so doing it stated:

> "[53] In view of these exceptional circumstances and bearing in mind the critical stage now reached in the applicant's fatal illness, the implementation of the decision to remove him to St Kitts would amount to inhuman treatment … in violation of Article 3 … his removal would expose him to a real risk of dying under the most distressing circumstances and would thus amount to inhuman treatment…
>
> [54]…in the very exceptional circumstances of this case and given the compelling humanitarian considerations at stake… the implementation of the decision to remove the applicant would be a violation of Article 3." (my emphasis)

100. The House of Lords considered the application of the decision in D in its decision in N v Secretary of State [2005] UKHL 31. This concerned an illegal entrant from Uganda who was diagnosed as HIV-positive shortly after her arrival in the UK. Although her Article 3 claim was initially successful before an adjudicator, it ultimately failed before the House of Lords, even though she had been receiving treatment in the United Kingdom, which had resulted in a drastic improvement in

her medical condition and the withdrawal of such treatment would shorten her life expectancy because it would not be replicated in Uganda.

101. Their Lordships reminded themselves that there was no suggestion of N:

> "being subjected to any of the forms of treatment that article 3 proscribes from intentionally inflicted acts of the public authorities in Uganda or from those non-state agents in that country against which the authorities there are unable to afford her appropriate protection. We are dealing here with a decision of the Strasbourg court which created what the Court of Appeal rightly accepted was an "extension of an extension" to the article 3 obligation." - [Lord Hope of Craighead at [23]: see also Lord Nicholls of Birkenhead at [8], Baroness Hale of Richmond [70], Lord Brown of Eaton-under-Heywood [86], with Lord Walker of Gestingthorpe expressing agreement with the speeches of all of the other Law Lords [55]].

102. Having considered the 'pressing humanitarian considerations' of the case, Lord Nicholls concluded that N did not fall within the class of *"exceptional"* case recognised in D v UK

103. Lord Hope opined, with the express agreement of Lord Walker:

> "[48]… Strasbourg has adhered throughout to two basic principles. On the one hand, the fundamental nature of the article 3 guarantees applies irrespective of the reprehensible conduct of the applicant…On the other hand, aliens who are subject to expulsion cannot claim any entitlement to remain in the territory of a contracting state in order to continue to benefit from medical…assistance provided by the expelling state. For an exception to be made where expulsion is resisted on medical grounds the circumstances must be exceptional…The question on which the court has to concentrate is whether the present state of the applicant's health is such that, on humanitarian grounds, he ought not to be expelled unless it can be shown that the medical and social facilities he so obviously needs are actually available to him in the receiving state… [t]he Strasbourg court has been at pains in its decisions to avoid any further extension of the exceptional category of case which D v United Kingdom represents…
>
> [50] …What the court is in effect saying is that the fact that the treatment may be beyond the reach of the applicant in the receiving state is not to be treated as an exceptional circumstance. It might be different if it could be said that it was not available there at all and that the applicant was exposed to an inevitable risk due to its complete absence… For circumstances to be…"very exceptional" it would need to be shown that there were compelling humanitarian grounds for not removing him to a place which lacked the medical and social services which he would need to prevent acute suffering while he is dying…"

104. Baroness Hale founded her conclusions on the following understanding of Strasbourg authority:

> "[69] In my view, therefore, the test, in this sort of case, is whether the applicant's illness has reached such a critical stage (i.e. he is dying) that it would be inhuman treatment to deprive him of the care which he is currently receiving and send him

home to an early death unless there is care available there to enable him to meet that fate with dignity. This is to the same effect as the text prepared by my noble and learned friend, Lord Hope of Craighead. It sums up the facts in *D*. It is not met on the facts of this case.

[70] There may, of course, be other exceptional cases, with other extreme facts, where the humanitarian considerations are equally compelling. The law must be sufficiently flexible to accommodate them…"

105. Having given careful and detailed consideration to the Strasbourg jurisprudence, Lord Brown opined:

"[86] The unmistakable conclusion to be drawn from this series of recent decisions is that the Court has adopted the clear stance that article 3 is not breached by the return of an AIDS sufferer to his or her home country save in circumstances closely comparable to those in D itself.

[87] This is not perhaps surprising. D represented, as Laws LJ below observed, "an extension of an extension to the article 3 obligation". The Court in Bensaid (para 40) spoke of "the high threshold set by article 3, particularly where the case does not concern the direct responsibility of the Contracting State for the infliction of harm".

106. His Lordship went on to say:

"[90] As already indicated, my clear understanding of the subsequent Strasbourg case law is that the Court has now adopted 'a restrictive line'. It has not been prepared to grant 'an absolute right for seriously ill persons to remain in the host country to get treatment, provided they had managed to set foot there.' The 'very far-reaching' consequences of such a right would give rise to positive obligations which the Court has not thought it right to impose upon the Contracting States."

And then:

"[93] The logical distinction between the two very different scenarios presented respectively by D and the later cases is surely this. D appeared to be close to death; paragraph 21 of the Court's judgment there records that at the hearing on 20 February 1997: "according to his counsel, it would appear that the applicant's life was drawing to a close much as the experts had predicted" (a medical report of June 1996 having stated that D's prognosis was limited to 8-12 months). The critical question there was accordingly where and in what circumstances D should die rather than where he should live and be treated. D really did concern what was principally a negative obligation, not to deport D to an imminent, lonely and distressing end. Not so the more recent cases including the present one. Given the enormous advances in medicine, the focus now is rather on the length and quality of the applicant's life than the particular circumstances of his or her death. In these cases, therefore, the real question is whether the State is under a positive obligation to continue treatment on a long-term basis. It is precisely in this type of case that the Court's statement in D (para 54), that those subject to removal "cannot in principle claim any entitlement to remain on the territory of a Contracting State in order to continue to benefit from

medical, social or other forms of assistance provided by the expelling state", has particular application.

