



IAC-FH-CK-V1

**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00070/2018**

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On the 25 July 2024**

Before

UPPER TRIBUNAL JUDGE OWENS

Between

**AE
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Yong, Counsel instructed by Davies, Blundell and
Evans Solicitors

For the Respondent: Ms Isherwood, Senior Presenting Officer

Heard at Field House on 4 March 2024

DECISION AND REASONS

History of the Appeal NB vulnerable witness

1. This appeal comes before me for re-making. I set aside the decision of First-tier Tribunal Judge Loke promulgated on 4 February 2020 allowing the appellant's appeal against the decision to refuse his protection and human rights claims on the basis that there had been a material error of law for the reasons given in the decision dated 15 October 2020 appended to this decision at Annex A.

2. I treated the appellant as a vulnerable witness because he has complex mental health conditions as well as physical health conditions and is particularly vulnerable after being the victim of a traumatic attack. He did not request any reasonable adjustments apart from regular breaks, but I bear his vulnerability in mind when assessing his evidence.

The issues in this appeal

Resolved issues which are no longer in dispute

- a) The judge's finding that the appellant had failed to rebut the presumption that he has been convicted of a particularly serious crime and is a danger to the community was upheld. This has the effect that the s72 certificate is upheld, and the appellant is excluded from protection under the Refugee Convention. Similarly, he is excluded from Humanitarian Protection pursuant to paragraph 339D(iv). In view of the appellant's history of criminal offending since this finding was made in 2020 this remains the position and it was not submitted before me that this issue should be revisited given the passage of time.

Issues not argued before me but raised in reasons for refusal letter

- a) Whether the respondent has discharged the burden in respect of Article 1C(5) of the 1951 Refugee Convention in respect of cessation of Refugee status.
- b) Whether the appellant has a well-founded fear of persecution for another reason.
- c) Is there a risk of Article 15(c) harm?

Outstanding issues to be resolved

- a) whether the appellant is likely to suffer a serious, rapid and irreversible decline in his health resulting in intense suffering or a significant reduction in life expectancy due to the lack of medication or treatment because of affordability or accessibility.
 - b) whether the appellant would face a real risk of serious harm by reasons of the conditions in which he would be living on his return to Somalia contrary to Article 3 of the ECHR in accordance with headnote of OA.
 - c) Would it be a disproportionate breach of Article 8 ECHR to return him to Somalia. (In practice the Article 8 ECHR outcome stands and falls with the Article 3 ECHR assessment)
3. If the appellant were found to be at risk of Article 3 ECHR treatment, the effect of this would not be that he is entitled to Humanitarian Protection because he is excluded from this by reason of his risk to the community of

the UK and his serious offending, but that he would not be removable to Somalia at the present time.

Appellant's Background

4. The appellant is a national of Somalia. He was born in Hargeisa, Somalia, now known as the Republic of Somaliland. He is from the Isaaq clan. His father was a high-ranking officer in the army during the Barre regime and the family moved to Mogadishu in 1971. His father was appointed to the Somali Embassy in London as a military attaché in 1988. The appellant entered the United Kingdom as a visitor on 3 October 1988 at the age of 19 and was given diplomatic exemption as a family member of an employee of the Somali embassy. His father died in March 1989 and the appellant claimed asylum on 26 April 1989.
5. He was granted refugee status on 31 October 1989. The basis of the grant of refugee status was the risk to the appellant because of his father's connection to the Barre regime and because of his membership of the Isaaq clan.
6. He was granted indefinite leave to remain on 7 January 1994.
7. The appellant's mother and sister came to the UK in 1991. The appellant grew up in Camberley living with his older sister. He started using drugs in the early 1990's.
8. He was subsequently convicted of numerous offences. Between 1992 and 2004 he committed various offences including robbery, burglary and supply of Class A drugs. On 21 June 2006 a decision was taken to deport the appellant. An application was made to the European Court of Human Rights who allowed his appeal on 28 June 2011. The appellant was subsequently granted discretionary leave to remain, valid until 10 November 2013.
9. The appellant continued to commit offences after 2008.
10. On 9 November 2015 the appellant was convicted of seven counts of supplying class A drugs. He was sentenced to 68 months imprisonment.
11. On 18 November 2016 the appellant became subject to a deportation order which was signed on 9 April 2018. On 10 April 2018 the appellant was served with a decision entitled "Decision to deport, cessation of refugee status and to refuse human rights claim". This is the decision against which the appeal lies. At the time of the decision the appellant was in prison. On 15 August 2018 he was released on licence.
12. The appeal was not decided until 4 February 2020. The decision allowing the appeal was set aside in October 2020. Thereafter there were various delays caused by Covid, sickness and the appellant being incarcerated as well as various adjournment requests in order for the appellant to obtain

further evidence which was difficult because the appellant was in custody. It has taken over three years to hear the re-making decision.

13. The appellant was living in the community from 15 August 2018 until 16 February 2021 when he was recalled to prison for breach of a slavery and trafficking risk order and because he was under investigation for further drug offences.
14. On 13 April 2021 he was convicted for a breach of the slavery and trafficking risk order and sentenced to 20 days imprisonment. He was remanded in prison to serve the balance of his 2015 offence. On 15 June 2021 he was detained under immigration powers pending deportation. He was released on 23 September 2021. He was arrested on 26 or 27 September 2022 on suspicion of conspiracy to supply class A drugs and remanded in custody
15. During the course of this appeal, on 4 April 2023 the appellant was convicted of being concerned in the supply of Class A drugs. On 5 September 2023 he was sentenced to 28 months imprisonment. His sentence was completed on 19 December 2023 because he completed the majority of his sentence when he was on remand. Since then, he has been in immigration detention.
16. The appellant is currently subject to a slavery and trafficking risk order which is valid until 24 June 2026. He is prohibited from contacting certain people and there are various other restrictions in place in respect of his mobile phone and address.

Position of the parties

17. The appellant's position is set out in counsel's skeleton argument. The appellant is a 54-year-old Somali national who was born in Hargeisa but moved to Mogadishu when he was two years old. He is a member of the Isaaq clan which is a majority clan in Somaliland. He has not lived in Somalia for over 36 years. His mother and father are deceased. He has two sisters, but they are unable to offer support and he has no close relatives in Somalia. There are various preserved positive findings.
18. The appellant submits that there is real risk he will be subject to treatment contrary to Article 3 ECHR on account of his deteriorating health condition and drug addiction. He submits that due to his personal characteristics there are substantial grounds for believing that he will be compelled to live in an IDP camp in breach of Article 3 ECHR. The appellant submitted a country expert report prepared by an academic, Professor Mario I. Aguilar from the University of St Andrews in support of his case.
19. The respondent's position, also set out in her skeleton argument, is that the appellant's ability to access assistance from his clan has to be reassessed in the light of OA where it is confirmed that family and social links are retained between the diaspora and those living in Somalia and

that very few returning members of the diaspora are forced to end up in IDP camps. The appellant would not be ostracised as a returning criminal and has some work experience.

20. The respondent criticises the expert report. It is submitted that it will not be a breach of Article 3 ECHR to remove the appellant to Mogadishu because he will be able to secure remittances from family members, he will enjoy clan support and therefore will be able to access treatment and medication. There are no substantial grounds for believing that he will be destitute. It is submitted that the consequences of removal would not engage the Article 3 threshold in Paposhvili v Belgium [2016] ECHR 1113 which was confirmed in AM(Zimbabwe) v SSHD [2020] UKSC 17. It is submitted that the appellant would not quickly relapse. There is no evidence that he is still taking methadone. There was criticism of a medical report by Dr Sommerlad. It is submitted that medical services are available in Somalia.

