

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

JR/5428/2019

Field House,
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London
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22nd May 2020

BEFORE

THE HONOURABLE MRS JUSTICE FOSTER DBE

BETWEEN:

THE QUEEN (on the application of YA)

Applicant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Miranda Butler, instructed by Wilson Solicitors LLP, appeared on behalf of
the Applicant.

Jack Anderson, instructed by the Government Legal Department, appeared
on behalf of the Respondent.

JUDGMENT

MRS JUSTICE FOSTER:

Introduction

1. This is a claim for judicial review of the respondent Secretary of State for the Home Department (“SSHD”)’s decision of 15 October 2019 refusing to treat further submissions made by the applicant as amounting to a fresh claim under paragraph 353 of the Immigration Rules (“IRs”). It is also a challenge to a further and supplementary decision dated 6 January 2020 which gave extended consideration to further psychiatric materials concerning the mental health of the applicant and provision of treatment on return.
2. The issues which I have to decide concern whether the Secretary of State erred in concluding, initially on 15 October 2019, that the applicant YA does not have a real prospect of establishing before an Immigration Judge that his removal to Somalia would cause the UK to be in breach of Article 3 of the ECHR on account of the risk of his suicide.
3. This case has a significant history. YA’s right to remain in the UK was first curtailed in the light of his conviction in 2015. There has been a large number of individual decisions concerning him since then; at one point his removal to Somalia was actually in train but aborted once aboard the aeroplane taking him back to Somalia.
4. This judgment is divided into the following sections
 - a. Background paragraphs 5-30
 - b. Medical Material paragraphs 31-49
 - c. The Impugned Decisions paragraphs 50-72
 - d. Legal Framework paragraphs 73-119
 - e. The Applicant’s Case paragraphs 120-126
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a. Background

5. The claimant was born in Somalia in 1988. His father owned a small business before the Somalian Civil War. His parents, who died natural deaths in the early 1990s, had lived in the Modena District of Mogadishu when he was a young child. His grandmother brought him up with his siblings.
6. YA entered the UK aged about 14 on a trip organised by his grandmother, with his family, in October 2003; he has two brothers in the UK, and at least one cousin. There is evidence of other more distant family members still living in the Mogadishu area. He claimed asylum on entry as a member of the Reer Hamar minority clan and has described an incident where he was kidnapped aged 13 or 14 by a criminal gang to obtain money from his family. After several days of ill-treatment including being hung out of a window and being beaten, he was released when the family paid the ransom. He also described abusive forced work as a shoe-shiner between 2001 and 2003 which the SSHD has recognised as falling within the description of modern slavery.
7. On 28 July 2008 aged 19 he was convicted of rape and conspiracy to rape a woman over the age of 16 and sentenced to 9 years imprisonment in August 2009. He had one previous conviction from 2007 for assaulting a police officer and being drunk and disorderly. The rape and conspiracy to rape were committed on 10 August 2007 with three other men, in Central London, and involved the gang rape of a 16-year-old girl whom they had come across in Trafalgar Square after the clubs had closed. The victim was described as alone, lost, without money and under the influence of drink. She went with the

applicant and others to a flat and was gang raped within 20 minutes of arriving. Her sanitary protection was forcibly removed, and she was hit and bruised when resisting. In the course of the rapes, photographs of her were taken, although not by the claimant.

8. At trial, YA's defence to the effect that she had consented was described by the judge as "absurd". The circumstances of the crime were such as to cause the judge to describe the defendants as having no respect for human beings, reflecting that the sounds of her hysterical distress and screaming could be heard on the 999 call made by neighbours, and that the victim would suffer severe and enduring psychological harm as a result of the attack. None of them had been working, they spent their time hanging about at night in the West End when the clubs were closing. The judge said the applicant's only mitigation was his age. YA continues to deny his guilt, still maintaining it was consensual sex.
9. YA was released from prison on 16 August 2012 but recalled on 23 May 2014, then bailed for offences of alleged GBH common assault and theft, which were eventually dropped. Whilst in prison he was convicted of an offence of causing another to convey a mobile phone into prison and sentenced to a further six months to be served concurrently.
10. On 21 April 2016 the Secretary of State decided to cease YA's refugee status and to deport him to Somalia. This decision was unsuccessfully appealed. On 4 July 2017 FTTJ Hollingworth heard evidence including from the claimant, and in a long, careful and detailed judgement dismissed YA's appeal against the removal of status and refused his further protection and human rights claims.
11. The decision of FTTJ Hollingworth included the finding that a person in the position of the claimant, an ordinary civilian, would no

longer face a real risk of persecution or harm such as required protection under Article 3 ECHR or Article 15(c) of the Qualification Directive. There had been a durable change in the situation concerning Al-Shabab in Mogadishu, a reduction in civilian casualties and no real risk of forced recruitment to Al-Shabab for civilian citizens of Mogadishu including recent returnees from the West. The judge held that some money from abroad, namely from his family in the UK, would be available to him initially while he was seeking employment, and that he had been equipped by a series of prison courses to embark on employment in joinery and construction or indeed catering or cleaning on his return to Somalia. Taking into account details of the country situation in the relevant case law, the judge noted there was a vibrant construction industry in Mogadishu.

12. In light of the circumstances of his criminal record, and having full regard to the consequences of return, the judge held that the active refoulement was a proportionate response to the danger posed by the claimant to the community. He found in particular that it was a matter of great concern that the claimant had not completed work regarding his sexual offending, and he retained unhealthy and distorted views towards women and relationships, and authority figures, in particular the police. It was clear the claimant had failed to accept responsibility for his criminal behaviour. He characterised the offending as particularly serious and without mitigating factors.

13. The Judge also found the applicant was not socially and culturally integrated in the UK due to his behaviour. He had not established that he had a family life in the UK and for most of his life had not been here lawfully. In all the circumstances the FTTJ held there would be no breach of Article 8 ECHR in respect of the applicant's private or family life if he were to be deported as a Foreign National Offender.

14. Permission to appeal this decision was refused and also refused for a subsequent judicial review application made in September 2017. In February 2018 the Court of Appeal refused permission to appeal against the High Court's decision to refuse permission.
15. On 21 September 2018 the applicant was served with removal directions effective 9 October 2018. YA had become appeal rights exhausted. That day further representations were made by his solicitors and refused that day by the SSHD. The applicant's removal in October 2018 was thwarted by an incident on the aeroplane involving a passenger protest, and the plane was impeded from leaving due to the disruption.
16. YA was returned to immigration detention. On 25 October 2018 he was found unresponsive in his cell having taken an overdose of prescribed medication. It was noted in a medical report in November by a clinical practitioner that he had historically attempted to take his own life "through overdose and tying ligature". 50 mg Sertraline was prescribed.
17. On 22 December 2018, a Dr Thomas sent an initial opinion by email after assessing YA at HMP Bedford on 20 December 2018. He explained that YA had told him he had tried to kill himself twice, he believed he would be persecuted because he was from a minority tribe in Somalia. He was described as dishevelled, poorly kempt, although his attention and concentration were alright. Dr Thomas said YA had symptoms suggestive of a diagnosis of a moderate depressive episode with anxiety and panic attacks. YA was in his view at significant risk of self-harm/suicide. He recommended that his mental health would benefit from multidisciplinary support available in a secure healthcare setting and recommended transfer to secure hospital. On 22 December 2018 the applicant made further representations in a human rights claim based on this preliminary report.

18. In considering the representations on 4 January 2019, the SSHD accepted the applicant's mental health issues but noted that it was not suggested that there was no care or treatment in Somalia. She did not accept that YA's case met the Article 3 threshold. The SSHD set out 2017 materials on Somali Country of Origin Information concerning medical treatment and medication, recognising that any treatment available "might not be of the same standard as that which is provided by the National Health Service," but saying that Somalia had a healthcare system which the Home Office considered capable of assisting YA if necessary – although it was not accepted that his illness was of a type or severity that founded a claim to remain in the UK, or precluded his removal from it under Article 3. The SSHD refused to treat the further submissions in as a fresh claim and served the applicant with notice of a removal window.

19. This was challenged but on 15 of January 2019 the SSHD maintained her decision, refusing YA's submission that he had a fresh claim under paragraph 353 of the Immigration Rules.

20. On 24 January 2019, in a formal report, Dr Thomas recorded the previous findings, that YA said his symptoms of depression and anxiety had started since his current detention at Harmondsworth Detention Centre, describing a history of living at the YMCA, going to clubs, and smoking cannabis regularly with his friends and drinking at weekends. The report reflected the conclusions made earlier and indicated that Dr Thomas was unable to comment on the risk of suicide after YA's removal because he was unaware of what circumstances his and support would be then. Dr Thomas also indicated that although YA may have exaggerated some details which he may perceive assisted his case, based on the history and mental state examination and evidence, he nonetheless diagnosed a moderate

depressive episode as before. Further representations and the further report from Dr Thomas were sent to the SSHD on 4 February 2019.

21. The SSHD refused this claim on 1 April 2019. That refusal was challenged by a pre-action protocol letter. Further representations made on 9 April 2019 were refused on 17 April 2019 in respect of the human rights applications, and also under paragraph 353 of the Immigration Rules.
22. On 15 April 2019 the applicant, whilst on bail, was found by police in Liverpool attempting to travel to Belfast. He admitted he was seeking to travel via Dublin to Spain. He was detained; a further refusal decision was made on 16 April 2019.
23. Removal directions were served again upon the applicant on 26 of April 2019 and on 30 April 2019 a further judicial review challenge was submitted. The removal directions were deferred. The application was refused on 17 July 2019 at an oral hearing. About a week before the judicial review refusal, the applicant was found attempting to hang himself in detention.
24. The 17 July 2019 oral refusal of permission by UTJ Craig was also a detailed consideration of the materials including Dr Thomas' reports. His dismissal of the application for judicial review was in trenchant terms. The judge remarked that if there were credible evidence that the applicant would be at a risk of breach of his Article 3 rights on removal, then however appalling the offences had been, if there were that risk, removal would be unlawful; however, he found there was no such evidence. The medical evidence indicated the symptoms of depression and anxiety had started at Harmondsworth, and importantly did not refer to what will happen on return to Somalia. He applied the case law, in particular *J* [2005] EWCA Civ 629.

25. UTJ Craig, like FFTJ Hollingsworth, considered the risk of destitution and did not find it arguable such a case was made out. In dismissing the application for judicial review of the Secretary of State's paragraph 353 refusal, the judge commented "this applicant's case remains absolutely hopeless." He considered YA had been seeking to frustrate his lawful removal.
26. Almost immediately thereafter on 19 July 2019 further representations were made without his legal representatives, and he requested deferral of removal on the basis of concerns about mental health and suicidal tendencies but was refused. Tribunal Judge Gleeson also refused the application stating there was no merit in the grounds for review.
27. On 20 July 2019 Professor Katona conducted a preliminary telephone consultation with YA in order to assess whether he was fit to fly in light of proposed deportation on 22 July 2019. He reported that YA said to him he was struggling since the removal directions and that he wanted to die here. He was worried if they forced him back to Somalia, he might get tortured and enslaved as happened to him before when he was a youngster, he was worried to death. He said he intended to try and seek an opportunity to kill himself, but he was watched 24 hours a day.
28. YA told Professor Katona that previous suicide attempts had been precipitated by receiving removal directions. He was put on a plane, screamed, and passengers protested. There had been a campaign about him which he said was covered up by UK and Somali media.
29. Professor Katona assessed YA's suicide risk. He reached a preliminary psychiatric diagnosis that YA was suffering from PTSD.