[94] …It must be shown that the applicant's medical condition has reached such a critical stage that there are compelling humanitarian grounds for not removing him or her to a place which lacks the medical and social services when he or she would need to prevent acute suffering while he or she is dying"

107. When N came to be considered by the Strasbourg court, it also concluded that the Article 3 claim must fail, the majority summarising the applicable principles in the following terms:

"[42] Aliens who are subject to expulsion cannot in principle claim entitlement to remain in the territory of a contracting state in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling state. The fact that the applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the contracting state is not sufficient in itself to give rise to breach of art 3. The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the contracting state may raise an issue under art 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling. In *D v UK* … the very exceptional circumstances were that the applicant was critically ill and appeared to be close to death, could not be guaranteed any nursing or medical care in his country of origin and had no family there willing or able to care for him or provide him with even a basic level of food, shelter or social support.

[43] The court does not exclude that there may be other very exceptional cases where the humanitarian considerations are equally compelling. However, it considers that it should maintain the high threshold set in *D v UK…* and applied in its subsequent case law, which it regards as correct in principle, given that in such cases the alleged future harm would emanate not form the intentional acts or omissions of public authorities or non-state bodies, but instead form a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country.

[44]…Advances in medical science, together with social and economic differences between countries, entail that the level of treatment available in the Contracting State and the country of origin may vary considerably. While it is necessary, given the fundamental importance of Article 3 in the Convention system, for the Court to retain a degree of flexibility to prevent expulsion in very exceptional cases, Article 3 does not place an obligation on the Contracting State to alleviate such disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction. A finding to the contrary would place too great a burden on the Contracting States."

108. Turning to the Strasbourg court's decision in M.S.S. v Belgium and Greece (Application 30696/09) in which the applicant, an asylum seeker and as such *"a member of a particularly underprivileged and vulnerable population group in need of special protection"* had spent months in Greece living in a state of extreme poverty, unable to cater for his most basic needs: food, hygiene and a place to live, and with an ever-

present fear of being attacked and robbed. There was no likelihood of his situation improving.

109. The Court found:

> "[366] In the instant case the Court has already found the applicant's conditions of detention and living conditions in Greece degrading… It notes that these facts were well known before the transfer of the applicant and were freely ascertainable from a wide number of sources… It also wishes to emphasise that it cannot be held against the applicant that he did not inform the Belgian administrative authorities of the reasons why he did not wish to be transferred to Greece. It is established that the procedure before the Aliens Office made no provision for such explanations and that the Belgian authorities applied the Dublin Regulation systematically…
>
> [367] Based on these conclusions and the obligations incumbent on the States under Article 3 of the Convention in terms of expulsion, the Court considers that by transferring the applicant to Greece the Belgian authorities knowingly exposed him to conditions of detention and living conditions that amounted to degrading treatment."

110. Underpinning these conclusions was an earlier conclusion, drawn in relation to the treatment received by the applicant in Greece, that:

> "[264]…It follows that, through the fault of the [Greek] authorities, the applicant has found himself in a situation incompatible with art. 3 of the Convention. Accordingly there has been a violation of that provision." [264] (our emphasis)

111. It is plain that the Strasbourg court was here identifying that in its conclusion the Article 3 proscribed treatment meted out to the applicant in Greece, a Contracting State to the Human Rights Convention, emanated from the intentional acts or omissions of the Greek authorities. This being so, no question arose as to whether there were 'exceptional circumstances'. This is no doubt why it made no reference to its earlier decision in N v United Kingdom.

112. The 'fault' of the Greek authorities had been established as a consequence of a combination of a number of features of the case, most particularly that the obligation to provide accommodation and decent living conditions to asylum seekers had entered into positive law in Greece, through transposition of the European Reception Directive. It failed to adhere to the obligations imposed by its own domestic legislation or those imposed on it by the Reception Directive. Had it done so, the applicant's suffering would have been substantially alleviated.

113. In Sufi and Elmi v United Kingdom (Applications 8319/07 and 11449/07) (2012) 54 EHRR 9, the Court stated, when considering the issue of internal relocation within Somalia and in particular whether the applicants would be at risk of Article 3 ill-treatment on account of the dire humanitarian conditions in refugee camps in southern and central Somalia:

> "[281] The Court recalls that *N. v. the United Kingdom* concerned the removal of an HIV-positive applicant to Uganda, where her lifespan was likely to be

> reduced on account of the fact that the treatment facilities there were inferior to those available in the United Kingdom. In reaching its conclusions, the Court noted that the alleged future harm would emanate not from the intentional acts or omission of public authorities or non-State bodies but from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country. The Court therefore relied on the fact that neither the applicant's illness nor the inferior medical facilities were caused by any act or omission of the receiving State or of any non-State actors within the receiving State.
>
> [282] If the dire humanitarian conditions in Somalia were solely or even predominantly attributable to poverty or to the State's lack of resources to deal with a naturally occurring phenomenon, such as a drought, the test in *N. v. the United Kingdom* may well have been considered to be the appropriate one. However, it is clear that while drought has contributed to the humanitarian crisis, that crisis is predominantly due to the direct and indirect actions of the parties to the conflict. The reports indicate that all parties to the conflict have employed indiscriminate methods of warfare in densely populated urban areas with no regard to the safety of the civilian population (see paragraphs 82, 123, 127, 132, 137, 139-140 and 160, above). This fact alone has resulted in widespread displacement and the breakdown of social, political and economic infrastructures. Moreover, the situation has been greatly exacerbated by al-Shabaab's refusal to permit international aid agencies to operate in the areas under its control, despite the fact that between a third and a half of all Somalis are living in a situation of serious deprivation.
>
> [283] Consequently, the Court does not consider the approach adopted in *N. v. the United Kingdom* to be appropriate in the circumstances of the present case. Rather, it prefers the approach adopted in *M.S.S. v. Belgium and Greece*, which requires it to have regard to an applicant's ability to cater for his most basic needs, such as food, hygiene and shelter, his vulnerability to ill-treatment and the prospect of his situation improving within a reasonable time-frame (see *M.S.S. v. Belgium and Greece*, cited above, § 254)." (my emphasis)