Evidence before me

21. I had before me the original respondent's bundle containing inter alia the appellant's asylum interview, his convictions and the respondent's decisions. I also had before me an up-to-date PNC print out, a slavery and trafficking risk order, the appellant's skeleton argument dated 18 September 2023, the respondent's skeleton argument, a diabetes care plan for the appellant, documents from the DWP in relation to the appellant's sister, a supplementary bundle of 23 pages, a World Report on Somalia, compressed bundle 1 comprising 330 pages and compressed bundle 2 comprising of 624 pages. I was also provided with the expert report by Professor Aguilar. I have considered all of the evidence before me including items not specifically listed.
22. I also had before me the latest country guidance on Somalia OA(Somalia) (CG)[2022] UKUT 33 (IAC), ("OA") and the latest Country Information and Policy Note on Somalia.

Oral evidence

23. The appellant's witness statement signed on 16 September 2019 is out of date, although it contains some more detailed evidence of his background. There was a further witness statement dated 18 September 2023.
24. I heard oral evidence from the appellant who gave his evidence in English. The appellant's oral evidence was as follows: He has had no contact with anyone in Somalia. He is not aware of his sisters having contact with anyone in Somalia. He has never received financial assistance from anyone in the UK. His sisters have had enough of him because he has brought shame on the family. He is from the Isaaq clan. He does not have much knowledge about Somali clan culture. He did not assist his mother to run her business in Somalia. He left Somalia when he finished high school. He worked briefly in the UK many years ago. when he was aged about 19

working in kitchens and as an assistant chef. In prison he has been doing some cleaning and mopping and making sandbags. He lived in a government house/barracks in Mogadishu with his mother because his father was in the army. He speaks broken Somali, although he can understand it. One of his sisters has a Somali husband although his family are all in the UK. His other sister is unmarried. The whole family live in Surrey where there is not a large Somali community. They lived amongst "English people". He does not know if his sister and her husband have visited Somalia but does not think so. He does not think that his mother sent remittances to Somalia when she was alive, nor does he think that his father sent remittances. He last saw his sisters briefly when they attended a previous court hearing. His sisters have not been to visit him either in prison or in the detention centre although he does speak to them on the telephone. He has had no contact with his brother since 2019/2020. He does not speak to his brother. He has English friends who are not from a Somali background. The individuals who attacked him in 2018 were Somali.

25. In the UK he lived on and off with his disabled sister who would take him in when he had nowhere to go. He would stay for a short time on the sofa and wash his clothes. There was not enough space for him. He was given his own accommodation in 2019 after he was attacked because he was homeless. He has been on and off drugs. The last time he took drugs was when he was arrested on 27 September 2022. He has been taking methadone since 2018 after he was attacked. He believes that if he is sent to Somalia, he will find access to drugs. He denied having any connections in Somalia.
26. The symptoms of his depression are feelings of being scared, depressed and paranoid. He smells burning and screams every night.

Submissions

27. Ms Isherwood continued to rely on the reasons for refusal letter and her skeleton argument. She submitted that the appellant is from a majority clan and most clans are represented in Mogadishu. She submitted that the appellant's oral evidence was evasive and vague. He is not telling the truth. The appellant has connections in Somalia. His sister is married to a man of Somali origin. The appellant would be able to get support in Somalia even after a lengthy absence. She referred me to the relevant paragraphs of QA. It is possible to get unskilled work in Somalia. The appellant can sew sandbags. There is economic growth in Mogadishu. There is no Article 15(c) threat. The appellant will not be at risk from Al Shabab. He can take a taxi from the airport, book a hotel and would be able to network with majority clan members. He would receive remittances. His sisters did not attend court to be cross examined. The appellant will have extended family in Mogadishu. He lived there from the age of 2 until the age of 19. He has lived independently in the UK. There is some treatment in Mogadishu for mental health problems. Hard drugs are not available, and the appellant wants to be clean. The test for Article 3

ECHR harm is high. She submitted that the appellant could not demonstrate that he would suffer treatment contrary to Article 3 ECHR on a medical basis. The medical evidence is not sufficient. Although the appellant has had fleeting ideas of suicidal ideation, he has not acted on these or made any formal plan or attempts.

28. She made various criticisms of Dr Choudary's medical report. He is not a country expert and is not in a position to state that there is no treatment for the appellant in Somalia. She also made submissions on the country expert which she submitted goes beyond OA.
29. Ms Wong's starting point were the clear unchallenged factual findings made by the First-tier Tribunal. Her submission is that OA does not impact on the factual findings. The appellant has not lived in Somalia for 36 years. His consistent evidence is that he has no family there. His sisters' evidence was accepted in the last appeal hearing at which they were cross examined. They were accepted to be credible witnesses. They have provided the appellant with food and accommodation in the past but not with financial support. One sister is disabled and has a low income. She is in rent arrears. The other has a disabled husband and is in receipt of universal credit. He has breathing difficulties and cannot work.
30. The appellant's clan is passed to him via his father who died in March 1989 shortly after the appellant left Somalia. His father was not alive to send funds to his mother. The Isaaq clan is predominant in Somaliland.
31. The appellant is particularly vulnerable. He has PTSD with co-morbid depression. One of his symptoms is an inability to concentrate and memory loss. He has diabetes and other physical health problems. She made submissions in respect of Article 3 ECHR on health grounds.
32. In the UK, the appellant has a safety net in terms of having secure accommodation, support services and some emotional support from his family. In Somalia he has no family and no accommodation. Without methadone he will have withdrawal symptoms and his mental health will deteriorate as will his ability to function. He is also at risk of relapse. He will resort to taking any drugs he can. He has not been employed since 1993. He will struggle to find work because of his ill health and drug addiction. There are substantial grounds for believing that he will become destitute and homeless or end up living in an IDP camp. In short, he will fall into headnote (13) and (14) of OA.

Cessation/ refugee status and risk pursuant to Article 15(c)

33. At this point I will address these issues as they primarily concern matters of law. These issues were raised by the respondent in the refusal letter but they were not dealt with by First-tier Tribunal Judge Loke and therefore there are no preserved findings in respect of them. Ms Yong did not seek to make any representations either in her skeleton argument or orally in relation to the cessation issue and only briefly touched on risk to the

appellant because of westernisation. I deal with these issues for the sake of completeness.

34. The correct approach to cessation is set out in PS(cessation principles) Zimbabwe [2021] UKUT 283 (IAC). It is for the respondent to demonstrate that the circumstances which justified the grant of refugee status have ceased to exist and there are no other circumstances which would now give rise to a well-founded fear of persecution. The phrase ceased to exist in this context means “permanently eradicated”.
35. As far as cessation is concerned, I am obliged to follow the most recent country guidance in respect of this. Headnote 2 of OA confirms that paragraph 407 replicated in Headnote of MOJ is still applicable.
36. This states:
 - a. Generally, a person who is “an ordinary civilian” (i.e. not associated with the security forces; any aspect of government or official administration or any NGO or international organisation) on returning to Mogadishu after a period of absence will face no real risk of persecution or risk of harm such as to require protection under Article 15(c) of the Qualification Directive or Article 3 of the ECHR. In particular, he will not be at real risk simply on account of having lived in a European location for a period of time of being viewed with suspicion either by the authorities as a possible supporter of Al Shabaab or by Al Shabaab as an apostate or someone whose Islamic integrity has been compromised by living in a Western country;
 - b. There has been durable change in the sense that the Al Shabaab withdrawal from Mogadishu is complete and there is no real prospect of a re-established presence within the city. That was not the case at the time of the country guidance given by the Tribunal in AMM,
 - c. The level of civilian casualties, excluding non-military casualties that clearly fall within Al Shabaab target groups such as politicians, police officers, government officials and those associated with NGOs and international organisations, cannot be precisely established by the statistical evidence which is incomplete and unreliable. However, it is established by the evidence considered as a whole that there has been a reduction in the level of civilian casualties since 2011, largely due to the cessation of confrontational warfare within the city and Al Shabaab’s resort to asymmetrical warfare on carefully selected targets. The present level of casualties does not amount to a sufficient risk to ordinary civilians such as to represent an Article 15(c) risk.
 - d. It is open to an “ordinary citizen” of Mogadishu to reduce further still his personal exposure to the risk of “collateral damage” in being caught up in an Al Shabaab attack that was not targeted at him by avoiding areas and establishments that are clearly identifiable as likely Al Shabaab targets, and it is not unreasonable for him to be expected to do so.
 - e. There is no real risk of forced recruitment to Al Shabaab for civilian citizens of Mogadishu, including recent returnees from the West.