He described his prominent depressive symptoms as a secondary to YA's PTSD. Professor Katona did not believe YA was feigning to him. He judged YA to be at "very high risk" of suicide with a "very high risk" he would be actively suicidal and disruptive during the removal process planned for 22 July 2019. He judged YA unfit to fly.

30. He recommended YA's removal be postponed allowing full psychiatric assessment including full face-to-face assessment of suicide risk and his fitness to fly. He also recommended that before YA was removed to Somalia there should be another face-to-face assessment of any deterioration and to allow confirmation or otherwise of PTSD.

b. Medical Materials

(i) Dr Galappathie's July 2019 Report

31. The removal arranged for 22 July 2019 was in the event deferred given YA's booking on 23 July 2019 with another Consultant Psychiatrist, Dr Nuwan Galappathie. Further submissions were made on the basis of his 31 July 2019 report, but refused. The applicant asserted for the first time through this report that he was a victim of modern slavery.
32. The material matters which emerge from the report of Dr Galappathie of 31 July 2019 report are as follows.
33. YA told Dr Galappathie that he had not ever drunk to excess and had given up on entering prison and used cannabis from 16 or 17 for three years only. The report reflects medical notes through 2018 recording low mood and frustration but no suicidal feelings. However, on 25 October 2018 he reported taking an overdose of tablets. In November 2018 it was agreed he should start antidepressant medication with 50 MG Sertraline. He saw a psychiatrist in February

2019 who was of the opinion he did not suffer from a mental health problem but there is a note that he had tried to hang himself in prison. By May 2019 he was reporting depression anxiety and nightmares, he was not complying completely with his antidepressant medication regime. He said he had received Sertraline 150mg from February or May 2019, but it did not help. He denied active thoughts of self-harm.

34. Dr Galappathie records the suicide attempt and that YA was put on watch. YA reported he was tired of the Home Office trying to deport him all the time, though his life was in danger in Somalia. The wish to kill himself was due to going back to Somalia. He denied committing the rape saying it was consensual. He very much disliked detention, if released into the community he would keep appointments and engage with mental health services and take part in psychological therapy to address his past trauma. He had no plans to harm himself in the community because there he would get help from his family and he would not fear going back to Mogadishu and being killed.

35. Emphasis within documents and case law has, throughout, been added.

36. Dr Galappathie stated:

“89. ICD – 10 F 33 Recurrent Depressive Disorder

...

“91 In my opinion, clinically, [YA] presented as an individual **suffering from severe depression with active thoughts and plans regarding suicide.** He presented as hopeless, **with plans to commit suicide should he be returned to Somalia.** In my opinion the **diagnosis of severe depression with active thoughts and plans regarding suicide** is supported by his history, clinical examination and review of his health records.

92. **In my opinion, his depression is likely to have been caused by his past history of suffering from trauma within Somalia, whereby he was kidnapped, tortured, beaten with weapons and hung out of a window with threats of being killed made against him and his family.** [YA] also described

being the victim of modern slavery and **said that he was made to work for two years by his neighbour shining shoes, and that he was threatened to do this work and was not paid, other than by his neighbour giving him and his family food.** He told me he did not know what to call this before, but now understands he has been the victim of slavery. **He is also likely to have found his prison sentence for the index offence to have contributed to his depression as he reports being falsely convicted.** In addition, his ongoing **immigration detention and deportation proceedings are likely to have further contributed** to his ongoing symptoms of depression.”

37. Dr Galappathie also diagnosed Post-Traumatic Stress Disorder which he related to YA’s treatment in Somalia. Symptoms consistent with PTSD were noted he observed on 12 July 2018 at HMP Littlehey, they appeared to have worsened as reflected in the account given to Dr Patel on 11 July 2019. YA appeared to have suffered from a marked deterioration since seeing Dr Thomas in January. However he placed his findings in the context of the fact there were high levels of depression in about 80% of the detained community including, anxiety, PTSD, hopelessness, particularly in those who had served prison sentences such as YA where high levels of frustration and anxiety were reported. He recommended release from immigration detention to accommodation in the community and he said:

“99. In my opinion, **[YA] would benefit from release from immigration detention to appropriate accommodation within the community.** In my opinion, the current deterioration in his mental state, in relation to **severe depression with suicidal thoughts and serious attempts to commit suicide and worsening of his PTSD, are related to his detention under immigration powers at the IRC and his ongoing deportation proceedings.** In my opinion, **he would benefit from release to the community,** such that he can receive appropriate treatment for his mental health problems by his GP and community mental health services. If you were to be released to the community, **he is likely to no longer present with suicidal thoughts and would be amenable to engage with appropriate treatment** in the community.”

38. Specialist treatment in the UK was recommended with antidepressants and therapy to address his depression, and follow-up

by a consultant psychiatrist in secondary care. He described YA as insightful and willing to engage and therefore likely to have a good response. He said he would anticipate a good prognosis if he could receive treatment in the UK. His problems which are related to fear of being returned to Somalia where he believed he would be tortured and killed, could be managed within the community.

39. Dr Galappathie concluded his report thus:

“His current risk of self - harm suicide

“104.... In my opinion [YA] **presents with a high risk of serious self-harm and completed suicide should he remain within immigration detention with a view to being deported to Somalia.** This would be indicated by the high number of risk factors that [YA] presents with, including depression, PTSD, the significant worsening of his mental state, past history of torture, report of being a victim of modern slavery and recent serious acts of attempted suicide by way of attempting to hang himself and swallow a razor blade, such that he has been placed on constant observations. In my opinion, should he remain within immigration detention with a view to being deported, he will present with a high risk of serious self-harm or completed suicide. In my opinion, his risk of self-harm and suicide will increase further should attempts be made to forcibly remove him to Somalia. **In my opinion, if attempts were made to place him on a flight to Somalia, he is likely to suffer a further deterioration in his mental state, which is already very fragile. He would then be at risk of unpredictable behaviours including serious self-harm and completed suicide.** In my opinion, **whilst in the IRC, he presents with an unacceptably high risk of suicide** and is at risk of death by way of an impulsive and highly lethal method, such as attempting to hang himself or swallow razor blades, given that he has recently made such attempts and has now been placed on constant observations.

“105. Your assessment of the risk to his health in light of the evidence of treatment available in Somalia

106. In my opinion in light of the evidence of treatment in Somalia, I would be highly concerned about [YA’s] mental health if [YA] were to be returned to Somalia. In my opinion, **if he is unable to access the treatment that he requires, he is likely to suffer from a substantial deterioration in his mental health by way of depression and PTSD such that he would present with a high risk of serious self-harm or completed**

suicide. His mental health is likely to worsen within Somalia, such that he would lack the ability to seek treatment for his mental health problems.”

40. The SSHD had also sought a Consultant Psychiatric opinion from Dr Nimmagadda.

(ii) Dr Nimmagadda’s Report of September 2019

41. The material findings of Dr Nimmagadda were contained in a report dated 13 September 2019 following a consultation with YA as follows:

“10.2 When asked about his appetite, he told me that he has no appetite, but in the past to use to over-eat. When I asked for more details, **he stated that he had not been eating for the last two weeks and reported that he had lost some weight. He described his energy levels as low.**

10.3 He told me that he has poor concentration and cannot read or concentrate. When I asked him what he wishes to happen, he stated that he wants his life back; he wants to reconnect with his family. He wants to clear his name and he wants a job and to succeed.

10.4 **When asked about suicidal thoughts, he told me that he sometimes thinks he does not want to live anymore.** He stated that he overdosed in Bedford prison in the past.

10.5 **He told me that he does not have any current suicidal plans. He did not disclose having any psychotic symptoms in the form of auditory hallucinations or delusions.**

10.6 **He stated that he will feel safe and secure if he remains in the UK. But if he goes to Mogadishu, he will be targeted. He believes that he will be tortured to join a Militia. He feels vulnerable there.”**

42. YA told Dr Nimmagadda he had had flashbacks and nightmares which had got more severe. He believed he would be targeted in Somalia because he was the person on the news in the incident on the aeroplane stating **they will think he is a madman and will chain**

him up. He stated there were no mental health treatments in Somalia.

43. Dr Nimmagadda considered information from the medical records, and collated "Other Relevant Information" as follows:

13.1 I obtained feedback from the Engagement Support Officer, Suman Garrow from IRC that **[YA] currently works in the laundries in the afternoons.** Normally he spends his time in the laundry room on his own when he is not busy. The hours he works varies from day to day and usually depends on when he gets out of bed, **but on average she works 2 to 4 hours per day. It was not clear how long he had been doing this job in the laundry, but more than two weeks. I learned that the quality of his work was good, and he concentrates and works well with detainees and is compliant to instruction.** [YA] usually skips meals from the servery, sometimes going without food for the day. He occasionally eats his own food in his room. On average she is seen once per day at the servery.

13.2 I further learnt that he normally sits in his room unless working or going to pray. **He is very quiet on the wing and does not want to interact with the officers, however when he does interact is always polite.** I understand that he has been compliant with his medication.

44. The central part of Dr Nimmagadda's opinion was as follows:

"14.2 based on the available information including his own account, **there is no evidence to suggest that he has received regular input from the Mental Health Services either in the prison or in the community for any serious mental health issues. His mental health problems seem to have started after the deportation process has started.** There is evidence to suggest that, **during this period he has been diagnosed as suffering from depression and treated with antidepressants. There is evidence that he made suicidal attempts. He gave a history of suffering from flashbacks and nightmares related to his traumas during his early teenage years in Somalia.** I note that he has recently been diagnosed with suffering from Post-Traumatic Stress Disorder by two independent psychiatrists.

14.3 I have considered his medical reports in the Harmondsworth IRC during the last four months. During this period he has been assessed by mental health staff including Consultant Psychiatrists and **he has not been diagnosed with any serious mental health problems. There is evidence to suggest that there were multidisciplinary mental health team meetings about his care, and it is deemed that he does not need any active mental health input. On the other hand, it has been agreed that he is likely to benefit from psychological support.** As he was not prepared to undertake group work, he was referred to individual psychology sessions. I believe this is mainly of a supportive nature. He continues to remain on antidepressants.

14.4 During my assessment [YA] presented as a polite gentleman who was cooperative, and he engaged well with my interview. He was able to give a clear account about his past and present situations. He was able to clearly argue how he was wrongly convicted for the offence of rape and why he should be given an opportunity to appeal to get justice. **It is clear that [YA] is suffering from low mood and feels hopeless about his future if he were to be deported to Somalia. He seems to have genuine fears about his safety in Somalia, particularly in light of his past experiences.**

14.5 From a mental health point of view **while he is suffering from some depressive symptoms I believe they do not qualify the diagnosis of depression. I believe those symptoms could be understood in the context of his deportation proceedings.** I note that **while he is not engaging fully with other inmates or staff, he still able to do his job in the laundry and able to display concentration when doing the job.** He has been able to maintain regular contact with his family members and is benefiting from that input. He mentioned that he feels safe and secure if he were not to be deported and allowed to remain in the UK and **it appears to me that his serious worries and fears about his future are contingent on his deportation to Somalia. While he describes flashbacks and nightmares, I do not have enough evidence to make a diagnosis of Post-Traumatic Stress Disorder. He seems to have coped with the effects of his past traumas without any help so far. Even if it is considered he had these symptoms, he seemed to have coped with these for a considerable period of time without any treatment.**

There is also no evidence to suggest that any of his post-traumatic symptoms have affected his functioning while he has been living in the UK. By his self-report, it is only after the deportation proceedings were started, the symptoms have become severe.”