114. The Court in Sufi and Elmi identified that it was a relevant component of the decision in N v United Kingdom that it could ***not*** be said that the harm N was at risk of suffering emanated from an intentional act or omission of public authorities or a non-State body [281]. In Sufi and Elmi the Court were faced with a different situation, where the harm likely to be faced by the applicants upon return to Somalia was found to derive, predominantly, from the direct and indirect actions of the parties to the conflict in that country [282]; this being in the context of there having been no functioning state in Somalia. It was on this basis that the Court distinguished the case from N v United Kingdom.

115. There is now, of course a functioning state in Somalia which is presumably why Mr Toal done not pin the claimant's colours directly to the mast held aloft in Sufi and Elmi, despite that decision giving specific consideration to the circumstances in IDP camps in Somalia.

116. The rationale underlying the decisions in M.S.S. and Sufi and Elmi for not applying the N threshold is, also, clearly identifiable from the Strasbourg court's more decision in S.H.H v UK (2013) 57 EHRR 531. In S.H.H. an Afghan national from Nangarhar province, whose lower right leg had been amputated, left leg and right hand had been seriously injured and who was suffering from depression, had arrived in the United Kingdom in 2010 and claimed asylum shortly thereafter. His application was refused by the Secretary of State, who (i) broadly disbelieved the evidence given by the applicant because of the inconsistencies in his claim and the vagueness of his account, (ii) concluded that the applicant would not be at risk from Hezb-i-Islami upon return and (iii) in relation to his medical problems found that the applicant's case was not 'very exceptional' so that it did not cross the high threshold of severity such as to engage Article 3. The First-tier Tribunal dismissed the applicant's appeal and permission to appeal was refused.

117. Before the Strasbourg court the applicant, *inter alia*, complained that he would be at risk in Afghanistan on the basis that (i) he would be particularly vulnerable to violence because of his disabilities and (ii) due to his lack of familial support. He asserted that he would face living conditions and discrimination in Afghanistan of a type that reaches the Article 3 threshold. In so submitting it was argued that his case could be distinguished from N v United Kingdom because it neither involved a naturally occurring illness, nor the consequences of a serious medical condition and the lack of treatment available to it.

118. Of significance to the instant case, is the further submission made in S.H.H. to the effect that the United Nations Convention on the Rights of Persons with Disabilities should inform the scope of Article 3 and, as such, there would be a real risk that he would face inhuman and degrading treatment upon return to Afghanistan due to government inaction.

119. In its conclusions, the court referred at some length to its earlier decisions in N v United Kingdom, Sufi and Elmi and M.S.S. [75-77]. Having found there to have been no evidence that disabled persons *per se* were at greater risk of violence than the general Afghan population [85-87], the court turned its mind to the nature and relevance of the living conditions that awaited the applicant in Afghanistan, which involved a consideration of the appropriate principles against which such assessment ought to take place.

120. Having undertaken such as assessment it found, for the following reasons, that the principles of N v the United Kingdom *should* be applied. First:

> "[89] The Court recalls that *N.* concerned the removal of an HIV-positive applicant to Uganda, where her lifespan was likely to be reduced on account of the fact that the treatment facilities there were inferior to those available in the United Kingdom. In reaching its conclusions, the Court noted that the alleged future harm would emanate ***not*** from the intentional acts or omission of public authorities or non-State bodies but from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country. The Court also stated that Article 3 did not place an obligation on the Contracting State to alleviate disparities in the availability of medical treatment

between the Contracting State and the country of origin through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction (ibid, § 44). The Court acknowledges that, in the present case, the applicant's disability cannot be considered to be a "naturally" occurring illness and does not require medical treatment. Nevertheless, it is considered to be significant that in both scenarios the future harm would emanate from a lack of sufficient resources to provide either medical treatment or welfare provision rather than the intentional acts or omissions of the authorities of the receiving State" [89] (my emphasis)

Second:

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

Third:

"[91] Although in *Sufi and Elmi v. the United* Kingdom, cited above, the Court followed the approach set out in *M.S.S.,* this was because of the exceptional and extreme conditions prevailing in south and central Somalia. In particular, there was clear and extensive evidence before the Court that the humanitarian crisis in Somalia was predominately due to the direct and indirect actions of all parties to the conflict who had employed indiscriminate methods of warfare and had refused to permit international aid agencies to operate (paragraph 282 of the *Sufi and Elmi* judgment). On the current evidence available, the Court is not able to conclude that the situation in Afghanistan, albeit very serious as a result of ongoing conflict, is comparable to that of south and central Somalia [91]." (my emphasis)

Fourth:

"[e]ven though the difficulties and inadequacies in the provision for persons with disabilities in Afghanistan cannot be understated, it cannot be said that such problems are as the result of the deliberate actions or omissions of the Afghan authorities rather than attributable to a lack of resources. Indeed the evidence suggests that the Afghan authorities are taking, albeit small, steps to improve provision for disabled persons by, for example, the National Disability Action Plan…" (my emphasis)

121. The Court dismissed the application, determining the applicant's case not to be a *"very exceptional one, where the grounds against removal are compelling."*

122. As I have identified above, Article 3 principally applies so as to prevent expulsion where the risk of 'ill treatment' in the receiving country emanates from intentionally inflicted acts of the public authorities or from non-state bodies when the authorities are unable to afford the applicant the appropriate protection. It is only if *"the source of the risk of the proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country"* (D at [49]), that consideration turns to whether there are *"exceptional circumstances"* of the type identified in D and N.