37. The appellant was granted refugee status because of his father's connection to the Barre regime and because of his membership of the Isaaq clan. Given that the Barre regime was ousted many years ago, the appellant's father died in 1989, and the position in respect of clans has moved on substantially, I have no hesitation in concluding that there has been a significant and non-temporary change in circumstances, such that the original basis for recognising the appellant as a refugee no longer applies. As held in MOJ and upheld in OA, "[t]here are no clan militias in Mogadishu, no clan violence, and no clan based discriminatory treatment, even for minority clan members." It follows that the Secretary of State has demonstrated that the circumstances in connection with which the appellant was recognised as a refugee have ceased to exist; the required symmetry between the grant and cessation of refugee status is present, insofar as the basis for the appellant's initial recognition as a refugee is concerned. I am satisfied that the Secretary of State has discharged the burden in respect of Article 1C(5) of the 1951 Convention in this respect. The appellant's previous fear from the Barre regime or other majority clans is no longer well-founded. Ms Yong did not attempt to submit that this is not the case given OA.
38. It is also necessary to consider whether there is another basis upon which the appellant could be recognised as a refugee. Ms Yong briefly submitted at paragraph 4 of her skeleton argument that the appellant would be returning as a westernised individual and would be potentially a target but did not elaborate any further in her submissions. There is some reference to this in the expert report, but I am not persuaded that the opinion of the expert is sufficient for me to depart from the headnote in the country guidance I have set out above. These issues were comprehensively considered in MOJ and OA. I find in light of the country guidance that the appellant does not have a well-founded fear of persecution due to his membership of a social group nor his ethnicity. I also find that there is no real risk of treatment contrary to Article 15(c) of the Qualification Directive due to a risk of indiscriminate violence. Again, Ms Yong did not pursue any arguments in respect of this either in her skeleton argument or oral submissions.

Preserved Findings

39. The following findings are preserved from the decision of First-tier Tribunal Judge Loke promulgated on 4 February 2020 subject to the caveat that some findings must be revisited in the light of the country guidance of OA and the passage of time given that four years have elapsed between the original appeal and the remaking.
- (a) The appellant came to the UK in 1988 when he was 19 years old. He has lived in the UK for 36 years and has not returned to Somalia since his arrival.

- (b) He has had no contact with anyone in Somalia. It is not realistic that he will engage with family members or clan members. He will be returning to Somalia as a single male without any family support.
- (c) The appellant has no access to financial resources.
- (d) The appellant has very little prospect of securing a livelihood. He has limited education. He has worked in the UK previously however his last period of employment was in 1993. His drug addiction issues, and mental health condition will also render it more difficult for him to access employment.
- (e) The appellant will be unable to receive remittances from abroad. One of his sisters is disabled and in receipt of benefits. His other sister has limited financial resources and three adult children who remain at home.
- (f) The appellant is unemployed. At the date of the hearing before the First-tier Tribunal, he lived in a flat owned by the council. If he returned to a country where he has not lived for 31 years, without his methadone script he would be destitute.
- (g) It is reasonably likely that as a person without family or clan support he would have to live in an IDP camp. Humanitarian conditions in IDP camps continue to be poor.
- (h) The appellant is receiving methadone with respect of his drug addiction and mirtazapine to combat depression.
- (i) The appellant has been diagnosed with PTSD particularly as a result of being the victim of a serious assault in December 2018.
- (j) If the appellant were deported back to Somalia in the absence of family support and medication, he would rapidly deteriorate making him a highly vulnerable adult.
- (k) At the time of the hearing his mental health issues were relatively stable. The appellant only achieved this stability on account of the extensive support he has received from his sisters and his prescribed medication. The appellant also suffers from mental and behavioural disorders due to the use of drugs which includes depression.
- (l) At the time of the hearing the appellant saw his sisters daily. They provided him with meals, did his washing, reminded him to take his medication and attend his appointments. His memory is poor.
- (m) Even if medication is available in Somalia the appellant would be unable to access it.
- (n) At the date of the hearing before the First-tier Tribunal neither mirtazapine nor methadone were available in Somalia.

- (o) The appellant is not at risk simply on account of having lived in a European location.
40. I make some further findings which are not in contention being based primarily on the supporting evidence before me and which was not challenged by the respondent.
- (a) The appellant's immigration history and criminal offending are set out as above.
 - (b) His father died in March 1989.
 - (c) His sister died in 2012 with dementia.
 - (d) His mother died in April 2015.
 - (h) The appellant has spent the most part of the last nine years being incarcerated. The only period he has been in the community during this period is for a 13-month period between August 2018 until February 2021 and for a year between September 2021 and September 2022. In September 2021 he was tagged with strict conditions. Prior to August 2019 the appellant was effectively homeless and living temporarily with family or friends.
 - (i) The appellant has physical health problems some of which have been diagnosed since the previous hearing. He has been diagnosed with Type 2 diabetes and takes 500mg of metformin per day as well as having a diabetes care plan. He has high cholesterol and takes atorvastatin 20 mg. He takes levothyroxine for thyroid problems. He takes a blood thinner rivaroxaban 20 mg for DVT.
 - (j) He continues to have long standing depression for which he takes mirtazapine 15mg. He also takes quetiapine 25mg which is an anti-psychotic.
 - (k) He is still on a methadone script and has been since 2005. He currently takes 15mg of methadone a day. (This evidence was served on the Tribunal and respondent after the hearing with my permission.)
 - (l) He has had Talking therapy in prison. He has been in Highdown, Belmarsh, Wandsworth and Wormwood Scrubbs prison since 2021.
 - (m) Whilst in prison he has obtained some certificates in textiles.
 - (n) He speaks Somali badly although he understands it.
 - (o) He will receive the resettlement grant of £750.
 - (p) The appellant continues to be very vulnerable.

- (q) The appellant was taken hostage and attacked on 24 December 2018. He was tortured and suffered from major burns on his face, torso, back and leg for which he was hospitalised. He received a skin graft. This event led to him suffering from PTSD. His symptoms include poor sleep, fear depression and paranoia. He has nightmares. He co-operated with the police and following a criminal trial the perpetrators were convicted and incarcerated.

Facts and evidence which are in dispute

41. When making my findings on these issues I have had regard to entirety of the evidence as well as the country guidance including OA and the respondent's CPIN.

Expert report

42. I turn to the expert report by Professor Aguilar. The majority of the report addresses the generic history of clans in Somalia and the previous country guidance of Moj & Ors (Return to Mogadishu) Somalia CG [2014] UKUT 442. At paragraph 45 the expert states that she has not been provided with details of the appellant's clan and at various points in the decision refers to him coming from a "minority clan" when the appellant has never claimed to be from a minority clan. Many of the expert's conclusions are at odds with the country guidance in OA. For instance, the expert asserts that the appellant's clan membership "disappears" after a lengthy absence. This was not the evidence before the Tribunal in OA. Similarly, the expert finds that the appellant would be targeted because he is westernised. It was established in OA that this is not a risk factor. I place no reliance on any of the conclusions of the expert which depart from the guidance in OA or which criticise its conclusions.
43. I place reliance on the expert's analysis of the Isaaq clan as he clearly has extensive expertise on the subject of clans. The expert deals with the appellant's clan at paragraph 82 of the report. The Isaaq majority clan were primarily based in Hargeisa which is now known as Somaliland and were heavily bombed by Said Barre. Most members of the Isaaq clan are now based in contemporary Somaliland. I accept the expert opinion that the Isaaq have very little presence in Somalia and Mogadishu.