45. Dr Nimmagadda stated in his view the applicant was fit to be detained with appropriate medical support and medication and
“... he was fit to fly to Somalia with appropriate medical escorts and a supply of his medication until he can access suitable medical support in Somalia upon his return.”
46. It is clear there were distinct differences of opinion between the psychiatrists.
47. In essence, Dr Galappathie believed YA was suffering from severe depression likely to have been caused by his past trauma in Somalia. He also diagnosed PTSD. Dr Nimmagadda disagreed that there was sufficient to form a diagnosis of PTSD, YA had coped with the effects of past traumas for quite some time until then without the need for any assistance. His mental health problems seem to have started after the deportation process had started. He attributed the depressive symptoms to YA’s deportation proceedings, not to a depressive illness. Dr Nimmagadda believed his serious fears were contingent on his return to Somalia. Dr Galappathie recommended YA’s release, since if he remained in detention with a view to deportation YA would present with an unacceptably high risk of self-harm and suicide. Dr Galappathie was highly concerned if YA returned to Somalia and could not access the treatment he required, he would suffer from a substantial deterioration.
48. The difference in views was not stark in all areas. Dr Galappathie reflected that the circumstances of detention contributed to YA’s depression and that what he saw as a deterioration of his conditions with suicidal thoughts and serious attempts on his life would be ameliorated by appropriate treatment out of detention.

Indeed, YA was likely to present with suicidal thoughts no longer if released into the community with treatment.

49. Before the January decision a further report was received from Dr Galappathie, but the first of the SSHD's decisions was based upon the medical materials referred to above.

c. The Impugned Decisions of the SSHD

(i) 15 October 2019 Refusal Letter

50. The SSHD concluded in a decision of 15 October 2019 that YA was a victim of modern slavery under the NRM process based on the time he was a shoe-shiner as a boy but refused him Discretionary Leave to Remain.

51. YA argued that the materials in the medical reports, particularly that of Dr Galappathie, supported the contention that the situation facing YA in Somalia would lead to a real risk of an Article 3 breach and constituted a new claim under IR 353.

52. In her 15 October 2019 Refusal Letter the SSHD set out the issue thus:

“35. Consideration has been given to your assertion that you should be allowed to stay in the UK based on Article 3 of the ECHR on medical grounds. You allege that you suffer from mental health problems and you would be unable to access treatment in Somalia. Two psychiatric reports have been provided for consideration at... [Et cetera]”

53. She set out most of the major paragraphs of the expert reports with elements of the history from past detention notes including the attempts YA had made on his life, and the deductions and diagnoses of the doctors. Citing paragraph 14.2 of the report of Dr Nimmagadda which she noted was more recent, where he understood the symptoms as in the context of the deportation proceedings, she did not accept

that YA was suffering from a severe depressive illness. She considered YA was fit to fly with appropriate medical escorts and with a supply of medication.

54. The SSHD reiterated that the threshold set in Article 3 foreign medical cases was high, and exceptional circumstances preventing return had to be shown. The information provided did not indicate his condition was such that it would be inhumane to remove him; the high threshold of severity that breached Article 3 had not been reached on the basis of his mental health problems.

55. She set out details of a WHO report recognising the limited number (five) of mental health centres in Somalia. It also referred to the general possibility of mental health patients being chained up in Somalia, which had exercised YA and his advisors. She noted however that the Habeeb Hospital in the city of Mogadishu (from which he came and to which he would be returned), and another Hospital with a mental health ward had, with WHO help, implemented a programme called the “Chain-Free Initiative” which was aimed at restoring the rights and dignity of mentally-ill patients. She concluded that medical treatment was available in Somalia which YA could access in the future. He had not provided evidence he would be denied it, nor that he could not travel to obtain it; the letter concluded YA’s removal did not breach Article 3.

56. When dealing with the risk of self-harm particularly, the SSHD referred to the case of *J v SSHD* [2005] EWCA Civ 629 stating she had considered whether there were substantial, strong grounds for believing removal would expose him to a real risk of serious harm or loss of life through suicide or self-harm under Article 3. She concluded it would not, making reference to protections and support on the journey and the availability of care in Mogadishu, plus modern means of communication to keep in touch with family.

57. The letter concluded that whilst there may be risks when he was informed of the decision to remove, all reasonable measures had been put into place to protect against them, similarly during physical removal, escorts would accompany him and a medic would be provided for his deportation. There would not therefore be a real risk of serious harm or loss of life during the removal.
58. She acknowledged that an Article 3 claim could in principle succeed in a suicide case but if the fear of ill-treatment upon return were not well founded, that would tend to weigh against there being a real risk the return would result in treatment contrary to Article 3. A question of considerable relevance was whether the UK and/or the receiving state had effective mechanisms to reduce the risk of suicide, and if so, that would weigh heavily against the claim of violation of Article 3. Even if the risk were regarded as severe, an increase in the risk of suicide as a result of the removal was not sufficient to bring the case near the high Article 3 threshold, when considering the measures put in place to minimise the risk of suicide. YA could seek treatment for a mental health condition, especially a predisposition to self-harm, in Somalia and the risk of suicide and self-harm would be effectively minimised. In the circumstances the risk did not attain the level of severity necessary to meet the high Article 3 threshold.
59. The SSHD expressly did not accept that YA's claimed thoughts of suicide were as the result of past ill-treatment or torture. It was not accepted by the SSHD that the risk stemmed from YA being "subjectively terrified at the prospect of returning to the scene of his torment" (reflecting language used in the case of *Y and Z (Sri Lanka)* [2009] EWCA Civ 362).

(iii) Addendum Report of Dr Galappathie

60. This application for judicial review was made on 28 October 2019. An addendum psychiatric report was received from Dr Galappathie dated 4 November following a visit to YA on 1 November 2019. YA reported his mental health had continued to worsen since July, describing a series of other symptoms and a constant fear of being returned to Somalia. He said he had not been seen by the Mental Health Team: he did not trust them and did not want to see them.
61. Dr Galappathie said he remained of the opinion YA suffered from recurrent depressive disorder and had had a worsening episode of depression since last examined. YA described worsening suicidal thoughts, and hearing voices-which to Dr Galappathie appeared plausible and was likely to represent underlying psychological distress. He expressed again the view that the depression was likely to have been caused by his past history of suffering trauma within Somalia when he was kidnapped. The prison sentence was likely to have contributed to his depression since he reported being falsely convicted. His view was the PTSD had worsened and YA's thoughts and plans about suicide had become more intense.
62. Dr Galappathie stated that YA's had developed an "intense fear of persecution" by the man who made him shine shoes in Somalia. He again recommended release into the community. The detention and the fear of imminent return had acutely worsened his mental health. YA believed he would be recognised in Somalia and persecuted.
63. Dr Galappathie further said that YA could be safely managed in the community and was unlikely to present with a risk of harm to others given that he had effectively served a long prison sentence and was unlikely to commit further offences. He described YA as insightful and willing to engage with therapy and therefore likely to have a good

response to psychological treatment, concluding “I would anticipate a good prognosis if he can receive treatment in the UK.” He referred to a high risk of serious self-harm and completed suicide if YA remained in immigration detention with a view to being deported to Somalia. Dr Galappathie formally disagreed with Dr Nimmagadda as to diagnosis and fitness to be detained and flying to Somalia. In his view Dr Nimmagadda had not adequately considered the impact of return to Somalia on YA’s mental state.

(ii) The 6 January 2020 Reconsideration

64. On 6 January 2020, a further refusal letter was written by the SSHD. That letter and the Detailed Grounds of Defence reflect a significant development in enquiries by the SSHD as to healthcare provision in Somalia.

65. The letter set out detailed specific enquiries undertaken with a mental health provider in Mogadishu who could be commissioned to provide appropriate treatment upon the claimant’s return to Somalia. The SSHD repeated she did not accept that there was such a risk as was alleged by YA, but, if there were, she said it was, on the facts, mitigated.

66. The medical materials were considered again, including the addendum report of Dr Galappathie. The detailed consideration previously given in the 15 October Refusal Letter and thereafter in the pre-action protocol response were referred to, but the SSHD’s position was maintained.

67. The SSHD noted that Dr Galappathie said YA was worse and would benefit from release into the community. He had disagreed with Dr Nimmagadda, but she observed that Dr Nimmagadda’s assessment of YA working in the laundry was considered rather more

reliable as an indication of YA's position, so she placed less weight upon Dr Galappathie's views than upon Dr Nimmagadda's. A further ground for placing less weight upon the Addendum Report of Dr Galappathie was expressed thus:

“14. The SSHD also finds **the conclusions reached by Dr Galappathie in respect of your continued risk to the public, further undermines the credibility of the report.** To clarify, **the SSHD wholly refutes Dr Galappathie stance that you no longer pose a significant risk to the public, because you have served your prison sentence.**

15. **Such a view is also contradicted by your National Offender Manager and two Immigration Judges who have maintained your detention due to your high risk of harm to the public. It is also a conclusion which is wholly contradicted by the Immigration Judge at your appeal for July 2017; as well as the subsequent Immigration Judges who upheld that decision.**

16. As stated at paragraph 9-10 of our letter of 15 October 2019, within your appeal determination promulgated on your case by the IAC on 4 July 2017, upheld by the First Tier Tribunal on 21 July 2017 and by the Upper Tribunal's on 17 August 2017; **the Immigration Judge noted in his determination dated 4 July 2017:**

“I do not find that the Appellant has completed the necessary or sufficient work to address the risk of repetition. I do not find that the Appellant has accepted his responsibility for rape. **I do not find that the Appellant has rebutted the presumption that he constitutes a danger to the community... I find that the appellant does constitute a danger to the community**” (paragraphs 73-74 refer).”

17. The SSHD maintains the position of the courts and your Offender Manager; your Offender Manager characterised you as being a high risk of harm; particularly to young white females in clubs, public houses or under the influence of alcohol, through physical and psychological harm, through committing acts of assault and rape, and a risk to males of a similar age to yourself. This opinion was reached in part because of your distinct lack of remorse and because you have failed to partake in the rehabilitation programs offered to you.

18. Given that you continue to avoid taking responsibility for your actions and the crimes you have perpetrated against your victim; it is considered that you remain a high risk of harm.

19. This is also evident by Dr Galappathie's own admission that you have not shown awareness or remorse for the offence you have committed, despite his subsequent conclusion that your risk to the public is reduced. **Dr Galappathie's [sic] goes so far as to describe your crime as an "alleged" offence; whether this is a quote directly from you, or an opinion of Dr Galappathie, it is uncertain."**

68. The SSHD continued:

"23. To conclude, given all of the above, and the wholly refuted conclusions reached by Dr Galappathie regarding your criminality and the risk you pose to the UK, the SSHD finds that little weight can be attached to his report and therefore, the conclusions reached within it are not accepted. As above, the SSHD relies upon the conclusions reached within Dr Nimmagadda's report.