123. Turning back to domestic jurisprudence, on closer analysis it appears as though analogies can be drawn between the legal principle Mr Toal now seeks to establish, in reliance on the failure of the Somali authorities to abide by their obligations as set out in the numerous identified international agreements, and that which the Court of Appeal rejected in its decision in ZT v Secretary of State for the Home Department [2005] EWCA Civ 1421.

124. In ZT the Court of Appeal (Buxton, Sedley and Jonathan Parker LJJ) considered a case involving a Zimbabwean national with HIV. She was receiving treatment in the United Kingdom, which had stabilised her condition. It was not in dispute that if returned to Zimbabwe she would not survive past one or two years. ZT's appeal against the Secretary of State's decision to remove her to Zimbabwe had been allowed by an adjudicator on Article 3 ECHR grounds, a decision that was subsequently overturned by the Immigration Appeal Tribunal (IAT). In the Court of Appeal the appellant, by then represented by Nicholas Blake QC, sought to submit, on the basis of arguments that had not previously been deployed, that the IAT were wrong to find error in the adjudicator's determination or, alternatively, that it had erred itself when re-making the decision on Article 3 and 8 grounds. In his judgment, Buxton LJ (with the agreement of Jonathan Parker LJ), said as follows:

> [12] Mr Blake recognised that he was constrained, as is this court, by the decision of the House of Lords in *N* [2005] 2 AC 296, analysing the Strasbourg jurisprudence and in particular *D v United Kingdom* 24 EHRR 423. Their Lordships addressed the question in somewhat differing language, but to the same general effect, which can perhaps be best represented by the guidance given by Baroness Hale of Richmond in her paragraphs 69-70:
>
> > "the test, in this sort of case, is whether the applicant's illness has reached such a critical stage (ie he is dying) that it would be inhuman treatment to deprive him of the care which he is currently receiving and to send him home to an early death unless there is care available there to enable him to meet that fate with dignity. This is to the same effect as the test proposed by my noble and learned friend, Lord Hope of Craighead. It sums up the facts in *D*. It is not met on the facts of this case. [70] There may, of course, be other exceptional cases, with other extreme facts, where the humanitarian considerations are equally compelling. The law must be sufficiently flexible to accommodate them"

> [13] Mr Blake said that there were two respects in which Ms ZT's case fell outside the very restrictive regime laid down by *N*; and one respect in which the IAT had in any event wrongly applied *N*. Before addressing the ways in which *N* is sought to be distinguished I am bound to make two observations… .
>
> [14] Mr Blake's first ground of distinction between this case and the previous jurisprudence was that whereas in *N* it was accepted that the receiving country, Uganda, was making proper efforts to counter an impossibly difficult situation, in the present case the difficulties in Zimbabwe had been significantly contributed to by the policy of the government itself, in particular in its malevolent attitude, discriminatory practices in the application of health care, and systematic violations of humanitarian and human rights laws. It was argued, by analogy with the decision of the European Court of Human Rights in *Soering* 11 EHRR 439, that a separate category of liability under article 3 arose where the lack of health care of which the applicant complained was directly the fault of the receiving state…
>
> [16] The argument, as a point of law, is misconceived. *Soering* came nowhere near to laying down any special rule about the behaviour of the receiving state, within the ambit of the single rule of article 3 in terms of inhuman and degrading treatment… [i]n the particular factual category of health cases, *N* lays down the rules as to how article 3 should be applied. Those rules include a specific requirement of exceptional circumstances. They do not include a special sub-category, turning on the behaviour of the receiving state, that takes the case outside the normal article 3 regime.
>
> [17] If, as I consider plain, there is no special rule of law relating to the behaviour of the receiving state, then the weight that the tribunal gives to that behaviour must be a matter for the judgment of the tribunal applying the guidance in *N*. Nothing was put before the IAT that suggested that a detailed examination of the behaviour of the Zimbabwe government was required of it.
>
> [18] That said, I can envisage a case in which the particular treatment afforded to an AIDS sufferer on return, in terms of ostracism, humiliation, or deprivation of basic rights that was added to her existing medical difficulties, could create an exceptional case..."

125. There is nothing in the evidence before me which leads me to conclude that the circumstances that presently pertain in the IDP camps in Mogadishu are the result of the deliberate actions or omissions of the Somali authorities, rather than being attributable to a lack of resources. No attempt was made by Mr Toal to identify evidence which supports a contention that the Somali authorities the failure to abide by international agreements was an intentionally inflicted act of the public authority in Somalia or from those of non-State bodies in that country when the authorities there are unable to afford him appropriate protection.

126. I conclude, therefore, that this is not a case which is to be considered on the basis of the *"MSS paradigm"* – as Mr Toal characterises it - but rather, as the Court of Appeal recently concluded in its decision in another case in which deportation to Somalia was proposed: SSHD v Said [2016] EWCA Civ 442:

> "[18]…to succeed in resisting removal on article 3 grounds on the basis of suggested poverty or deprivation on return which are not the responsibility of the receiving country or others in the sense described in para 282 of *Sufi and Elmi,* whether or not the feared deprivation is contributed to by a medical condition, the person liable to deportation must show circumstances which bring him with the approach of the Strasbourg Court in the *D* and *N* cases."

What clan does the claimant belong to?

127. As identified above the claimant has at all times up until last week maintained that he is from the Majeerteen sub-clan of the majority Darod clan. The First-tier Tribunal made a finding of fact to that effect.