Remittances from family

44. Miss Isherwood for the respondent submits that in light of OA, the appellant will be supported with remittances by his family in the UK or his brother in Dubai. This submission appears to go behind the preserved findings but I deal with them in any event because of the passage of time since the last appeal.
45. The appellant's sisters did not attend the appeal hearing at the Upper Tribunal despite attending the previous hearing before the First-tier Tribunal and attempting to attend the last adjourned hearing. Ms

Isherwood submitted that the witnesses had not been cross examined which meant their evidence was not reliable and that they would send financial remittances to their brother. However, I take into account that both witnesses were cross examined before the First-tier Tribunal and that both witnesses were found to be credible by the judge. Her findings in respect of these witnesses and their ability to send financial support to the appellant have been preserved. In these circumstances the witnesses' failure to attend the hearing does not undermine the preserved findings.

46. There was nothing before me to indicate that there has been any substantial change for the better in their circumstances. I was provided with a statement and medical evidence in respect of the disabled sister IE. This confirms that she has mobility problems because of polio. She has hyperthyroidism and is on several medications. She was recently treated for papillary thyroid cancer. I have no reason to disbelieve her assertion in her witness statement that she is on a very low income, is in rent arrears and will not remit money to her brother if he is returned to Somalia both for financial reasons and because she knows he will spend the money on drugs. This is consistent with the fact that she has not visited him in prison nor immigration detention and not sent any money and the fact that in the past she provided only temporary accommodation, moral support and washing facilities but not financial support.
47. In respect of the second sister EA, I was provided with evidence that she and her husband continue to be in receipt of Universal Credit and that EA is in receipt of Carer's Allowance which is consistent with her assertion that her husband has a disability, and the family are on a low income. I also take into account that this sister has not visited the appellant in prison nor sent him money and I find that the fact that she has not assisted him in the UK is indicative of the fact that she will not assist him by sending remittances to Somalia.
48. Further there has never been any evidence before the Tribunal to suggest that the appellant has a relationship with his brother. Given the appellant's history of drug use and criminality I accept his evidence that he is not in contact with his brother and has not been so for many years.
49. I do not go behind the preserved findings. I am satisfied that the appellant will not receive remittances from family in the UK.

Support from extended family or a wider clan network in Somalia

50. The respondent also asserts that pursuant to QA the judge's finding that the appellant will not have clan support must be revised. In QA it was found that deportees would be very likely to be able to access support in Somalia from clan or extended family, given the importance of clan in Somali culture. Ms Isherwood also submitted that when asked by Dr Choudary about his family, the appellant stated that he had "little" family in Somalia and that this meant "some family" rather than no family.

51. I take into account that this sentence is ambiguous and was recorded by a third party. The appellant certainly had wider family in Somalia in the past. For instance, in his screening interview, he refers to his father's brother and children as being missing, but this was many years ago at the time of the civil which displaced so many people.
52. The appellant was a poor witness and as Ms Isherwood submits his evidence was often vague and muddled. However, there is evidence before me that the appellant's memory is poor. His counselling psychologist Dr Eliane Grierson from CMRS Surrey Heath who assessed him on 18 July 2019 stated that "His cognitive ability and memory seems to be impaired by years of hard drug intake". She commented that he struggled to recount his past. In May 2021 Dr Choudhary assessed the appellant as having mental and behavioural disorders due to the use of opiates. He did not conduct a formal cognitive assessment and found that he had "moderate insight". The appellant states that his memory is poor, and I find that this is consistent with his years of hard drug use, PTSD vulnerability and lack of sleep. On this basis I accept his evidence that he cannot remember saying this to Dr Choudhary. At the hearing he insisted he did not have any contact with even one person in Somalia. I find that this is more plausible given his history and living circumstances in the UK. His account as recorded by Dr Choudhary seems rather at odds with his other evidence and I treat it with caution. I do not find that the preserved finding that he has no family in Somalia is undermined.
53. I have considered the issue of clan support very carefully. The appellant left Somalia at the age of 19. He did not live independently as an adult in Somalia, and he left the country 36 years ago. Shortly after he arrived in the UK his father died. The war broke out and for a period he did not know where his mother and sister were. He was on his own with his sister after his father died and ended up living in Camberley near Farnham outside London. His older sister who he viewed as a mother died in 2012. His mother died in 2015, 9 years ago. The appellant was not brought up amongst the Somali diaspora in the UK. His friends are mainly white British, and he has not been immersed in Somali culture in the same way that other members of the Somali diaspora are. I accept that his Somali is rusty. The appellant has a strong British accent and identifies as British. He is not immersed in the Somali diaspora in the UK. He has not visited Somalia for 36 years nor has he been in contact with anyone there. He has been living an unstable and chaotic life for years. For a long time in the UK, he was adrift and homeless, occasionally staying with his sisters. He was provided with his own accommodation in August 2019. He was then in receipt of Universal Credit. He reports feeling fearful and being isolated both when in the community and when in prison. For most of the last 9 years he has been institutionalised. On balance, I accept the appellants evidence that he does not have any close or extended family in Somalia given the date he came to the UK, the fact that his parents who were more likely to have had links with the diaspora have died - his father many years ago, the passage of time and turbulent events in Somalia which took place after he arrived. I find that he does not have extended family or

friends in the Somali diaspora in the UK who would assist him by making contacts with people in Mogadishu or Somalia who can assist him.

54. Ms Isherwood submits that he would be able to get assistance from the Isaaq clan in general because of the cultural imperative to help someone of one's own clan and because the Isaaq is a majority clan. In this respect, I note that not only has the appellant not sent remittances to his extended family in Somalia himself, nor have his two sisters because of their economic circumstances. His father died many years ago so would not have sent remittances and the appellant does not think his mother sent any. She also died 9 years ago and so none have been sent from her since that time. The appellant has not been living as part of a household or family that has been sending money remittances. I find that the appellant's family is perhaps unusual in this respect. He does not have an extensive clan or network of assistance to draw on. I also note that there are few members of the Isaaq clan in Mogadishu. As a matter of common sense, although most Somalis may be able to obtain assistance from their clan, there must be some exceptions to this rule.
55. OA is also authority for the proposition that extended clan would not hold his criminality against him. It seems to me that despite strong clan ties, that very distantly related or just fellow clan members would be wary of assisting a long-standing drug dependent individual with visible injection scars and burn marks on his legs and arms with complex mental health problems, disinhibited behaviour (see more below), who is not familiar with Somali culture. I find that it is very likely that this particular appellant, because of his individual profile will not be able to obtain the assistance of clan members, either in Mogadishu or in Somaliland. I take into account the latest CPIN on Somalia where it is said that "people with disabilities are at heightened risk of violence and abuse, a situation that is worsened by the social stigma associated with intellectual and psychosocial disabilities" which is consistent with this. In this respect I also note and take into account that the appellant was attacked by men of Somali heritage in the UK and that his attackers were convicted and are serving sentences.
56. I find that notwithstanding OA that this appellant will not be able to obtain assistance from his clan because of his individual profile.

Employment

57. Ms Isherwood submitted that the appellant has some skills which will enable him to find employment or set up a business. In my view the possibility of the appellant being able to support himself are very slim given his particular vulnerabilities. He has not been employed in the UK since 1993 when he was working in kitchens and as an assistant chef for a very short period. This was when he was aged about 19 and in good health and had some support from close family members. After so long out of employment his skills are negligible. He is able to clean and sew a straight line. Importantly he does not speak fluent Somali. At the age of 53

he is also an older person in a society which is very youthful. These problems are compounded by the lack of support or assistance he will receive in Somalia, the likely consequences of withdrawing from drugs or of his attempts to obtain substances to replace methadone and the likely deterioration in his mental and physical health. (of which see more below). I do not find that is likely for all of these reasons that the appellant will be able to obtain employment which he will use to support himself and prevent himself from falling into destitution. I find that the preserved finding in respect of this remains undisturbed.