24. That said, **without prejudice to the above conclusions, it is ultimately found that barring all speculation, your submissions on the basis of your mental health are bound to fail before any further appeal court, given that there are medical resources available to you on return to Somalia that you can access for support."**

69. The SSHD reflected that there was mental health provision in Somalia, as previously set out, but in addition to this, further steps had been taken to ascertain and procure appropriate care if needed.

70. The letter sets out that the SSHD established contact with a Mental Health Care Centre in Mogadishu Somalia and, having reviewed the anonymised medical reports, they had accepted YA and that they could offer appropriate Mental Health and Psychosocial Services on his return to Somalia. The facility had psychiatric, counselling, psychosocial support and emergency departments as well as a trained team of qualified doctors; [redacted emails were enclosed].

71. The SSHD referred to Dr Galappathie's claim that, because of YA's subjective fear of return, he would not be able to engage with treatment if returned, whilst not accepting that claim, the SSHD says

that her exchanges with the facility in Somalia show that steps will be taken to address YA's personal needs *before* his arrival and on his entry to Somalia. A personalised care plan package would be purchased for YA by the SSHD for a treatment plan specific to his needs [again emails were enclosed]. The facility, which was specified, had been investigated and it had accepted it could provide appropriate treatment.

72. On the basis of these considerations the Secretary of State said not only was treatment available in Somalia in general terms, but it was accessible to YA himself particularly, with a tailored treatment plan available on his return. At the First Tier Tribunal hearing YA had accepted his family would be able to help him a little at the outset in Somalia, and that he had admitted having extended family there with whom he was in contact. In light of these factors the SSHD concluded that on no legitimate view could his claim succeed.

d. Legal Framework and the approach of this Court

73. The approach this court is required to take is well established. It is "a *Wednesbury* approach, tempered by the demands of anxious scrutiny": see *R (TK) v SSHD* [2009] EWCA Civ 1550 at paragraph 9. To examine the lawfulness of her decision requires these questions to be considered:

- a. First, has the SSHD asked herself the correct question? The question is not whether the SSHD herself thinks that the new claim is a good one or should succeed but whether there is a realistic prospect of an Immigration Judge taking a favourable view.
- b. Second, in addressing that question both in respect of the evaluation of the facts and in respect of the legal conclusions to be drawn from those facts, has the Secretary of State satisfied the requirement of anxious scrutiny?

Fresh claims

74. The starting point is the Immigration Rules where the requirements of a fresh claim are set out. Paragraph 353 of the Immigration Rules provides:

'353. When a human rights or protection claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:

- a. had not already been considered; and
- b. taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection. This paragraph does not apply to claims made overseas.

75. The Court of Appeal in *WM (DRC) v SSHD* [2006] EWCA Civ 1495 said the following at paragraphs 9 – 12 with regard to paragraph 353:

"9 ... As the Secretary of State rightly submitted, his conclusion as to whether there was a fresh claim was not a fact nor precedent to any other decision but was the decision itself. **The court could not take that decision out of the hands of the decision-maker. It can only do that when it is exercising an appellate role, with appeal excluded, the decision remains that of the Secretary of State, subject only to review and not appeal.** And in any event, whatever the logic of it all the issue to which Lord Bingham MR gave only a tentative answer in *Onibiyo* arose for decision before this court in *Cakabay v Secretary of State for the Home Department (No 2)* [1999] Imm AR 176. **It makes clear that the test is a Wednesbury test.**

... Whilst, therefore, the decision remains that of the Secretary of State, and the test is one of irrationality, **a decision will be irrational if it is not taken on the basis of anxious scrutiny.** Accordingly, a court when reviewing a decision of the Secretary of State as to whether a fresh claim exists must address the following matters.

First has the Secretary of State asked [her]self the correct question? The question is not whether the Secretary of State

[her]self thinks that the new claim is a good one or should succeed but whether there is a realistic prospect of an adjudicator applying the rule of anxious scrutiny thinking that the applicant will be exposed to a real risk of persecution on return: see para 7 above. The Secretary of State of course can and no doubt should treat his own view of the merits as a starting point for that inquiry but it is only a starting point in the consideration of a question that is distinctly different from the exercise of the Secretary of State making up his own mind. **Second**, in addressing that question both in respect of the evaluation of the facts and in respect of the legal conclusions to be drawn from those facts, **has the Secretary of State satisfied the requirement of anxious scrutiny?** If the court cannot be satisfied that the answer to both of those questions is in the affirmative it will have to grant an application for review of the Secretary of State's decision."

76. The concept I must apply when considering "no realistic prospect of success" is the meaning given in *AK (Sri Lanka) v SSHD* [2009] EWCA Civ 447 where Laws LJ explained it meant "a case with no more than a fanciful prospect of success" (see paragraph (34) applied) in *R (TK) v SSHD* [2009] EWCA Civ 15502).

77. The SSHD relies in particular upon the dictum from *WM* set out above, and further, on *AK (Afghanistan) v SSHD* [2007] EWCA Civ 535 where the question was phrased as

"whether an independent tribunal might realistically come down in favour of the asylum or human rights claim, on considering the new material together with the material previously considered" (Toulson LJ @ [23]).

78. Ms Miranda Butler on the applicant's behalf draws my attention particularly to the case decided by HHJ Anthony Thornton QC, sitting as a Deputy Judge of the High Court, *ST v SSHD* [2012] EWHC 988 (Admin) where the question was characterised in somewhat more expansive language as

"unless the claim is considered to be hopeless and as being incapable of succeeding at the second hearing before an independent professional specialist judge with all the additional benefit of such a hearing..."

I do not take that case to be seeking to gloss the test set out by the Court of Appeal elsewhere. The court was there dealing with material adverse credibility findings capable of correction at a further oral hearing, which is not this case.

Article 3

79. Article 3 of the ECHR provides that “no one shall be subjected to torture or to inhuman or degrading treatment or punishment” and where successfully invoked, provides absolute protection; no balancing act is conducted of public against private interests.

80. The case of *D v United Kingdom Application 30240/96* (1997) 24 EHRR 423 was the first case to explain the application of Article 3 to cases of illness. The starting point of the Court’s reasoning was the tension between the right of a state to control its borders and Article 3’s absolute prohibition on torture and degrading treatment.

46. The Court recalls ... that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens. It also notes the gravity of the offence which was committed by the applicant and is acutely aware of the problems confronting Contracting States in their efforts to combat the harm caused to their societies ...

47. However in exercising their right to expel such aliens Contracting States must have regard to Article 3 of the Convention which enshrines one of the fundamental values of democratic societies. It is precisely for this reason that the Court has repeatedly stressed in its line of authorities involving extradition, expulsion or deportation of individuals to third countries that Article 3 prohibits in absolute terms torture or inhuman or degrading treatment or punishment and that its guarantees apply irrespective of the reprehensible nature of the conduct of the person in question.”

81. The facts in D were extreme:

“51. ... the applicant is in the advanced stages of a terminal and incurable illness. At the date of the hearing, it was observed

that there had been a marked decline in his condition and he had to be transferred to a hospital...

52. The abrupt withdrawal of these facilities will entail the most dramatic consequences for him. It is not disputed that his removal will hasten his death. There is a serious danger that the conditions of adversity which await him in St Kitts will further reduce his already limited life expectancy and subject him to acute mental and physical suffering.”

82. The test applied was stringent:

“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** by the respondent State in violation of Article 3.”

83. The SSHD submitted before me that there were very few exceptions to the stringency of the Article 3 threshold and a similar approach to that seen in the illness cases applied to suicide risk. In the illness case of *N v Secretary of State for the Home Department* [2005] UKHL 31 [2005] 2 AC 296 the House of Lords set out the rationale for *D* and cases like it, Lord Brown said:

“94. What then must be established to bring a case of this nature within the category of very exceptional cases represented by *D*? I am content to adopt the test stated by my noble and learned friend, Lord Hope of Craighead: it must be shown that the **applicant's medical condition has reached such a critical state, that there are compelling humanitarian grounds for not removing him or her to a place which lacks the medical and social services which he or she would need to prevent acute suffering.**”

84. The House of Lords in *N* agreed upon the test to be applied, namely, that the applicant had to be effectively on his or her deathbed. As set out in the judgment of Lady Hale in paragraph 69:

“... 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.”

85. The SSHD before me relied upon this as the current approach to health including suicide cases, and also upon a statement from *N* in the ECtHR (*N v United Kingdom* 2008 47 EHRR 39) at paragraph 91:

“The fact that the applicant’s circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the contracting state is not sufficient in itself to give rise to breach of article 3.”

86. The ECtHR had also said as follows in *N*:

“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] and applied in its subsequent case-law, which it regards as correct in principle, given that in such cases the alleged future harm would emanate not from the intentional acts or omissions of public authorities or non-State bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country.**

44. ... [I]nherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights (see [*Soering v United Kingdom* (1989) 11 EHRR 439 (“*Soering*”) at paragraph 89]).

87. *N* was an AIDS sufferer, who received anti-retroviral treatment in the UK, without which, if she were returned, she would undergo acute physical and mental suffering and an early death, with a much diminished life expectancy. The Grand Chamber of the ECtHR concluded that removal of *N* would not breach Article 3. Since the decision in *D v United Kingdom* the Court had in fact never found a proposed removal to violate Article 3 on health grounds, although, so said the majority, a very exceptional case might exist with very compelling humanitarian grounds. Three judges dissented in *N* on the basis that the majority had introduced a policy balance into the application of Article 3, where other case law made it clear that the prohibition on ill-treatment was an absolute one.

88. In the domestic court in *N* the House of Lords had also decided that for states to allow foreign nationals to remain for indefinite medical or other benefits, and to interpret the Convention as imposing such an obligation would be to extend the reach of the Convention further than Contracting States would be prepared to accept. They articulated the test, set out above: such that a case would succeed where removal denied an applicant, in effect, the opportunity to die in dignity. Article 3 did not require Contracting States to allow aliens to remain for indefinite medical treatment and associated welfare benefits.

89. This exacting approach was applied in ECtHR suicide cases, as the SSHD showed by reference to *Balogun v UK* (60286/09) where a challenge was brought to the deportation of a Nigerian national on the grounds there was a real risk of suicide were he to be returned. He had an uncontested diagnosis of depression which had necessitated in-patient psychiatric treatment following a suicide attempt. The Court found that the claim was manifestly ill-founded but revealed its approach in such cases was slightly different. It said at paragraph 31:

“The Court reiterates that, according to its established caselaw, aliens who are subject to expulsion cannot in principle claim any right to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance provided by that State, unless such exceptional circumstances pertain as to render the implementation of a decision to remove an alien incompatible with Article 3 of the Convention. **Finally, the Court recalls that in order to violate Article 3, treatment must attain a minimum level of severity, this applies regardless of whether the risk of harm emanates from deliberate acts of State authorities or third parties; from a naturally occurring illness ... or even from the applicant himself....** The Court recalls that in previous cases involving a risk of suicide, it has found not only that the high threshold for Article 3 applies to the same extent as it does in other types of cases, but that **appropriate and adequate steps taken by the relevant authorities to mitigate a risk of suicide will weigh against a conclusion that the high threshold of Article 3 has been reached.**”

90. The similarity of approach to the two types of medical issue was not in dispute in the present case. However, it is in my judgement clear that the importance of risk mitigation in judging Article 3 engagement is the important common feature of the suicide risk cases. It assumes particular prominence in recent developments in the law affecting all medical cases.