128. Prior to the 19 June this was a fact which was not in dispute. However, in the abovementioned e-mail sent to the Upper Tribunal on 19 June by the claimant's solicitor, indication is provided that the claimant now believes that he belongs to the minority Madhiban clan. Insofar as this issue is concerned I conclude the decision of the First-tier Tribunal is to be maintained and I proceed on the basis of the evidence that the claimant has consistently given since 2009 and which has been confirmed by the claimant's mother i.e. that he is a is a member of the Majeerteen sub-clan of the Darod clan.

129. The Darod clan are an ethnic majority (noble) clan, with members spread throughout Somalia. The Majeerteen sub clan are found mainly in Puntland. The number of members of the Darod clan inhabiting Mogadishu is identified in the background evidence as being between 7% and 10% of the population (the size of which is of itself not known with any precision, the two experts who gave evidence in MOJ providing figures of 1.5 million and 2.5 million people, respectively).

What, if any, funds will the claimant have available to him at the point of return to Mogadishu?

130. The Secretary of State does not seek to go behind the First-tier Tribunal's conclusion that the claimant would not have available to him in Mogadishu remittances from any family member.

131. Mr Jarvis submits, however, that the claimant would have available to him:

    i. £750 obtained through the Facilitated Returns Scheme;

    ii. Alternatively, $100 paid by UK authorities to the claimant upon the claimant's departure;

    iii. Funds (or the promise thereof) the Home Office to the claimant to meet his short-term accommodation needs in Mogadishu;

    iv. Funds (or the promise thereof) from members of the claimant's clan (Darod) resident in the UK (other than members of his 'family')

132. I will consider these in turn, starting first with the monies (or promise of monies) that Mr Jarvis asserts will be accessible to the claimant upon application under the Facilitated Returns Scheme.

133. The Tribunal in MOJ did not consider this issue in any detail, merely observing at [423] that:

> "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."

134. Judge Southern (one of the authors of MOJ) gave further limited consideration to the relevance of the Facilitated Returns Scheme, in the reported decision of AAW (expert evidence – weight) Somalia [2015] UKUT 00673 (IAC), stating:

> "[57] He would, though, be entitled to claim £750 under the respondent's Facilitated Return Scheme, should he chose to apply for it…
>
> [64(f)] The appellant has no family accommodation in Mogadishu to return to but, as is evidenced by the experience of his own parents, resort to less formal accommodation does not necessarily mean living in conditions that fall below the Article 3 threshold. This appellant can apply for a resettlement grant and is well placed to secure work in the vibrant construction industry in Mogadishu today" (emphasis added)"

135. Neither the Tribunal in MOJ nor that in AAW considered the operation of the Facilitated Returns Scheme, a task that I am now asked to undertake.

136. The relevant guidance explaining the Facilitated Returns Scheme for foreign national offenders is found in a 35-page document headed: "*The Facilitated Returns Scheme (FRS), version 8: published for Home Office staff on 3 October 2016*"

137. The introduction to this document identifies that the Facilitated Returns Scheme (FRS) was established on 12 October 2006 to make the early removal for foreign national offenders (FNOs) easier. The primary aim of the scheme is to encourage FNOs to leave the UK at the earliest possible opportunity. It is open, *inter alia*, to "*time-served prisoners*".

138. An application under the FRS can be made by telephone or by informing an immigration Officer or member of prison staff. The making of an application is not, however, treated as being compatible with pursuing an appeal against deportation and if the appeal process is still ongoing an applicant is required to sign a "*disclaimer form*" withdrawing such appeal. This, in my view does not, of itself, prevent an appeal being determined on the basis of monies being available from the FRS upon return for any given applicant, and Mr Toal did not seek to argue that such an approach should be taken.

139. An applicant will usually receive a reply within 72 hours of an application being made. If accepted the current values of the grants are £1500 if an applicant is still serving a custodial sentence, and £750 if the application made after the expiry of the custodial sentence. In the instant case the relevant sum is £750.

140. If an applicant does not have either a valid travel document or an acceptance that such a document will be issued, any acceptance under the FRS is provisional until the aforementioned issue is resolved. Successful applicants will (if detained) be provided with a pre-paid cash card in the sum of £500 the day before removal. In circumstances where it is not possible to provide a cash card, cash will be provided instead. The remaining sum is 'uploaded' to the cash card once the International Organisation for Migration have, within the first month of departure, confirmed contact with the applicant.

141. Page 12 of the FRS guidance identifies a number of *"categories of foreign national offender"* that fall outwith the scope of the FRS. It is uncontroversial that the claimant falls within one of the identified categories: i.e. he *"has pursued an immigration appeal beyond first-tier tribunal or its earlier equivalents in the past."* In such circumstances the guidance provides that an application made by such person under the FRS *"will be rejected"*.

142. One would have thought at this stage that terminal damage had been done to Mr Jarvis' submission that the claimant would be entitled to assistance under the FRS upon his return. However, the FRS guidance document provides, at page 14, for exceptions for those who do not otherwise meet the criteria under the scheme. This section of the guidance reads:

> "**Cases not otherwise meeting the criteria for departure under the Scheme**
>
> Cases liable to deportation or removal action that do not meet the other criteria for departure under FRS are normally not eligible.
>
> An FRS application can be accepted exceptionally on a case by case basis with authorisation of the local deputy director. This might be where for example it is considered that enforcing departure of a FNO would be especially difficult to enforce without allowing them financial assistance under FRS. However, such cases will be numerically few.
>
> In such cases, the FRS team senior executive officer must contact their operational counterpart who will be managing the FNO's deportation to discuss whether an application under the scheme can be accepted.
>
> The FRS team senior manager (a senior executive officer or higher) has the final decision whether to accept such an application."

143. Mr Jarvis submits that the claimant falls squarely within the confines the above passage and is therefore bound to succeed in an application made under the FRS. I do not accept that this is so. The starting point is that the claimant is not eligible for assistance under the FRS for the reasons already highlighted. It is only in exceptional (and numerically few) cases that an application under the FRS will, in such circumstances, be accepted. Whilst there is information on page 14 of the guidance as to the circumstances relevant to the exercise of the discretion involved in considering such an application, ultimately it is a subjective decision made by a local deputy director.