Opiate Addiction, Mental and physical health and suicide risk

58. I first make factual findings.
59. The preserved findings from the First-tier Tribunal form the starting point of my assessment of the appellant's opiate addiction and mental health. There was before me medical evidence which postdates that hearing from Dr Kunal Choudhary including addendum reports dated 25 May 2021, 10 February 2022, 6 July 2022. The conclusions of Dr Choudhary have not been challenged by the respondent and I find that he has the appropriate expertise to assess the appellant's drug dependency and mental health. There were also medical records from when the appellant was in HMP Highdown. I was also provided with extensive GP records from 1992 to November 2019.
60. There is no doubt that the appellant has a longstanding serious drug addiction. He started using cannabis at the age of 20. He started using crack and heroin in 1995. He was smoking and injecting heroin and injecting crack. He also used cocaine, Khat and spice. By 2013 he was said to be smoking £100 of heroin every day £20 of crack, and buying 80mg of Diazepam. From the GP notes it is clear that the appellant frequently attended the GP with infected scabs and sores at his injection sites. Compliance with substance misuse services was erratic.
61. On every occasion he has seen Dr Choudhary and in his witness statements he asserted that he had been "clean" for a period, only for him to admit later that he returned to taking drugs because of stressful events in his life. The drug tests referred to in the reports are frequently positive despite his claims to be "clean". The assault on him in 2018 was in the context of taking drugs and all his offending is connected to his drug use. The photograph of his legs in the scarring report show multiple scars. My view is that the appellant has consistently tried to downplay his drug use which is consistent with the behaviour of an addict and with him being physically dependent on drugs. In May 2022, Dr Choudhary found that the appellant had mental and behavioural disorders due to the use of opiates, dependence syndrome and that he was on a replacement regime. Importantly I find that his mental and behavioural disorders are an illness.
62. At the date of the hearing, Ms Isherwood submitted that there was no evidence that the appellant continues to take methadone and this

submission was also made in her skeleton argument. The appellant insisted that he was still taking methadone. With my permission he provided evidence of this subsequent to the hearing. I find he continues to be on a methadone script of 15ml per day and that Ms Isherwood's submission is not made out.

63. On this basis, I find that if the appellant is removed to Somalia he will be being removed as an individual with active dependence syndrome. The Secretary of State has not submitted that methadone is available in Somalia.
64. I accept Dr Choudhary's evidence that stopping his drug replacement medication abruptly is likely to cause the appellant to suffer withdrawal symptoms soon after his arrival in Somalia. I accept that he is likely to become disinhibited and that will experience intense symptoms of opiate withdrawal including abdominal pains, cramps, diarrhoea, vomiting and hot and cold flushes. I accept that he will become physically and emotionally distressed and that this is likely to trigger his PTSD and is likely to result in him behaving unpredictably and erratically in a highly distressed and agitated manner.
65. I also accept the expert view that the appellant will quickly relapse in order to self-medicate and cope with his distress. His history of drug use is closely linked to trauma, and he uses drugs to alleviate symptoms of distress. He is likely to experience considerable stress on being deported to Somalia. In accordance with OA it will be difficult for him to obtain hard drugs, but it is likely that he will try very quickly to obtain any substance he can, for instance alcohol, khat or cannabis or all three. It is very likely that he will spend the money he returns with on obtaining drugs and this will be his first priority to alleviate the withdrawal symptoms and self-medicate for his PTSD and depression rather than finding housing. This will also put him in a vulnerable situation as he is likely to mix with undesirable company in order to obtain these substances. In my view he will be very vulnerable to exploitation. In this respect I note that not only was he subject to a horrific attack in 2018 but there is reference to him being held at gunpoint and kidnapped in 1990. The appellant has had a chaotic life in the UK where he has been frequently homeless even with moral support and support with housing from his sister and friends as well as some assistance from the mental health team and drug services. Although he was living in his own flat for a short time prior to being incarcerated, he was receiving some assistance from the community health team, and he had access to medication not just drug replacement therapy but for other physical health problems. Even then he felt fearful of going out alone and worried for his safety. He is now institutionalised. His physical health problems are worse, and he is on more medication. He is still fearful. This is an indication of the extent of his vulnerability. None of the support he has received in the UK will be available to him in Somalia either immediately or in the long term.

66. It is not possible to view the appellant's drug dependency in isolation because he also has complex mental health issues. It is accepted that the appellant has PTSD and co-morbid depression. I find that he takes medication to assist his mental health including mirtazapine 30 mg and quetiapine 25mg. I also had before me evidence that the appellant completed 6 sessions with the psychological therapy services in prison from November 2023.
67. As a result of the attack on him he frequently wakes up at night screaming or covered in sweat remembering being beaten and burned. He feels worried and frightened and is hypervigilant. He is low in mood and tearful. He has poor sleep and nightmares which also contribute towards muscle tension, heavy breathing and increased heart rate. He reported these consistent symptoms both to Dr Choudhary and the to the mental health team. His evidence in this respect was consistent
68. He has had some limited treatment for PTSD whilst in prison but still remains unwell. At the end of the sessions, he still had moderate- severe levels of distress. Medication is not effective on its own. He requires support from the trauma focused CBT from the community mental health team. The evidence from Dr Choudhary is that if the appellant is not in a "contained environment" which means in a safe place with family or institutional support he is likely to experience a rapid decline in his mental health. I agree with Dr Choudhary' conclusion that without medication and treatment, his mental health is likely to very quickly deteriorate and that he is likely to have difficulties in functioning. He is likely to neglect himself.
69. He has also reported suicidal ideation in the past. On assessment in 2019 he was said to have fleeting suicidal ideation and that he had not acted and had no formal plan. It was said that lack of treatment for his complex mental health problems and substance misuse exacerbates the risk of self-harming behaviour. In 2021 he was assessed as being a low suicide risk whilst in a contained environment.
70. Although I find that the risk of the appellant experiencing suicidal thoughts and ideation will increase on the evidence before me, I do not find that there is a realistic prospect or that it is reasonable likely that the appellant will commit suicide on the basis that he has been in very poor mental health in the past and has not taken any concrete steps. Further, I view the appellant's assertion that he has deliberately self-harmed by burning himself with cigarettes with some scepticism. He told Dr Choudhary and Dr Sommerlad that he only injected in the arms and not in the neck or groin. From the photos before me, there are clearly multiple scars on the lateral anterior and medial aspects of both thighs and both lower legs all of which had hyperpigmented rims. Dr Sommerlad first found these to be "very consistent" with the story of self-inflicted injuries "mainly cigarette burns producing full thickness and sometimes deeper necrosis and healing by secondary intention".

71. Having reviewed the GP notes where the GP refers to ulcers and scars in the legs from injecting heroin and references to injecting in the groin, Dr Sommerlad revised his opinion to state that these “areas of necrosis could have been caused by intradermal or subcutaneous injection with infection”. (Interestingly on examination by Dr Grierson in 2019 the appellant showed her blisters which he stated were as a result of blood clots but her view was that they looked more like cigarette burns).
72. In both cases, Dr Sommerlad notes that either way whether cigarette burns, or infected injection sites, these are a form of self-inflicted injury, and that the location of the scars is consistent with self-inflicted injury. My view having considered the medical records that most of these scars are more likely to be as a result of infected injection sites, however I also take into account that this in itself is a form of self-harm and this lends weight to my finding that the appellant will most certainly do anything he can to self-medicate through whatever substance he can find on arrival in Mogadishu. I also do not rule out the possibility that the appellant has harmed himself by burning himself with cigarettes.
73. The appellant’s mental health condition is exacerbated by his physical health conditions which include diabetes and hyperthyroidism, deep vein thrombosis and an irregular heartbeat. He is now taking blood thinning agents, metformin and medication for his thyroid.