91. In paragraph 32 of *Balogun* the ECtHR explained that the question of risk was to be addressed in three stages: notification of the decision, actual removal and after arrival in the foreign state. The Court also said, importantly:

“The Court notes that *this is the approach espoused by the Court of Appeal in J v Secretary of State for the Home Department... and which the court considers is entirely consistent with the requirements of Article 3.*”

92. In *Balogun* the government had proffered evidence of the risks being considered and steps that would be taken to minimise them. Escorts trained in suicide and self-harm awareness and prevention were to be provided on the flight and, on arrival, there was evidence psychiatric treatment would be available in Nigeria if required. For those reasons the applicant’s case was in the event rejected.

93. The Court in *Balogun* thus concluded

“ (Paragraph ...)in the light of the precautions to be taken by the Government and the existence of adequate psychiatric care in Nigeria, should the applicant require it, the Court is unable to find that the applicant deportation would result in a real and imminent risk of treatment of such a severity as to reach [the Article 3] threshold. It therefore follows that the applicant’s complaint under Article 3 is manifestly ill founded...”

94. Following the case of *N*, the ECtHR has had occasion to reconsider the Article 3 threshold in an illness case, *Paposhvili v*

Belgium Application 41738/10, decided in December 2016. The Grand Chamber was invited (in the words of the submissions of the applicant)

“to go beyond its findings in *N v United Kingdom* and to define ... a realistic threshold of severity that was no longer confined to securing a “right to die with dignity”” (paragraph 149)

The intervener made similar submissions.

95. The Court recognised that the threshold for Article 3 had been that the applicant was close to death, and then said:

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

96. It is important to note that the Court expressly maintains the “high threshold” for illness removal cases and that those meeting the test set out are to be understood as coming within the meaning of “very exceptional.”

97. Mr Paposhvili was a failed asylum seeker who sought exceptional leave to remain in Belgium on the basis that his chronic lymphocytic leukaemia constituted exceptional humanitarian circumstances, since he would not have access to potentially life-saving treatment in Georgia where he was to be returned. Medical materials suggested the discontinuation of treatment, unavailable in Georgia, meant an average life expectancy of three months.

98. The court's essential conclusion (paragraph 205) was that in the absence of any actual assessment by the authorities of the risk facing the applicant, there was insufficient material to conclude the applicant would not run a real and concrete risk of treatment contrary to Article 3. The violation of Article 3 stemmed from the absence of an assessment of risk, by the government, given the materials that had been provided to them (Paragraph 206), and reliance upon unsubstantiated claims about the possibility of posting medication to him.

99. The case of *Paposhvili v Belgium* therefore is authority also, in my judgement, for imposing what can be regarded as a set of procedural requirements, should the state wish to resist an arguable Article 3 claim. In cases where an applicant brings forward evidence amounting to a prima facie case of substantial grounds for believing that, if removed, he or she would be exposed to a real risk of treatment contrary to Article 3 (to use the wording of paragraph 186), the state is called upon as follows:

- a. the state has to "dispel any doubts raised by" the evidence, and closely scrutinise the alleged risk, addressing any reports made by reputable organisations concerning treatment in the receiving state (paragraph 187);
- b. the state must "verify on a case-by-case basis" whether the care generally available in the receiving state was in practice sufficient to prevent the applicant's exposure to treatment contrary to Article 3 (paragraph 189);
- c. the state must consider accessibility of treatment to the applicant, by reference to its cost, available family network, and location; (paragraph 190)
- d. if serious doubts nonetheless still surrounded the impact of removal, the returning state must obtain an individual assurance from the receiving state that appropriate

treatment would be available and accessible to the applicant (paragraph 191).

100. I would not read *Paposhvili* as holding that there is some independent breach of Article 3 obligations where enquiries are not made nor doubts dispelled: this would run counter in my view to the analysis in suicide cases where the measure of Article 3 risk is increased or diminished by the presence of effective inquiry. However, the point was not argued before me and I reach no concluded view. I refer to the close examination of this (among other issues) in the case of *AXB (art 3 health: obligations; suicide) Jamaica* [2019] UKUT 397 (IAC) with whose conclusions on this point I respectfully agree.

101. The approach in *Paposhvili*, an illness case, is broadly consistent with authoritative domestic guidance in *J v SSHD* [2005] EWCA Civ 629 and in *Y and Z (Sri Lanka)* [2009] EWCA Civ 362, both of which were suicide risk cases, as to the approach that should be taken where it is said that the risk of suicide on refoulement is such that removal would be contrary to Article 3 ECHR.

102. In *J*, the appellant, a citizen of Sri Lanka said he would commit suicide if returned to Sri Lanka and that the decision to remove him violated his rights arising under both Article 8 and 3.

103. Summarising the law concerning Article 3 refoulement, the Court of Appeal in a unanimous judgement delivered by Dyson LJ said materially:

"26. First, the test requires an assessment to be made of the severity of the treatment which it is said that the applicant would suffer if removed. This must attain a minimum level of severity, The court has said on a number of occasions that the assessment of its severity depends on all the circumstances of the case, **But the ill-treatment must "necessarily be serious" such that it is ("an affront to fundamental humanitarian principles to**

remove an individual to a country where he is at risk of serious ill-treatment": see *Ullah* paras [38—39].

27. Secondly, **a causal link must be shown to exist between the act or threatened act of removal or expulsion and the inhuman treatment relied on** as violating the applicant's Article 3 rights. Thus in *Soering* at para [91], the court said:

"In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment."

See also para [108] of *Vilvarajah* where the court said that **the examination of the Article 3 issue "must focus on the foreseeable consequences of the removal of the applicants to Sri Lanka"**

28. Thirdly, **in the context of a foreign case, the Article 3 threshold is particularly high simply because it is a foreign case. And it is even higher where the alleged inhuman treatment is not the direct or indirect responsibility of the public authorities of the receiving state, but results from some naturally occurring illness, whether physical or mental.** This is made clear in para [49] of *D* and para [40] of *Bensaid*.

29. Fourthly, **an Article 3 claim can in principle succeed in a suicide case** (para [37] of *Bensaid*).

30. Fifthly, in deciding whether there is a real risk of a breach of Article 3 in a suicide case, a question of importance is whether the 'fear of ill-treatment in the receiving state upon which the risk of suicide is said to be based is objectively well-founded, **If the fear is not well-founded, that will tend to weigh against there being a real risk that the removal will be in breach of Article 3.**

31. Sixthly, a further question of considerable relevance is **whether the removing and/or the receiving state has effective mechanisms to reduce the risk of suicide. If there are effective mechanisms, that too will weigh heavily against an applicant's claim that removal will violate his or her Article 3 rights.**"

104. Ms Butler relied on *Y(Sri Lanka) and Z (Sri Lanka) v the Secretary of State for the Home Department* [2009] EWCA Civ 362 where these principles were applied in a situation in which the claimants argued they would commit suicide if returned to the scene of their previous rape and torture. This case adds a gloss to the fifth of Dyson LJ's questions above.

105. The background facts in *Y and Z* were extreme and described by Sedley LJ in the following way:

“8. In addition to the torture and sexual violation of both appellants in government custody, the second appellant’s husband and daughter were killed by the security forces in 2001 while she was working in Malaysia as a housemaid to support her family. Two male cousins were executed by the security forces, and their mother (the appellants’ aunt) starved herself to death in a public protest. None of this was found to create a well-founded fear of persecution or ill-treatment on return, but in the light of the AIT’s reappraisal in *LP* [2007] UK AIT 00076 of the situation of returnees in Sri Lanka a further application has been made, and is still pending, by way of a fresh claim. Meanwhile, however, the severity of the appellants’ experiences is capable of having a bearing on the issues before this court, as is **the further tragedy of the loss of some 50 family members in the tsunami which occurred at the end of 2004.**

9. The Home Office has at no point of this protracted and complex case sought to have either appellant examined by a psychiatrist nominated by itself or to secure agreement to a joint psychiatric examination. All the expert evidence has been submitted on the appellants’ behalf, and all has come from a reputable specialist whose qualifications and experience have not been in question. The Home Office’s case has depended entirely on finding fault with it.”

106. The six principles expounded by Dyson LJ in *J* were set out and applied to the position in *Y and Z*. Sedley LJ then said:

“15. ... The corollary of the final sentence of paragraph 30 of *J* is that in the absence of an objective foundation for the fear some independent basis for it must be established if weight is to be given to it.

Such an independent basis may lie in trauma inflicted in the past on the appellant in (or, as here, by) the receiving state: someone who has been tortured and raped by his or her captors may be terrified of returning to the place where it happened, especially if the same authorities are in charge, notwithstanding that the objective risk of recurrence is gone.

16. One can accordingly add to the fifth principle in *J* that what may nevertheless be of equal importance is **whether any genuine fear which the appellant may establish albeit without an objective foundation, is such as to create a risk of suicide if there is an enforced return.**”

107. The Court of Appeal in *Y and Z* made striking criticism of the Tribunal below in its approach to an assessment of the psychiatric evidence and its conclusion upon that evidence, for example at paragraph 45, describing the Tribunal’s approach to the evidence:

“45. There is a limit to how much Panglossian optimism can decently be extracted from such a history of physical and familial devastation. I am entirely unable to accept that this limb of the case has been approached with the necessary realism and attention to fact.”

108. In that case the experts accepted that the particular experiences of *Y and Z* were so extreme that they were so fearful of the authorities at whose hands they had suffered, that they would not be able to actually seek any treatment in Sri Lanka.

“47. ... if it [i.e. their location on return] is their now devastated home area, what medical help would be available there, and to whom, if anyone, could they look for help and support? If it is Colombo, where they were held and tortured in the CID headquarters (and the horrific character of their treatment is relevant to this), what is the realistic possibility of their venturing into any proximity with officialdom? It is not and cannot be an answer that, because it has been decided that there is objectively no real risk of repetition, all such fears will evaporate in the light of day. The subjective reality of fear has to be given its full – and sometimes overwhelming – weight.”

"55 In relation to Y, Dr Patterson ... reported that "the recent multiple bereavements that he has suffered have precipitated a significant deterioration in his depression and markedly increased the risk of suicide", She restated her opinion that if returned to Colombo he would not seek out the help he needed, and that none would be on hand."

Similar evidence was given about Z.

109. In a passage to which the SSHD in this case draws my attention, Sedley LJ summarised the effect of the evidence thus:

"61 The upshot of the material findings and of the expert evidence which (for reasons I have given) stood unshaken, is that, although some psychiatric care is available in Sri Lanka, these two appellants are so traumatised by their experiences, and so subjectively terrified at the prospect of return to the scene of their torment, that they will not be capable of seeking the treatment they need. Assuming (what cannot be certain) that they come unscathed through interrogation at the airport, with no known family left in Sri Lanka and no home to travel to: the chances of their finding a secure base from which to seek the palliative and therapeutic care that will keep them from taking their own lives are on any admissible view of the evidence remote.