144. Despite these proceedings having been adjourned to allow for evidence to be introduced as to the application of the FRS, nothing has been produced by the Secretary of State to support her contention that the claimant would benefit from it. One could envisage, for example, evidence from a local deputy director giving more detail as to how discretion is exercised in any given case or, even, evidence from such a director that if this claimant were to apply on the basis of the facts currently known, the application would be treated favourably. The claimant, of course, is not in a position to produce evidence on this issue because any application he makes will automatically be rejected as a consequence of the pursuance of the instant appeal.

145. On the basis of the limited evidence made available on this issue I conclude that there is a real risk that the claimant will not be successful were he to make an application under the FRS.

146. I do accept, however, that the claimant will be provided with $100 on departure by the Home Office. In this regard, I have before me a witness statement dated 5 May 2017 and authored by Anne Brewer, Country Manager Team 1 (Africa), Country Liaison and Documentation, Returns Logistics in the Home Office, Immigration Enforcement department, in which the following is said:

> "1. I have been asked to provide information to the Upper Tribunal in respect of forced returns to Somalia.
>
> 2. I can confirm that, in respect of a forced returnee, where that person has not applied for or been refused assistance under the FRS (or VARRP) scheme, they will receive $100 on departure to cover their immediate needs."

147. Ms Brewer also provided evidence in relation to the possibility of the Home Office providing funds for the claimant's short term accommodation needs upon return to Somalia, in the following terms:

> "3. In exceptional circumstances the Home Office may also provide funds for short terms accommodation needs."

148. This is the only evidence before me going to the possibility of the claimant being provided with funds to cover his short-term accommodation costs in Mogadishu. Such evidence falls significantly short of demonstrating that such funds would be available to the claimant, and there is clearly a real risk they would not be. In particular, I observe that there is no indication as to type of circumstances which are likely to be sufficiently exceptional to persuade the relevant Home Office official that such a payment should be made. Furthermore, even if the claimant does demonstrate that there are exceptional circumstances in his case, there is still a discretion not to provide the funds (as evidenced by the use of the word "*may*" in paragraph 3 of Ms Brewer's statement). No indication is provided as to what factors will be considered in the exercise of this discretion. In any event, no evidence is provided as to the sum of any monies that would be paid in this regard, or as to the period that such monies would be provided for.

149. I turn finally to Mr Jarvis' submission that the claimant could approach members of the Darod community in the UK in order to secure remittances from them upon his return to Somalia. Mr Jarvis observes that the Darod clan are, in particular, resident in large numbers in the Islington area of London. Once again, I reject Mr Jarvis' contention.

150. The claimant is now in detention and there is no indication from the Secretary of State that there is a possibility of the claimant being released prior to his deportation (should he be unsuccessful in this appeal). It is difficult to conceive in these circumstances, particularly when taken in conjunction with the conclusions regarding the claimant's connections to his family members in the UK, that the claimant could orchestrate a situation in which he makes contact with a Darod clan member in the UK other than those who belong to his family, and persuades that clan member to either fund him upon his return to Somalia and/or use their contacts within Somalia to assist him in integrating there - either by way of providing accommodation and/or employment. Even if the claimant were not in detention I would have concluded that it would be entirely speculative to assume that the claimant could obtain assistance from non-familial Darod clan members living in the UK, in the manner suggested by Mr Jarvis, and I would have proceeded on the basis that he could not.

151. In all the circumstances, I conclude that the claimant will be returned to Mogadishu with US$100, but will not have access to other monies from the Home Office to meet his short-term accommodation needs, any monies under the FRS or monies from Darod clan members in the UK.

152. As to what will happen immediately upon the claimant's return to Mogadishu, Mr Jarvis points to evidence confirming that there are taxi services running between the airport and other areas of Mogadishu that charge approximately $5 for the journey. Three wheel scooters are also a popular form of transport in Mogadishu, which charge approximately $2 for a ten-kilometre journey. On the basis of such evidence I find that there will be no difficulties in the claimant travelling between the airport and an area of Mogadishu which is largely inhabited by the Darod clan, or indeed any other area of the city.

Will the claimant have to live in an IDP camp?

153. The issue of the availability accommodation must be considered in stages. First, consideration must be given to the obtaining of accommodation (other than in an IDP camp) in the immediacy of the claimant's return. The analysis of this issue is not impinged upon by the assessment of the likelihood of the claimant obtaining employment.

154. I bear in mind that the burden of proof is on the claimant, albeit it is a low one. As identified above, the claimant has no familial connections in Mogadishu to support him in his attempts to obtain accommodation upon return, nor can he draw upon any connections his UK based family members may have with persons in Mogadishu

in light of the First-tier Tribunal's conclusion that his family members have decided to sever ties with him.

155. Although it may be that clan membership would be of some assistance to some returnees in finding and securing accommodation in a majority Darod area, I do not accept that this will be so in the claimant's case. At present, he is effectively estranged from his clan membership. Nevertheless, the evidence does not demonstrate that one needs clan assistance in order to secure accommodation, either within or outwith an area populated by Darod clan members.

156. Neither party has produced satisfactory evidence as to the current cost of rental accommodation in Mogadishu, and there is no evidence, even historic, as to the cost of accommodation in those areas populated by the Darod clan. The only evidence that was drawn to my attention on the cost of accommodation is found in the Landinfo's Fact-Finding Mission Report from February 2014, in which the following is said:

> "Regarding housing and security in Mogadishu a well-informed journalist in Mogadishu explained that housing prices and house rentals may vary mainly according to the security situation in the sixteen districts of the city. As an example of this the source compared the districts of Hurriwwa and Waberi. In the outlying district of Hurriwwa you may rent a five room villa for approximately US$100 per month, while the same size villa in Waberi district (near the international airport and the AMISOM controlled area) may cost up to US$400 in rent per month."