Article 3 ECHR medical grounds

74. OA is authority for the fact that there is some access to mental health medication and treatment in Mogadishu albeit limited and much of it private. The secretary of state did not serve any updated evidence in this respect. There is also treatment for physical health conditions in Somalia although the respondent did not provide an updated list of treatment and medication available, and Ms Yong ran her Article 3 ECHR health arguments in respect of mental health issues only. I find on balance that treatment is available, however I find that the appellant is unlikely to be able access the treatment because of a combination of withdrawal, relapse a decline in his mental health as well a lack of family or clan support which will cause him to function poorly and act in an erratic way.
75. However, I find that the distress that the appellant will inevitably experience will not meet the Article 3 threshold because it would not result in him being exposed to a serious, rapid and irreversible decline in his state of health resulting in intense suffering or to a significant reduction in life expectancy in accordance with the Supreme Court in AM (Zimbabwe) [2020] UKSC 17, approving Paposhvili v Belgium (application no 41738/10). An applicant must adduce evidence capable of demonstrating that there are substantial grounds for believing that Article 3 ECHR would be violated. This is a demanding threshold. The applicant had to show a prima facie case of violation of Article 3 ECHR. The medical evidence particularly in respect of his physical conditions but also in respect of his mental health conditions does not go so far to demonstrate

that the appellant would have a significant reduction in his life expectancy nor that he will experience an irreversible decline in his health resulting in intense suffering to the standard required by Article 3 ECHR. I do not find that the appeal succeeds under Article 3 ECHR medical grounds.

Guidance in OA

76. I set out those headnotes which are relevant to this appeal:

(2) The country guidance given in paragraph 407 of MOJ (replicated at paragraphs (ii) to (x) of the headnote to MOJ) remains applicable.

(5) Somali culture is such that family and social links are, in general, retained between the diaspora and those living in Somalia. Somali family networks are very extensive and the social ties between different branches of the family are very tight. A returnee with family and diaspora links in this country will be unlikely to be more than a small number of degrees of separation away from establishing contact with a member of their clan, or extended family, in Mogadishu through friends of friends, if not through direct contact.

(8) The economic boom continues with the consequence that casual and day labour positions are available. A guarantor may be required to vouch for some employed positions, although a guarantor is not likely to be required for self-employed positions, given the number of recent arrivals who have secured or crafted roles in the informal economy.

(9) A guarantor may be required to vouch for prospective tenants in the city. In the accommodation context, the term 'guarantor' is broad, and encompasses vouching for the individual concerned, rather than assuming legal obligations as part of a formal land transaction. Adequate rooms are available to rent in the region of 40USD to 150USD per month in conditions that would not, without more, amount to a breach of Article 3 ECHR.

(11) The extent to which the Secretary of State may properly be held to be responsible for exposing a returnee to intense suffering which may in time arise as a result of such conditions turns on factors that include whether, upon arrival in Mogadishu, the returnee would be without any prospect of initial accommodation, support or another base from which to begin to establish themselves in the city.

(12) There will need to be a careful assessment of all the circumstances of the particular individual in order to ascertain the Article 3, humanitarian protection or internal relocation implications of an individual's return.

(13) If there are particular features of an individual returnee's circumstances or characteristics that mean that there are substantial grounds to conclude that there will be a real risk that, notwithstanding the availability of the Facilitated Returns Scheme and the other means available to a returnee of establishing themselves in Mogadishu, residence in an IDP camp or informal settlement will be reasonably likely, a careful consideration of all the circumstances will be required in order to determine whether their return will entail a real risk of Article 3 being breached. Such cases are likely to be

rare, in light of the evidence that very few, if any, returning members of the diaspora are forced to resort to IDP camps.

(14) It will 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 would be reasonable for internal relocation purposes.

Article 3 ECHR - living conditions

77. The next issue for me to decide in respect of Article 3 ECHR is whether the appellant would have no real prospect of securing access to a livelihood which would allow him to rent himself some accommodation, support himself and prevent him from falling into destitution and living in an IDP camp in living conditions which would breach Article 3 ECHR.
78. I take into account all of the appellant's individual characteristics as well as the general guidance in OA. It is accepted that the appellant has been absent from Somalia for a considerable period of over 36 years. He left Somalia as a young man and both his parents have died since he arrived in the UK. It has been found, given the considerable passage of time since then, that the appellant does not have contact with any close or extended family members in Somalia. He will also have no access to remittances. This is my starting point.
79. On arrival in Mogadishu, he would need to build a network of support from scratch in a relatively short period whilst living in hotels which he can pay for out of his resettlement grant. I have found that he will not be able to rely on his clan to assist him because of his complete lack of ties with the Somali diaspora, his poor mental health and his presentation.
80. I note and take into account that the appellant is a very vulnerable individual. He has previously been attacked and tortured. He has scars and visible drug marks. He has serious and complex mental health problems. He is drug dependent and would immediately start to withdraw without access to methadone which is said not to be available. This will cause him distress and to behave erratically. He will not be thinking rationally. I find that it is likely that his main priority in his distress will be to access a substance to cope with the inevitable stress he will be experiencing. He already has a fear of crowds and is frightened in the UK. He is likely to experience stigma because of his behaviour.
81. He is institutionalised and has been heavily dependent on his sisters or other services for instance prison for his self-care. He has physical health problems including diabetes, thyroid and DVT. He is in summary not a well man. He speaks broken Somali and is westernised.
82. I find that is reasonably likely that the appellant will quickly find himself in a very vulnerable situation. I find that he is not likely to establish a connection with a member of his own clan (very few of whom live in

Mogadishu) who is likely to give some limited assistance and could act as an informal guarantor.

83. On the facts of this appeal, I find that the appellant has no real prospect of finding an informal guarantor for him to obtain modest accommodation in Mogadishu or Somaliland or near an IDP camp. I also find that he will not be able to secure a livelihood which would allow him to rent himself some accommodation after his initial money runs out, support himself and prevent himself from falling into destitution. I find that his money is likely to run out quickly. He has few employment skills and last worked in 1993. He is a 54-year-old man which is relatively old on Somali terms. He has no skills is not fluent in the language and is in poor mental and physical health. Without access to medication his physical health will also deteriorate. He has no-one to assist him. He is very vulnerable. I find that there are serious grounds for believing that this appellant because of his individual profile is one of the rare returnees who will quickly find himself destitute and end up living in an IDP camp where he will be living in the very poor conditions described in OA and that he there are particular features that put him at risk including his extreme vulnerability including his poor mental and physical health, his age and his history of being assaulted.
84. I find that the appellant is at real risk of being subject to intense suffering on account of his living conditions in a way which is causally attributed to the Secretary of State's removal decision. I find that he would be living in conditions amounting to a breach of Article 3 ECHR. Inevitably this equates to very compelling circumstances in respect of Article 8 ECHR.
85. I find that the removal from the appellant from the UK would be a breach of Article 3 ECHR.

Notice of Decision

86. I re-make the decision. The appeal is allowed Pursuant to Article 3 ECHR and Article 8 ECHR.

Anonymity Direction

87. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

Signed R J Owens

Date 23 July 2024

Upper Tribunal Judge Owens

Appendix A



**Upper Tribunal
(Immigration and Asylum Chamber)** Appeal Number: RP/00070/2018 (V)

THE IMMIGRATION ACTS

**Heard at Field House by UK Court Decision & Reasons Promulgated
Skype
On: 11 September 2020**

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Before

UPPER TRIBUNAL JUDGE OWENS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AE

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr Clarke, Senior Home Office Presenting Officer
For the Respondent: Ms Yong, Counsel instructed by Davies Blunden and Evans
Solicitors

DECISION AND REASONS

For the sake of clarity, I will refer to AE as the appellant because he was the appellant before the First-tier Tribunal and to the respondent as the Secretary of State.

Introduction

1. AE is a Somali national born on 15 May 1969. The Secretary of State appeals against the decision of First-tier Tribunal Judge Loke sent on 4 February 2020 allowing AE's appeal on Article 3 ECHR grounds against the decision to deport him from the UK, cessation of his refugee status and refusal of his human right's claim. Permission to appeal was granted by First-tier Tribunal Judge Kelly on 25 February 2020.
2. The hearing was held remotely. Neither party objected to the hearing being held by video. Both parties participated by UK Court Skype. I am satisfied that a face to face hearing could not be held because it was not practicable and that all of the issues could be determined in a remote hearing. Both parties confirmed that the hearing was fair.