62. None of this reasoning represents a licence for emotional blackmail by asylum-seekers. **Officials and immigration judges will be right to continue to scrutinise the authenticity of such claims as these with care. In some cases, the Home Office may want to seek its own a joint report. But there comes a point at which an undisturbed finding that an appellant had been tortured and raped in captivity has to be conscientiously related to credible and uncontradicted expert evidence that the likely effect of the psychological trauma (aggravated in the present cases by the devastation of home and family by the tsunami), if return is enforced, will be suicide.**

63. On the present evidence, including where material the AIT's evaluation of it, the clear likelihood is that the appellants' only perceived means of escape from the isolation and fear in which return would place them would be to take their own lives. For reasons I have given, **the concomitant findings that their fear is no longer objectively well-founded and that there exists a local**

health service capable of affording treatment do not materially attenuate this risk, which is subjective, immediate, and acute.

64. In this situation, return would in my judgement reach the high threshold of inhuman treatment unconditionally prohibited by art,3 of the ECHR."

110. Read with *J, Y and Z* means that in an extreme case, where there is an independent basis for the fear giving rise to a genuine terror of return likely to prompt a successful suicide attempt, the fear is not to be discounted simply because the basis of the fear expressed cannot any longer be objectively established.

111. It is the SSHD's submission that the facts in YA's case are of a different order from these.

112. Mr Anderson noted that the Article 3 threshold was considered in *AM (Zimbabwe) v SSHD* [2018] EWCA Civ. *AM* was an illness case in which the appellants wished to invite the Supreme Court to reconsider, in the light of *Paposhvili*, the very stringent approach derived from *N*. It was accepted in *AM*, that the applicants were not "deathbed cases", and so not within *N*.

113. *Paposhvili* clearly relaxes the test for violation of article 3 in the case of removal of a foreign national with a medical condition. Sales LJ held at paragraph 38:

"... [T]he boundary of article 3 protection has been shifted from being defined by imminence of death in the removing state (even with the treatment available there) to being defined by the imminence (i.e. likely 'rapid' experience) of intense suffering or death in the receiving state, which may only occur because of the non-availability in that state of the treatment which had previously been available in the removing state."

114. The Court of Appeal however held that *Paposhvili*
- “37. ...relaxes the test for violation of Art 3 in the case of removal of a foreign national with a medical condition...only to a very modest extent”
115. The Court of Appeal accepted nonetheless that the threshold for involvement of Article 3 was changed. (paragraph 38 above).
116. Sales LJ held that the Grand Chamber sought only to "clarify" the approach set out in *N v UK* (paragraph 38(iv)) and had maintained a high threshold for the application of Article 3 in medical cases (paragraph 38(v)). The Court of Appeal expressly disavowed that a “significant reduction in life-expectancy” was to be read as a wide extension of protection in medical Article 3 cases (paragraph 40).
117. On the facts of *Paposhvili*, it was concluded that in reality there was only a procedural obligation placed upon states:
- “41. it is also significant that even on the extreme and exceptional facts of the *Paposhvili* case, where the applicant faced a likelihood of death within six months if removed to Georgia, the Grand Chamber did not feel able to say that it was clear that a violation of Article 3 would have occurred for that reason had he been removed. Instead, all that the Grand Chamber held was that he had raised a sufficiently credible art.3 case that it gave rise to a procedural obligation for the relevant Belgian authorities to examine that case with care and with reference to all the available evidence. The violation of art.3 which the Grand Chamber held would have occurred if he had been removed to Georgia was a violation of that procedural obligation.”
118. Since oral argument concluded in YA’s case, the Supreme Court has considered the case of *AM* and given important guidance that differs from the approach of the Court of Appeal. Further written argument was helpfully submitted by invitation of the Court and the applicant and respondent parted company on the appropriate

approach that I should now take in light of the Supreme Court's conclusions. I shall deal with the impact of *AM (Zimbabwe) v SSHD* [2020] UKSC 17 when I come to consider the application of the law below.

119. Country Guidance for Somalia was given - now several years ago-in the case of *MOJ (Return to Mogadishu) (rev 1) (CG)* [2014] UK QT 442 and considered the position of a returner to Mogadishu. The applicant drew attention to the following passages regarding general conditions.

“...

(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.”

e. The Applicant's Case

120. The applicant expressed YA's challenge as advancing a single compendious ground, namely that the Refusal Letter of 15 October 2019 and the Supplementary Decision of 6 January 2020 evinced numerous errors and showed that the SSHD had failed to exercise anxious scrutiny when she rejected the applicant's further submissions. The essential submissions centred on the SSHD's approach to the medical evidence adduced in support of the applicant's position and factual evidence as to access to healthcare in Somalia; irrelevancies were taken into account and material errors of fact. Among the material errors Ms Butler submitted that the SSHD had failed to have regard to Dr Galappathie's conclusions, to YA's medical history (which had also been ignored by Dr Nimmagadda) and had misdirected herself about the availability of healthcare in Somalia.

121. She submitted that the only rational decision open to the SSHD on the evidence was to find the paragraph 353 test was met, namely the applicants further submissions were capable of succeeding before an Immigration Judge because they showed that YA had a realistic prospect of showing that he was at a real risk of suicide on return to Somalia and a realistic prospect of showing that his treatment as a

returnee with serious mental health conditions and no close family in Somalia would be contrary to Article 3 ECHR.

122. By reference to YA's history, the material parts of which are set out above, Ms Butler submitted there is a realistic prospect that the tribunal would prefer Dr Galappathie's second report which reflects his view that there is a serious deterioration in YA's condition. The SSHD's preference for Dr Nimmagadda's report of 13 September 2019, even if open to her (which she said it was not, due particularly to the inadequate treatment of the issue of work in the laundry), was wrong because it had been superseded by Dr Galappathie's later 4 November 2019 report.

123. First Ms Butler attacked the SSHD's reasoning when saying that the Galappathie evidence was undermined due to his approach to criminal risk. On the evidence before Dr Galappathie these were, she submitted, reasonable, and qualified conclusions. In any event, even if it was illogical and wrong, criminal risk was a discrete issue which did not infect his judgement as to the position of YA. Further, in her submission the approach of the SSHD did not show anxious scrutiny.

124. Ms Butler accepted that the court's approach would be as in the case of *RA (Nigeria) v SSHD* [2014] EWHC 4073 (Admin) a decision of Andrew Thomas QC sitting as a Deputy Judge of the High Court on 8 December 2014. In that case he said:

"63.... it is clear that the defendant gave very careful consideration to Dr Bell's report. There is nothing to suggest that the defendant failed to have regard to his undoubted expertise. The decision letter contains a careful analysis of the contents of the report. However, in my judgement, the defendant was entitled to take into account all of the other material which was available to her. On any view... had far more information available to them and Dr Bell and had been better placed to assess the claimant.

64. The task which the defendant was required to perform in this case was not the determination of hard facts. It was an

assessment of risk, requiring a holistic view of all the information available. The defendant could not ignore Dr Bell's opinion, but she was entitled to take the limitations of his review into account in deciding what weight to attach to it when reviewing the case in the round."

125. She submitted secondly that YA's fear could be described as acute subjective fear, especially since he understood that he was now high-profile. All of the factors led to the increase in his PTSD which was likely to worsen his mental health position such that he would lack the ability to seek help. YA could be stabilised just so long as he remained in the UK, like the case of *Y*. Whatever happens, she says, the applicant will be too unwell to engage with treatment. She pointed to the risk of the applicant being chained and said there was no information about the availability of drugs. There may be facilities, but they do not conform to basic standards of decency. She described significant barriers to YA getting treatment on his return, insufficient detail about the treatment package was available in the context of prejudice and ill-treatment of mental health patients. In short, the evidence was far from sufficient to show that treatment was available.

126. In essence, she said the mere fact that the removing state takes some steps was not enough; there was a realistic likelihood of street homelessness for YA, in effect destitution; his circumstances were equivalent to those in *Y and Z*. It was open to the Immigration Tribunal to find a breach of Article 3 on these facts; the minimum level of severity in the *J* criteria was met; further YA was now far too unwell to work in Somalia. Like *Y*, the subjective fear was of such magnitude that the case was soundly based given his history; that is to say it is a "subjective, immediate and acute risk" and was comparable to *Y*.

f. Consideration

127. I approach this case on the basis that I must consider whether in my judgement, looking with great care at the decisions of the SSHD, she made a Wednesbury error in concluding that there did not exist a realistic prospect of an Immigration Judge (himself applying the rule of anxious scrutiny), concluding that YA would be exposed to a real and immediate risk of treatment of such severity as to reach the Article 3 threshold. Throughout, the SSHD must be seen to have applied anxious scrutiny.
128. Persuasively as they were advanced, I do not accept the submissions of Ms Butler.
129. Considering first whether the SSHD asked herself the right question. In my judgement it is perfectly clear she did.
130. The SSHD set out the test which she applied accurately (see the 15 October 2019 Refusal Decision at paragraphs 85 and 86). She set out the wording of paragraph 353 of the IR and indicated a list of points that had been previously considered. These were firstly, the fear of return to Somalia (extensively considered In July 2017 in the appeal determination upheld by the FTT and by the UT in August 2017). Further consideration was given 16 April 2019 and upheld by the UT on 2 June 2019 and 16 July 20. Secondly, YA's risk of suicide and mental health problems which were considered on 16 July 2019 and further in letters dated 20 July 2019 and 21 July 2019.
131. The SSHD then looked at submissions not previously considered; they did not in her view create a realistic prospect of success.

132. In this category came the psychiatric reports of Dr Galappathie of 31 July 2019 and Dr Nimmagadda of 13 September 2019. As set out in some detail above, the SSHD analysed both of the reports and adopted the findings of Dr Nimmagadda who had accepted that YA was suffering from some depressive symptoms but did not believe they met a diagnosis of depression or PTSD. He had put the symptoms in the context of the deportation proceedings noting that YA seemed to have coped with the effect of his past traumas without any help so far and even if these were such symptoms, he had coped with them for a considerable period of time without any treatment. It was only after deportation proceedings, on his own evidence, that the symptoms became severe. In my judgement these conclusions are clear, logical and evidence-based.

133. It was on the basis of this assessment from Dr Nimmagadda that the SSHD rejected the applicant's case as to the severity of his symptoms. Further, available evidence showed that the Chain-Free Initiative had been implemented in the Mogadishu hospital and the actual risk to this applicant, with his symptoms, of being chained, was not significant. Given the diagnosis of depressive symptoms linked to his deportation, this was a clearly sustainable conclusion.

134. Dr Nimmagadda formed a different view of YA's symptoms from Dr Galappathie, that recognised their connection to his deportation. His view of YA's functioning was informed by careful, reasonable deductions including from YA's operation in the prison environment, working in the laundry. This was plainly a sustainable approach from a non-treating doctor, called upon to assess medical notes, context, and the patient in person, as well as a number of previous psychiatric opinions upon him. It is not the case, as suggested, that he ignored the medical notes, he made reference to them.