157. The claimant would not require a five-bedroom villa. It can reasonably be assumed that cost of a single room would be substantially less than the amounts identified above for a five-bedroom villa. Some support for this, if required, is found in a UNHCR produced report from April 2016 titled *"Internal Displacement profiling in Mogadishu"* in which it is said that for the small proportion of IDP's that reported paying rent in Mogadishu, the average rent was $US10 per month – although I accept that this information is of limited utility because it only refers to IDPs and does not identify the type or location of such accommodation; nor does the information rule out the possibility that some or all of the respondents maybe paying rent to relatives at a rate below the market rate.

158. As to the costs of living in Mogadishu – other than accommodation costs, again, I was not taken to any specific information on this issue. I observe, however, that the aforementioned UNHCR report identifies that on average $US 1-2 per week is said to be spent per person on water by those persons who were the subject of the report. 72% of employed males earn US$14 or less per week on average. A report dated February 2016 and headed *"Youth, Employment and Migration in Mogadishu, Kismayo and Baidoa"*, authored by Altai Consulting for IOM Somalia, provides information (at [3.2.3]) that the *"poverty line"* is US$2 per day, although this is not specific to Mogadishu but said to represent the three cities, one of which is Mogadishu.

159. Drawing all this together, in my conclusion even allowing for an increase in the cost of accommodation since 2013 (the year the data in the report is said to relate to) the

claimant has not demonstrated that there is a real risk that he would not be able find a room in Mogadishu within the scope of the financial resources he has at his disposal in the immediacy of his return, even taking into account that he would require sufficient funds left over to pay for the goods he requires to ensure that he is living in circumstances which do not fall below that which it is acceptable in article 3 terms.

160. Turning the issue of the likelihood of the claimant obtaining employment. In MOJ the Tribunal relevantly said as follows:

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

The Tribunal then considered evidence given by Dr Hoenhe to the effect that a vast majority of people in Mogadishu are struggling to survive, concluding:

> "[349] This is a view that is not altogether easy to understand and we are unable to agree with it. The evidence is of substantial inward investment in construction projects and of entrepreneurs returning to Mogadishu to invest in business activity. In particular we heard evidence about hotels and restaurants and a resurgence of the hospitality industry as well as taxi businesses, bus services, drycleaners, electronics stores and so on. The evidence speaks of construction projects and improvements in the city's infrastructure such as the installation of some solar powered street lighting. It does not, perhaps, need much in the way of direct evidence to conclude that jobs such as working as building labourers, waiters or drivers or assistants in retail outlets are unlikely to be filled by the tiny minority that represents "the elite"".

161. The Tribunal summarised its conclusions on the issue of the availability of employment opportunities in Mogadishu in the following terms:

> "[351] …there is evidence before the Tribunal, identified by Dr Mullen, to the effect that returnees from the West may have an advantage in seeking employment in Mogadishu over citizens who have remained in the city throughout. This is said to be because such returnees are likely to be better educated and considered more resourceful and therefore more attractive as potential employees, especially where the employer himself or herself has returned from the diaspora to invest in a new business.
>
> [352] For those reasons we do not accept Dr Hoehne's evidence that it is only a tiny elite that derives any benefit from the "economic boom". Inevitably, jobs have been created and the evidence discloses no reason why a returnee would face discriminatory obstacles to competing for such employment. It may be that, like other residents of Mogadishu, he would be more likely to succeed in accessing a livelihood with the support of a clan or nuclear family.

> [407(h)] …it will be for a person facing return to Mogadishu to explain why he should 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 way."

162. Mr Toal observes that the evidence provided to the Tribunal in MOJ demonstrated that 500,000 people had returned to Mogadishu between November 2011 and August 2012 (MOJ at [346]) and that only 56,900 jobs were created between May 2011 and autumn 2013 (MOJ at [211]). He submits that the term 'economic boom' used in MOJ must be viewed with circumspection and within the true context of there being a "*massive over supply of labour*" in Mogadishu. With respect, the focus by Mr Toal on the label attached to the economic situation in Mogadishu by the Tribunal in MOJ is unhelpful. The Tribunal plainly considered the evidence before it as a whole, and concluded – even in light of the evidence Mr Toal now seeks to focus upon – that there were significant employment opportunities in Mogadishu at that time.

163. To bring matters more up-to-date, in its report of May 2016 the UNHCR, reliant on figures obtained from a Human Rights Watch of April 2015, state that approximately 370,000 IDPs live in Mogadishu.

164. Mr Toal submits that the number of IDP's living in Mogadishu has seen a recent substantial increase as a consequence of the prolonged drought affecting some areas of Somalia. Attention was particularly drawn to a report from the Internal Displacement Monitoring Centre of the Norwegian Refugee Council, showing that between 1 November 2016 and 24 March 2017 "*more than 79,000*" people had moved to Mogadishu. There is no indication as to how these figures were compiled, but Mr Jarvis did not seek to challenge their accuracy. He observes, however, that according to a Somalia Drought Watch publication of 6 April 2017, the rains have started to fall in the western side of Somaliland.

165. I accept that has been a recent influx of people into Mogadishu as a consequence of the drought in other areas of Somalia. This will inevitably lead to there being an increase in the number of persons looking for employment in Mogadishu. I have taken this into account when coming to my conclusions below. This increased figure will not, though, be equivalent to the figure identified above because at least some of those number will be children of non-working age and others will be women who are homemakers reliant on the males of the family unit to provide the necessary funds.