Anonymity

3. I make a direction for anonymity because AE previously had refugee status, is a highly vulnerable individual suffering from addiction and PTSD, and because in April 2018, he was the victim of a serious assault in the UK where he was tortured. I consider that in these circumstances, it is proportionate to protect his identity to prevent any further harm to him.

Background

4. The appellant arrived in the United Kingdom on 3 October 1988 at the age of 19. He was granted refugee status on 31 October 1989 and indefinite leave to remain on 7 January 1994.
5. The appellant was subsequently convicted of numerous offences. Between 1992 and 2004 he committed various offences including robbery, burglary and supply of Class A drugs. On 21 June 2006 a decision was taken to deport the appellant. An application was made to the European Court of Human Rights who allowed his appeal on 28 June 2011. The appellant was subsequently granted discretionary leave to remain, valid until 10 November 2013.
6. The appellant continued to commit offences after 2008. 015 the appellant was convicted of seven counts of supplying class A drugs. He was sentenced to 68 months imprisonment.
7. On 18 November 2016 the appellant became subject to a deportation order which was signed on 9 April 2018. On 10 April 2018 the appellant was served with a decision entitled "Decision to deport, cessation of refugee status and to refuse human rights claim".

The decision of the Secretary of State

8. The Secretary of state decided that the appellant falls within the provisions of s72(2) Nationality, Immigration and Asylum Act 2002. He is presumed to be a danger to the community in the UK because he has

been convicted in the United Kingdom of an offence and has been sentenced to a period of imprisonment for two years. He is therefore excluded from the protection of the Refugee Convention and can be removed from the UK. He is no longer at risk of serious harm because the circumstances in Somalia have changed and the factual basis on which he was granted refugee status no longer exists. The Secretary of State decided to cease his refugee status in accordance with Article 1C(5) of the 1951 Refugee Convention and paragraph 339A (v) of the immigration rules.

9. Turning to Article 3 ECHR, it is said there is no general Article 3 humanitarian risk in Mogadishu. The appellant can access the economic opportunities available in Mogadishu and can seek support from his clan. He is excluded from Humanitarian Protection. The Secretary of State decided that his health condition and drug addiction would not meet the threshold in order to breach his rights under Article 3 ECHR in accordance with N v UK [2005] UKHL 31. The public interest requires the appellant's deportation. He has been sentenced to a period of imprisonment for at least 4 years and there are no very compelling circumstances over and above the exceptions such that the appellant should not be deported. The appellant is not socially and culturally integrated into the UK and does not have a wife and partner. There would be no very significant obstacles to his integration to Somalia.

The decision of the First-tier Tribunal

10. The Judge heard oral evidence from the appellant and his sisters. The judge found that the presumption under s72(2) of the Nationality, Immigration and Asylum Act 2002 applies to the appellant in that he continues to be a danger to his community because of the persistent nature of his offending, the short time the appellant has been in the community since being released from prison and some recent relapses into drug use which is the cause of his criminal offending. The judge then turned to Article 3 ECHR. The judge found that after an absence of 30 years the appellant would not realistically engage with clan members and had no family members in Somalia; that the appellant was currently taking methadone and mirtazapine and that the appellant has been diagnosed with PTSD after an assault which took place in the UK in 2018 when he was kidnapped and tortured. The judge gave weight to the medical evidence before him in respect of the appellant's addiction and mental health problems as well as his vulnerability. Without family support and medication, the judge found that the appellant's mental health would rapidly deteriorate making him highly vulnerable. The judge then applied the principles set out in MOJ and others(Return to Mogadishu) (CG) 2014 UKUT 442 and in particular paragraph 408 in relation to the appellant living in circumstances 'falling below what is acceptable in humanitarian protection terms'. She compared the situation of the appellant with that of the appellant in SSHD v FY (Somalia) [2017] EWCA 1853. She concluded, taking into account all the circumstances in the round, that there is a real risk that the appellant would be living in circumstances

which would amount to a breach of Article 3 ECHR. The appeal was allowed on this basis.

The grounds of appeal

Ground 1 - Misapplication of the law

11. There is one narrow ground of appeal. The Secretary of State asserts that the judge misapplied the law in respect of Article 3 ECHR and applied the incorrect legal test to her findings of fact. The respondent relies on the decisions of SSHD v Said [2016] EWCA Civ 44 and MS (Somalia) [2019] EWCA Civ 1345 which clarify that paragraph 408 of MOJ and Ors (return to Mogadushu) Somalia CG [2014] UKUT 00442 (IAC) (the reference to “living in circumstances below what is acceptable in humanitarian protection terms”) is an assessment which is relevant to the issue of reasonableness of internal relocation in the context of a refugee claim and is not determinative of an Article 3 ECHR claim. An individual living in such circumstances would not, without more, reach the threshold of severity to demonstrate a breach of Article 3 ECHR in respect of which there is a separate and high legal test as set out in N v UK (2008) 47 EHRR 39 and D v UK (1997) 24 EHRR 423. It is said that the error is material because if the judge had applied the correct legal test to the facts before her, the judge may have come to a different conclusion.
12. There was no challenge to the factual findings made by the judge.
13. The appellant did not submit a Rule 24 response, although both parties produced written submissions.

The position of EA

14. The appellant’s position is that although the judge did not explicitly cite the correct legal test, the judge had the correct Article 3 ECHR legal test in mind and on the findings made by the judge, the judge would have reached the same conclusion in any event which is that returning the appellant to Somalia would amount to a breach of Article 3 ECHR. It is also says that the appellant meets the conditions of Article 15(b) and that there needs to be clarification in respect of conflicting authorities.

Discussion and Analysis

15. The respondent contends that the judge at [38] to [40] wrongly relied on paragraph 408 of MOJ which had been disapproved in Said as confirmed in MS (Somalia).
16. Paragraph 408 of MOJ states:

It will therefore only be those with no clan or family support who will not be in receipt of remittances from abroad and who had 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 terms'.

17. In Said at [18] it is said by the Court of Appeal;

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

18. This was later referred to in MS (Somalia) where it is said at [75];

"In Said v SSHD this Court disapproved of paragraph 408 of the above guidance in so far as it purported to establish the circumstances in which removal to Somalia would infringe Article 3. Burnett LJ with whom the other judges agreed, stated as follows:

"26. paragraph 407(a) to (e) are directed to the issue that arises under article 15(c) of the Qualification Directive. Sub-paragraphs (f) and (g) establish the role of clan membership in today's Mogadishu and the current absence of risk from belonging to a minority clan. Sub-paragraph (h) and paragraph 408 are concerned in broad terms with the ability of a returning Somali national to support himself. The conclusion at the end of paragraph 408 raises the possibility of a person's circumstances falling below what "is acceptable in humanitarian protection terms". It is with respect, unclear whether that is a reference back to the definition of "humanitarian protection" arising from article 15 of the Qualification Directive. These factors do not go to inform any question under article 15(c). Nor does it chime with article 15(b), which draws on the language of article 3 of the Convention, because the fact that a person might be returned to very deprived living conditions, could not (save in extreme cases) lead to a conclusion that removal would violate article 3

27. The Luxembourg Court considered article 15 of the Qualification Directive in Elgafaji v Staatssecretaris van Justitie [2009] 1 WLR 2100 and in particular whether article 15(c) provided protection beyond that afforded by article 3 of the convention. The answer was yes, but in passing it confirmed that article 15(b) was a restatement of Article 3. At para 28 is said:

"In that regard while the fundamental right guaranteed under Article 3 of the ECHR forms part of the general principles of Community law observance of which is ensured by the Court, and while the case-law of the European Court of Human Rights is taken into consideration in interpreting the scope of that right in the Community legal order, it is however article 15(b) of the Directive which corresponds in essence to Article 3 of the ECHR. By contrast Article 15(c) of the Directive is a provision, the content of which is different from Article 3 of the ECHR and the

interpretation of which must therefore be carried out independently although with due regard for fundamental rights as they are guaranteed under the ECHR”.