135. The SSHD applied obvious care to her assessment of the relevant information including expert opinion. She considered competing diagnoses carefully, and took detailed soundings of the factual position in Mogadishu; it is not arguable that she failed to apply anxious scrutiny to YA's case.
136. In the present case it is clear that the SSHD to an extent lost faith in Dr Galappathie's judgement, possibly also in his independence, in light particularly of his somewhat surprising re-assessment of YA's risk on release, given the previous compelling evidence of unresolved risks deriving from the gang rape offence, including YA's denial of it. This is not an illogical response, and it is not the case that the SSHD ignored the conclusions of Dr Galappathie as alleged. She was entitled to prefer Dr Nimmagadda's judgement. It is relevant that what is not unreasonably regarded as a material failure of Dr Galappathie's judgement on the issue of criminal risk and YA should cast doubt on his appraisal of a case where judgement and risk analysis, albeit in a different context, were central.
137. In this case, unlike *Y and Z*, the SSHD had a coherent well-reasoned expert report from Dr Nimmagadda that had come to a different conclusion as to the causes of the depressive symptoms and the likely risks on removal.
138. The issue here, however, is not whether an Immigration Judge might possibly prefer one medical report over another. The issue is whether, even on the basis propounded by Dr Galappathie, that YA was a high risk of suicide when he returned, it could properly be said that the Article 3 threshold was reached in light of the requirements of case law and the positive steps taken by the SSHD to minimise any risk that had been identified on YA's behalf.

139. The issue is whether YA's facts could amount to a breach of the high Article 3 threshold where the SSHD had researched and undertaken to provide appropriate medical care in the country to which the applicant could be removed on the basis that the risk (which she did not accept) materialised.
140. In my judgement given that factual background, this case could not reach the Article 3 threshold.
141. The SSHD had read the materials and reasonably formed the view that the opinion of Dr Nimmagadda was to be preferred. On that view, in fact YA did not suffer from a mental disorder; further he did not require a programme of treatment as Dr Galappathie suggested. Nonetheless, provision of mental health care was sought out in Somalia in case that indeed proved to be necessary- and the SSHD had actually made inquiries and found a provider for YA himself. What is more the SSHD would pay for this provision if it were needed.
142. In my judgement this case is bound to fail before an immigration judge for these reasons. The SSHD had properly acknowledged an Article 3 claim could in principle succeed, but on the facts of this case, in particular the evidence of mechanisms to reduce the risk of suicide at each stage, she did not accept the threshold of Article 3 had been reached. Her conclusion that the Immigration Judge could not find the threshold breached cannot be impugned.
143. By reference to the list of matters set out in *J* and the approach taken by the Court in *Paposhvili* when considering the measures put in place to minimise the risk of suicide, in the context of YA's history, this must be the case. YA had suffered when a youth of about 13, he was now over 30. The factual circumstances have been exhaustively dealt with by the Tribunal at various stages, and his ability to achieve employment in Mogadishu recognised. He was a young man with

some usable trade qualifications, who had managed to work when in detention. He would have some support from the UK for a time, and possibly had relations in Mogadishu (enquiries having been made of the local police by family on his behalf for an earlier submission). The SSHD was entitled to reject the suggestion that he would be destitute on return.

144. The Secretary of State also considered the case law, the prominent parts of which have been set out above and, rightly, it has not been suggested that errors were made in respect of it.

145. The January 2020 decision of the SSHD gave detailed further consideration to the medical evidence, including the November 2019 addendum report of Dr Galappathie. Ms Butler laid particular emphasis upon the SSHD's preference for the medical conclusions of Dr Nimmagadda over those of Dr Galappathie which she said were not taken into account. I do not accept that submission. The SSHD went at length into the materials presented by Dr Galappathie. Dr Nimmagadda's report was detailed, logical and balanced. He reached conclusions that were internally consistent but reflected a different assessment from Dr Galappathie. He accepted that YA was subjectively fearful of return, but reflected that before the threat of removal to Somalia, had coped effectively without treatment or interventions, subject to the inevitable context of incarceration and immigration detention.

146. Ms Butler characterised the reviewable errors as, first, failing to realise that the Dr Galappathie report recognised a risk that crossed the Article 3 threshold, second, that the SSHD had relied only on Dr Nimmagadda and third, that the preference for Dr Nimmagadda was unreasoned by the SSHD – indeed it was a flawed report itself. She submitted there was no proper basis for rejecting the conclusions reached by Dr Galappathie. I disagree. The evidence did not compel a

view that the Article 3 threshold was crossed. Furthermore, *Paposhvili* and *J* make plain that detailed specific enquiries such as were undertaken with the mental health provider in Mogadishu with a view to providing appropriate treatment upon the claimant's return if necessary, go directly to diminish risk and thus obviate a breach of the Article 3 threshold.

147. The SSHD was clear she did not accept the order of risk alleged by YA, but, that if such there were, it was, on the facts, mitigated. I do not accept that Ms Butler makes a sustainable critique of the SSHD's approach to the material nor that the medical evidence compels the result for which she argues.

148. The argument latterly from YA was that he was really a *Y and Z* type of applicant. He claimed such an intense, subjective fear of return to where, as a boy, he had been captured for ransom and held for a few days, and, as a child, had been made to work shining shoes for 2 years, that his position was comparable to the extreme position of *Y and Z* whose egregious suffering was described by Sedley LJ (see above).The SSHD's conclusion that Y's position was not comparable to this was plainly open her on the facts.

149. I accept that YA's return to Somalia is a matter of great fear and concern to him, but on the tests set out in the case law, in my judgement the facts do not approach the intensity of those pertaining in *Y and Z* whose experiences might be described as at the edge of human endurance and were overlaid by terrible losses of immediate family, both from the regime in Sri Lanka in the past, and more recently from the Tsunami which took scores of others of their relations.

150. It is clear from the decision letters that the SSHD has gone into careful detail about the substance of the matter being put on YA's

behalf by Dr Galappathie. Her reasons for finding that his opinion was less persuasive than that of Dr Nimmagadda and could not form the basis of a case with a reasonable prospect of success before an Immigration judge are not flawed. The Immigration Judge, properly directing himself could not find that the Article 3 threshold had been crossed, especially in light of the pre-removal enquiries and preparation made.

151. Even if an Immigration Judge were to find that YA had adduced evidence demonstrating there are substantial grounds for believing that he would be exposed to a real risk of treatment contrary to Article 3, in my judgement looking very closely at the risks, the Immigration Judge would be bound to find that any serious doubts about this particular person's return had been dispelled by the provision made by the SSHD in all the circumstances.

152. This is not a case where the adjudicator would have the option of simply relying upon the report of Dr Galappathie in preference to that of Dr Nimmagadda. The provision made is premised on Dr Galappathie being correct. The gist of the SSHD's analysis is that the Article 3 hurdle just is not surmounted on the facts of this case, and the contrary argument does not stand a reasonable prospect of success.

g. AM (Zimbabwe) v SSHD [2020] UKSC 17

153. I must now consider *AM* in the Supreme Court and whether it makes any difference to my conclusions, not least because the SSHD opened her submissions with heavy reliance upon a stringent test derived from the case of *N* for ascertaining whether the Article 3 threshold had been reached. Sales LJ in *AM* in the CA (37 above) supported her view that the impact of *Paposhvili* was not significant.

154. *AM* was another illness case, involving the return to Zimbabwe of an AIDS sufferer who arrived in 2000 but was subject to deportation following the commission of serious offences. By 2012 he was undergoing antiretroviral therapy for AIDS. It was doubtful whether he could access the relevant drug in Zimbabwe without which he would suffer infections that, untreated, would lead to his death. The SSHD had determined since he was not “at a critical stage of the illness” his physical and mental health did not engage the high Article 3 threshold.
155. The Supreme Court reflected upon the wide criticism of the test articulated in *N*, including judicial criticism in *Yoh- Ekalein Mwanje v Belgium* (2013) 56 EHRR 35. They noted that *Paposhvili* decided that there was a violation if removal were carried out “at the stage proposed by Belgium”, i.e. before proper consideration of the risks, emphasising the weight given to procedural steps.
156. Lord Wilson giving the judgment of the Court made clear that the Court in *Paposhvili*, contrary to the Court of Appeal’s assessment, did not purport to agree with the ratio in *N*. Nor was it helpful to describe its re-working of the scope of protection under Article 3 as merely “clarification” - as the court itself had done (*AM*, paragraph 32). In cases of resistance to return on grounds of ill-health, the Supreme Court said the principle has been modified. The “new focus” was upon the existence and accessibility of appropriate treatment in the receiving state, and for that reason, *Paposhvili* had made significant findings about the procedural obligations that fell upon a state. The Court observed that the full scope of such obligations remained to be decided in Europe, in that in *Savran v Denmark* [2019] ECHR 651, the ECtHR, by 4 votes to 3 appeared to have gone further than *Paposhvili* in placing obligations on the state. The issue was still to be considered by the Grand Chamber, but the Supreme Court recognised guidance was required (paragraph 32).

157. The Court explored what was meant by paragraph 183 in *Paposhvili*, emphasising that an applicant had to show “substantial grounds” for believing that it was a “very exceptional” case because of a “real risk” of subjection to inhuman treatment. This was, accordingly, a *prima facie* case: a case which if not challenged would prove infringement. A reason for emphasis upon state enquiry is that the state will be able more easily to assemble evidence about the availability and accessibility of suitable treatment for the ill person upon return. The requirement to “dispel any doubts” in paragraph 191, however, was to be read in context as dispelling any serious doubts.

158. The Supreme Court recorded that the SSHD, before them, had not sought to dissuade them from adopting the *Paposhvili* tests. This reflected the SSHD’s stance before me. Both counsel had agreed the approach as set out in *J*, a suicide case, was consistent with *Paposhvili*, an illness case. For that reason, *J* was likely to be of more assistance although both reflected a procedural duty upon the state.

159. The applicant suggested that *AM*, although an illness case, represented a general relaxation of the operation of the threshold in Article 3 cases and that therefore it was now clear that he could rely upon a “serious, rapid and irreversible decline” as the test in law and, by reference to it, he crossed that Article 3 threshold.

160. The SSHD submitted that *AM* made no difference here. It was agreed that *Paposhvili* had not required any modification of the tests in the two suicide risk cases *J v SSHD* and *Y and Z* and the departure from *N* does not affect YA’s application.

161. I agree with Ms Butler that inevitably, the adoption of the *Paposhvili* approach in domestic law modifies the approach to illness

cases. That is clear from *AM*, an illness case, and the terms in which the risk is now expressed as that of “serious rapid and irreversible decline”, rather than the “deathbed test” of *N*. She argues the approach to suicide cases is also modified by this.

162. The caselaw shows that the high threshold that applied to illness cases brought under Article 3 also applies to suicide cases where as here, they are “foreign” cases, that is where the risk is of ill-treatment in the state to which removal is proposed, and secondly, where illness or suicide risk is not the direct responsibility of the contracting state. Nothing in *AM* derogates from that principle.

163. However, whilst adopting “serious rapid and irreversible decline”, rather than an “imminent risk of dying”, as the threshold for engagement of Article 3 has some meaning for an illness case, (such a relaxation would, of course, have won *N*’s case for her), the change is hard to transpose to a suicide case. Such cases have principally been dealt with in terms of steps taken in mitigation of risk.