166. Moving on, both parties rely upon evidence contained the February 2016 report authored by Altai Consulting for IOM Somalia in relation to the prevalence of employment opportunities in Mogadishu. As regards the evidence therein relating to Mogadishu, it is based upon interviews with 400 people under the age of 30 (29% of those being between the ages of 14 and 19) with an almost equal split in the gender of the interviewees. Information was also received from employers, youth organisations, universities, job seeking services and government representatives.

167. It is immediately apparent that not only is the sample size small but, more significantly, that the claimant does not fall within the age range of the persons covered by report. Nevertheless, the evidence in the report still provides a useful overview of the employment opportunities available in Mogadishu.

168. The report identifies that Mogadishu *"demonstrates the highest dynamism…atttacts most investment and benefits…nearly all of the business stakeholders interviewed (68) shared there optimism with recent economic developments and noted the rise of new entrepreneurs…of the 77 companies interviewed….all found the present environment was positive for investment…".* It also concludes that there is a 6% unemployment rate amongst those living in Mogadishu aged between 14 and 30 years old. Amongst those who are not students or housewives the unemployment rate is said to be 30%. Although only a third of interviewees described themselves as having employment, this is said to be explained not by high unemployment rates but by underemployment.

169. The IOM further report that a third of 26-30 year olds have had no education, and that in any event the quality of primary and secondary level education is poor and that youths with primary/secondary level education are likely to be less educated that one would expect. In the same vein, high levels of illiteracy (72%) amongst the IDP population is disclosed by the April 2016 *IDP Profiling in Mogadishu* report, it also being identified therein that only 28% of IDPs in Mogadishu over 5 years old have been to school. There is an 'increasing' demand for educated staff, even for low level jobs. Job seekers who do not have an education are at a disadvantage on the job market in Mogadishu.

170. Drawing all the evidence together, including the substantial amount of evidence before me to which I have not referred, I conclude that there has been no material change in the level of the employment/economic opportunities available in Mogadishu from that identified by the Tribunal in MOJ and the later reported decision of AAW. The economy in Mogadishu is still vibrant, with reconstruction and retail being at the forefront of the 'boom'.

171. The issue still remains, however, as to whether this claimant would be in a position to take advantage of such opportunities. In this regard, Mr Toal draws attention to a "*Key Finding*" in the IOM report drawn in the following terms: "*…many of the job offers are not broadly advertised because employers favour the selection of relatives or clan members over the most skilled candidates…This excludes candidates who do not have the right connections or who come from minority clans.*" It is important, however, to consider the details of the report itself rather than the headlines by which the IOM choses to portray its findings.

172. A more in depth analysis of the report identifies that the position is substantially more nuanced. For low paid jobs within construction, logistics or trade companies, uneducated and unskilled workers wait in Bakara market between 6am and 8am each morning, to be recruited. There is a "gatekeeper" who, for a share of the earnings, manages recruitment for positions such as porters and manual workers.

173. This is entirely consistent with the conclusions in MOJ and AAW, it being said in the latter decision:

> "[64(e)]…As was made plain in *MOJ & Ors,* whilst it may assist a person seeking to find work to have the sponsorship of an established family network of majority clan, absence of that support was not a disqualification to access to work."

174. There is no indication that this recruitment process is clan biased but, in any event, as a member of one of the majority clans even if it were clan biased the claimant would not be excluded from access to such employment. Given that the claimant will be competing for employment against uneducated and unskilled workers, and given the type of employment that is on offer, the claimant's lack of work experience is not likely to count against him to any significant degree, if at all. He also has the benefit of two positive characteristics that his competition is unlikely to share i.e. his ability to speak English and the fact that he has been educated. As to the latter, the OASys report of 5 March 2015 indicates that the claimant was in education in the UK between the ages of 14 and 18.

175. The claimant could make use of the opportunities to obtain low skilled work in the immediacy of his return. The income levels are not high, but are sufficient to ensure the claimant would be able to live outside of an IDP camp in conditions which, although far from being as comfortable as the conditions the claimant has enjoyed in the UK, do not fall foul of the Article 3 threshold.

176. The IOM report further indicates that it is the small companies, which are most numerous, that rely on relatives, close friends and clan elders to identify candidates for employment, this being as a consequence of the insecurity and general distrust of people from a different clan. Most employers look for staff with simple skills, such as business management, English or basic IT knowledge. The claimant has one of these sought-after skills.

177. I accept, however, that simply being a member of a majority clan will not be sufficient of itself for the claimant to obtain employment in a 'small company'. He would need to gain the trust of clan elders. No reason has been offered, however, as to why the claimant could not familiarise himself with his clan and ultimately earn the trust of the clan elders, albeit I accept that this could not be achieved in the immediacy of his return.

178. Looking at all the evidence in the round, I conclude that the claimant would return to Mogadishu with sufficient funds to enable him to obtain simple accommodation and the necessary food and hygiene products to ensure that at the point in time of his return, and shortly thereafter, he would not be living in conditions which fall below the Article 3 threshold. He is a fit and healthy person, able to complete in the market for low skilled employment in Mogadishu. Such employment opportunities exist outwith the need for clan assistance and the claimant has the advantage of being educated when seeking out those opportunities. I do not accept that there is a real risk that the claimant will not obtain such employment in a relatively short period after his return, nor do I accept that there is a real risk that he would not earn

sufficient monies from such employment so as to enable him to live outwith an IDP camp in conditions which would not breach Article 3. The claimant also has the opportunity, over time, to ingratiate himself with members of the Darod clan, a majority clan, which is likely to provide him with further and better employment opportunities in the long run.

179. For all these reasons, I therefore conclude that the claimant's deportation would not lead to a breach of Article 3 ECHR.

Notice of Decision

The FtT's decision contained an error of law capable of affecting the outcome of the appeal and it is set aside.

Upon re-making, this claimant's (Mr Ahmed's) appeal is dismissed.

Signed:

Upper Tribunal Judge O'Connor
24 July 2017