28. In view of the reference in the paragraph preceding para 407 to the UNHCR evidence, the factors in para 407(h) and 408 are likely to have been introduced in connection with internal flight or internal relocation arguments which was a factor identified in para 1 setting out the scope of the issues before UTIAC. Whilst they may have some relevance in a search for whether a removal to Somalia would give rise to a violation of article 3 of the Convention, they cannot be understood as a surrogate for an examination of the circumstances to determine whether such a breach would occur. I am unable to accept that if a Somali national were able to bring himself within the rubric of para 408, he would have established that his removal to Somalia would breach article 3 of the Convention. Such an approach would be inconsistent with the domestic and Convention jurisprudence which at para 34 UTIAC expressly understood itself to be following”

[76] By relying upon and applying paragraph 408 of the MOJ decision in determining whether there would be a breach of Article 3 ECHR the FTT accordingly applied the wrong legal test”.

19. This principle is confirmed by the Upper Tribunal in SB (refugee revocation; IDP camps) Somalia [2019] UKUT 00358 (IAC) in which it is confirmed that MOJ was not proposition for the fact that a person who finds themselves in an IDP camp is thereby likely to face Article 3 harm.
20. I agree that the judge incorrectly applied the disapproved test at 408 of MOJ. At [38] the judge explicitly sets out the test in MOJ stating;

“I take into account the comments made by the Upper Tribunal at [408] of MOJ:

408. It will therefore only be those with no clan or family support who will not be in receipt of remittances from abroad and who had 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 terms.

In my assessment the Appellant fails into the category envisioned by the Upper Tribunal. I also consider this appellant to be in a similar situation as the appellant in SSHD v FY (Somalia) [2017] EWCA 1853. In that case the appellant had not been to Somalia since the age of 9 years, would also be returning to Somalia without any family support and was likely to be placed in an IDP camp”.

21. At [40] the judge reiterates the test stating;

“Stepping back and considering all the circumstances, I find there is a real possibility that the Appellant will face the prospect of living in circumstances falling below that which is acceptable in humanitarian terms. This prospect is exacerbated by the Appellant’s mental health difficulties. Whilst the Appellant’s condition is currently relatively stable, he is a vulnerable person.

There is a real risk that he will have to reside in makeshift accommodation eg. an IDP camp or be rendered destitute. This, together with the effect of deprivation of his methadone script and the separation from his sisters would have on his mental health and physical well-being; I conclude that there is a real risk that the Appellant will live in circumstances which would amount to a breach of Article 3". (My emphasis)

22. Ms Yong accepted that the reference to paragraph 408 of MOJ in the context Article 3 ECHR was an error. She also concedes that the judge does not refer to the correct Article 3 tests relevant to medical cases or destitution cases. Her principle submission is that the decision should not be set aside because the error was not material.
23. Both parties are in agreement that in order to demonstrate that he would be subject to treatment contrary to Article 3 ECHR, the appellant would need to adduce evidence capable of demonstrating that there are substantial grounds for believing he would meet the test set out in Paposhvili v Belguim [2016] ECHR 1113. The high threshold for Article 3 has been clarified by the Supreme Court in AM (Zimbabwe) v SSHD [2020] UKSC 17.
24. The test is expressed as follows in Paposhvili v Belgium [2016] ECHR 1113;

“183. The court considers that the “other very exceptional cases” within the meaning of the judgment in N v UK (paragraph 43) which may raise an issue under Article 3 ECHR 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 county 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.”
25. The judge’s findings in relation to the appellant have not been challenged. The judge finds that the appellant is a long-standing drug addict who currently takes methadone and mirtazapine. It is not suggested that these drugs are available in Somalia. The appellant has been living in the UK since the age of 19. He has no qualifications and has never worked because of his addictions. He has limited ability to look after himself and relies heavily on family support from his two sisters. One of his sisters is disabled and the other is her carer. Neither can afford to send remittances to Somalia. The appellant is not likely to obtain support from his clan and without medication, he would rapidly deteriorate in mental state making him a highly vulnerable adult. The judge accepts the medical report from Mr Choudhary in this respect.
26. Ms Yong submits that the appellant’s case is distinguishable on the facts from the cases relied on by the Secretary of State and that these findings of fact meet the high Article 3 ECHR threshold because of cumulative factors. These include the fact that it is accepted that the appellant was kidnapped and tortured in 2018 and that in a medical letter there is

reference to scars on his arms that have the appearance of cigarette burns. The appellant has been absent from Somalia for 30 years and has no family or clan support. He is unlikely to find work and has no real prospect of receiving money from relatives in the UK. Ms Yong refers to the case of FY (Somalia) v SSHD [2017] EWCA Civ 1853 which has a similar factual matrix where the Court of Appeal found that the high Article 3 threshold was met.

27. Ms Yong also refers to [422] of Said in which it is said;

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

28. Having given consideration to the conclusions of the judge, I note that she makes no reference to the threshold of severity or of the need to apply a higher threshold in Article 3 health cases and I am not satisfied that she had the correct legal test in mind when she found that it would be a breach of Article 3 ECHR to remove the appellant to Somalia. I also note that at [33] the judge highlighted that the appellant’s medical problems were not advanced as breaching his Article 3 ECHR rights.

29. I am not satisfied that the facts as found by the judge are sufficient, without more, to meet the required threshold of severity. What the appellant needs to show, is that he will be exposed to a “serious, rapid and irreversible decline in his or her state of health resulting in intense suffering”. Although the judge refers to the fact that the appellant’s living circumstances will have an effect on his mental health and physical wellbeing and accepts that the appellant’s mental health would rapidly deteriorate without treatment, the judge seems more concerned with the appellant’s vulnerability and ultimately finds that there is a real risk that the Appellant will be living in circumstances which would amount to a breach of Article 3. I note that the wording expressly refers to the ‘living circumstances’ of the appellant as opposed to the suffering and distress which will be experienced by the appellant.

30. I am not satisfied that the facts as found by the judge would inevitably lead to the conclusion that the appellant would experience Article 3 ECHR treatment on return to Somalia, although I acknowledge that the factual basis of his claim is very different from the appellant in Said who was able to obtain support from his family, seek assistance from his clan and who could, notwithstanding his depression, work.

31. On this basis, I find that there has been a material error of law in that the judge has applied the incorrect legal test and on the facts as found by the judge there is a possibility that had the judge applied the correct test that she would have reached a different conclusion in respect of Article 3 ECHR.

32. 39 I am not persuaded by the argument that the appellant could satisfy Article 15(b) in any event because the authorities set out above are very clear that Article 15(b) is a restatement of Article 3 ECHR.
33. Ms Yong also submitted that there needed to be clarification of the conflict between Said, MS and FY. I am also in agreement with Mr Clarke that there is clear guidance in MA(Somalia) that “to the extent that there is any conflict between the decision of this court in Said and that in FY (Somalia) the decision in this court in Said should be followed”. This was repeated and reiterated in SB. On this basis, I find that there has already been clarification between the Court of Appeal’s authorities of Said, MS and FY.
34. I therefore set aside the decision and adjourn this appeal for re-making in the Upper Tribunal.
35. The findings in relation to the section 72(2) certificate at [25] to [31] were not challenged and are preserved.
36. Similarly, in respect of Article 3 ECHR, the findings at [32], [33], [34], [35], [36] and [37] and [39] are preserved.
37. If the appellant wishes to adduce further evidence in respect of the effect on him of a return to Somalia, the appellant will need to produce the necessary notices. Mr Clarke made it very clear that the respondent would not object to further evidence being produced in respect of the Article 3 ECHR issue.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error of on a point of law.

The decision of the First-tier Tribunal is set aside in respect of the Article 3 ECHR assessment.

The appeal is adjourned for re-making in front of the Upper Tribunal in relation to Article 3 ECHR, and if necessary Article 8 ECHR.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed: R J Owens

Date: 15 October 2020

Upper Tribunal Judge Owens