164. Furthermore, the ECtHR expressly did not retreat from the high threshold in Article 3 cases (see *Paposhvili* paragraph 183, set out above), nor has *AM* done so, the modified test is a reflection it is said of a stringent approach. To the extent that *Paposhvili* as applied in *AM* has changed the landscape for suicide cases under Article 3, it has done so in my judgement by the adoption of the unequivocal risk mitigation requirements that fall upon the expelling state in such circumstances. The Article 3 threshold in suicide cases is generally judged *ex post facto* by the ECtHR, as analysed by Dyson LJ in *J* at paragraph 32. It is the risk as mitigated that is judged to meet or to not meet the criteria for Article 3.

165. In my judgement *AM* can make no difference at all to the outcome of *YA*’s case because here considerable and particular steps

were taken in respect of YA's needs and the position on his return has been provided for if the worst risks canvassed materialise.

h. Summary of Conclusion

166. In my judgement the position in law after *AM* in the Supreme Court is as follows:

- a. *Paposhvili* is not to be read as holding that *N* was rightly decided;
- b. *Paposhvili* should be seen as filling a gap in the protection against inhuman treatment afforded by Article 3 that was left by the case of *N v UK* such that gravely ill patients no longer need to show they are close to death: serious, rapid and irreversible decline in their state of health resulting in 'intense suffering' or in a 'significant reduction in life expectancy' may breach Article 3;
- c. A significant reduction in life expectancy means a substantial one in the context of inhuman treatment under Article 3;
- d. The procedural requirements are not "mere clarification" but a change in approach for illness cases;
- e. The context suggests (pending determination in the *Savran* case) that the principle that you have to "prove what you allege" has been modified by *Paposhvili*, so that in order to trigger the state's obligations to consider the risks, the applicant has to adduce evidence "capable of demonstrating that there are substantial grounds for believing" that Article 3 would be violated (i.e. that the evidence is capable of forming substantial grounds for believing) it is a very exceptional case nonetheless because of the real risk of subjection to inhuman treatment test (*AM* per Lord Wilson paragraph 32);

This is not materially different to the approach of *J* in the Court of Appeal;

- f. Such a case has to be one that, without challenge, would establish infringement – in other words a *prima facie* case as was analysed in *AXB v Secretary of State for the Home Department* [2019] UKUT 00397 (IAC);
- g. The “very exceptional” test still applies expressly, following *AM* and *Paposhvili*, because of the nature of the ill-treatment risked, arising as it does in the state of return in the present case: (it is “not ... an undemanding threshold” per Lord Wilson *AM* paragraph 32);
- h. Both *J* and *Y and Z* which reflect *Paposhvili*, will apply in cases of threatened suicide where the emphasis is upon mitigation of risk through investigation, and that approach has been expanded into the *Paposhvili* requirements where any *prima facie* breach is shown in an illness case;
- i. Where there is a perceptible difference between a “serious rapid and irreversible decline ... resulting in intense suffering” (*Paposhvili*) and circumstances equivalent to “nearing death” (*N*) for a person at risk of suicide, an applicant may invoke an arguable case based on the former rather than the latter degree of intensity; however,
- j. The real impact of *Paposhvili* as understood in *AM*, is to enshrine the investigatory aspect of suicide refoulement cases.

167. Nothing in the Supreme Court suggests in my judgement that the risk mitigation approach in suicide cases has changed, nor has the high Article 3 threshold test of exceptionality in medical cases of both kinds.

168. The SSHD has with some margin to spare in my judgement, fulfilled the obligations as they are now to be understood in an Article

3 suicide case and an Immigration Judge properly applying the law, could not find that YA's case amounted to a fresh claim under IR paragraph 353.

169. Whilst she does not accept the level of risk postulated on behalf of YA, as she submits, it is heavily mitigated by the investigations and provisions put in place for YA's return. The investigation of the healthcare situation in Mogadishu, the provision of mental health treatment of the nature suggested by YA's expert witness, and the payment for it by the SSHD, all point on these facts to the conclusion that a submission that this case crosses the high Article 3 threshold is bound to fail.

170. In my judgment the conclusion to this effect reached by the SSHD is unassailable. She has proceeded on the basis that there is a significant risk of deterioration on return such that YA requires specialist mental health assistance. She has made inquiries and procured that assistance, personally for him, with preparation before his arrival available, and paid for by her.

171. The circumstances of this case require sympathy and the most careful of consideration. Accordingly, in assessing the lawfulness of the decisions of the SSHD, I bear in mind particularly the importance of considering the issues with anxious scrutiny, understanding the import of the medical materials and the SSHD's assessment of them, but also recognising that the decision is that of the SSHD, and not for this court, as if on appeal (see the case law above *passim*).

172. In the present case the SSHD investigated the risks on her own account by commissioning a report herself and commencing investigations in Somalia taking steps of the very kind set out in *Paposhvili*, on the premiss that the materials adduced by YA raised the requisite case.

173. In my judgement the approach explained in *AM* by Lord Wilson is consistent with the relevant cases already decided on suicide risk. Where an articulated risk is addressed, as here, the Court would regard the risk itself as mitigated. If the coherent procedural steps are followed by the state as set out, then the threshold itself is not crossed: the risk that would cause the violation is mitigated. That remains the approach, after *AM*, in the Supreme Court and it remains the position here.
174. Where there are substantial grounds for believing removal risks inhumane treatment and those risks remain unaddressed, then an applicant may succeed. That is not this case.
175. The SSHD's submission after *AM* remained that the evidence of Dr Nimmagadda undermined the case run for YA as to his condition and the risks inherent in it, but, even if that were not so, conclusively, he suggested, the steps taken by the SSHD to ascertain treatment, conditions, and availability, plus providing for the treatment herself if necessary were sufficient to bring the risks well below the Article 3 threshold. I agree.
176. The SSHD was not making an error of law when she determined that an Immigration Judge properly applying the law could not find in favour of YA on an Article 3 claim in this case. The claim must be dismissed.



**Upper Tribunal
Immigration and Asylum Chamber**

Judicial Review Decision Notice

The Queen on the application of

Y.A

Applicant

v

Secretary of State for the Home Department

Respondent

Before The Honourable Mrs Justice Foster DBE

Application for judicial review: substantive decision
Decision: the application for judicial review is refused

UPON hearing counsel for the Applicant and for the Respondent

AND UPON the Applicant's application for permission to appeal

AND UPON reading the written submissions of the parties on costs and upon the stay of the Applicant's removal

IT IS ORDERED THAT:

1. The claim is dismissed.
2. Permission to appeal is refused for the reasons appearing in this Order
3. Permission for applying to the Court of Appeal must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal within 28 days of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).
4. Stay on removal is continued until 10.00 am. Monday 22 June 2020 or sooner Order.

5. Claimant do pay the Respondent's costs of the case.
6. The Claimant having the benefit of cost protection under section 26 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, the amount that he is to pay shall be determined on an application by the Defendant under regulation 16 of the Civil Legal Aid (Costs) Regulations 2013. Any objection by the Claimant to the amount of costs claimed shall be dealt with on that occasion.

REASONS

1. I refuse permission to appeal. It is not the case that the judgment did not deal with the issue of Dr Galappathie's opinion that YA was so traumatised he would not access treatment once in Mogadishu if he needed it.
2. The judgment had concluded that whether the Article 3 threshold had been reached must be judged in the light of mitigated risk, and that steps taken by the returning state went directly to the scale of the risk in any case.
3. The argument had been that YA was so affected he would not seek medical help once had returned. What the SSHD did was arrange for and agree to pay for treatment in Mogadishu from a named clinician who agreed, having read the reports, to take YA as a patient.
4. Expressly in mitigation of the risk of him not going to get treatment once there if he needed it, arrangements were also made to address his need before he arrived and on his entry to Somalia. This is reflected in the judgment at para 71 where (in the context of the SSHD's appraisal) the gist of the evidence on mitigation of risk is set out:

"71. The SSHD referred to Dr Galappathie's claim that, because of YA's subjective fear of return, he would not be able to engage with treatment if returned, whilst not accepting that claim, the SSHD says that her exchanges with the facility in Somalia show that steps will be taken to address YA's personal needs before his arrival and on his entry to Somalia. A personalised care plan package would be purchased for YA by the SSHD for a treatment plan specific to his needs [again emails were enclosed]. The facility, which was specified, had been investigated and it had accepted it could provide appropriate treatment."

5. The judgment rejects in terms that it would be open to the Immigration Judge lawfully to find the Article 3 threshold had been reached in the present case – and this was because the risks had been mitigated to such an extent- including that articulated by Dr Galappathie as above.
6. Further the case of Y and Z was prayed in aid as a direct comparator by YA– this was examined (and set out) in the judgment. It is a case dealing with a purely subjective fear of extreme intensity that renders the applicants, among other things, so fearful that they are unable to accept/seek-out treatment if returned, even if that treatment is available. Significant emphasis was laid upon it on behalf of the applicant.

7. The submission is recorded thus:

“126. In essence, [Ms Butler] said his circumstances were equivalent to those in *Y and Z*. It was open to the Immigration Tribunal to find a breach of Article 3 on these facts; the minimum level of severity in the J criteria was met; further YA was now far too unwell to work in Somalia. Like Y, the subjective fear was of such magnitude that the case was soundly based given his history; that is to say it is a “subjective, immediate and acute risk” and was comparable to Y.

8. Then the judgment says:

“148. The argument latterly from YA was that he was really a *Y and Z* type of applicant. He claimed such an intense, subjective fear of return to where, as a boy, he had been captured for ransom and held for a few days, and, as a child, had been made to work shining shoes for 2 years, that his position was comparable to the extreme position of *Y and Z* whose egregious suffering was described by Sedley LJ (see above).The SSHD’s conclusion that Y’s position was not comparable to this was plainly open her on the facts.

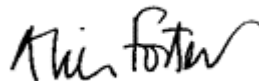
149. I accept that YA’s return to Somalia is a matter of great fear and concern to him, but on the tests set out in the case law, in my judgement the facts do not approach the intensity of those pertaining in *Y and Z* whose experiences might be described as at the edge of human endurance and were overlaid by terrible losses of immediate family, both from the regime in Sri Lanka in the past, and more recently from the Tsunami which took scores of others of their relations.

150. ... The Immigration Judge, properly directing himself could not find that the Article 3 threshold had been crossed, especially in light of the pre-removal enquiries and preparation made.”

9. Accordingly I do not find there to be a real prospect of success in the Ground raised, the judgment determined that an argument to the effect that the Article 3 threshold was crossed would, in light of the facts, be bound to fail, even if Dr Galappathie were correct.

10. I do not agree that the SSHD should be penalised in costs for ongoing preparations and inquiries as to provision for YA in Mogadishu, which are, of their nature, responsive to evidence and contingent on correspondence with agencies abroad. The Respondent should have their costs of the case in the usual way.

Signed:



THE HONOURABLE MRS JUSTICE FOSTER DBE

Dated: **22 May 2020**

Applicant's solicitors: Wilson LLP
Respondent's solicitors: GLD
Home Office Ref:
Decision(s) sent to above parties on: 22.05.2020

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a question of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).