**Upper Tribunal**
**(Immigration and Asylum Chamber)**

AAW (expert evidence – weight) Somalia [2015] UKUT 00673 (IAC)

**THE IMMIGRATION ACTS**

| **Heard at the Royal Courts of Justice**<br>**On 19 October 2015** | **Decision Promulgated**<br><br>…… |
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**Before**

**Upper Tribunal Judge Southern**

**Between**

**AAW**
(ANONYMITY DIRECTION MADE)

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr A Gilbert, of counsel
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

*A failure to comply with the Senior President's Practice Direction may affect the weight to be given to expert evidence. Any opinion offered that is unsupported by a demonstration of the objectivity and comprehensive review of material facts required of an expert witness is likely to be afforded little weight by the Tribunal. In particular, a witness who does not engage with material facts or issues that might detract from the view being expressed risks being regarded as an informed*

*advocate for the case of one of the parties to the proceedings rather than an independent expert witness.*

## DECISION AND REASONS

1. Permission having been granted to appeal against the determination of the First-tier Tribunal by which his appeal against a deportation order was dismissed, the appellant's appeal came before Upper Tribunal Judge O'Connor on 13 July 2015. By a decision dated 14 July, Judge O'Connor found that the First-tier Tribunal had made errors of law such as to require the determination to be set aside. His reasons for so finding are set out in the decision that is annexed hereto. Judge O'Connor said this about the circumstances leading to the decision to make a deportation order:

> "The appellant has a lengthy history of criminal offending in the United Kingdom. He was convicted of common assault in 2002, two sexual assaults and common assault in 2010, a breach of a community order in 2010 and for both failure to surrender (having been released on bail) and destroying/damaging property in 2011.
>
> Most significantly, however, the appellant was convicted on 27 October 2011 of wounding with intent (to cause grievous bodily harm) and sentenced to a term of six years' imprisonment. This led the Secretary of State to make a decision to deport him …"

It might be observed, also, that in his sentencing remarks the judge who passed that prison sentence said that if not for the prompt intervention of the medical services the appellant would have faced a murder charge. He went on to say:

> "Time and again it is said by the courts that people who use knives in order to attack others must face substantial custodial sentences and by substantial I mean lengthy.
>
> This was on any view a sustained attack. You were determined to mete out physical violence to (the victim). You armed yourself with a knife. You kicked the door of the living room open where he had retreated and, as I say, you plunged the knife twice into his body…"

2. For reasons that are not in dispute between the parties, it is not necessary to look any further into the determination of the First-tier Tribunal other than to say that their finding that section 72(2) of the Nationality, Immigration and Asylum Act 2002 applied in this case stands, so that the appellant cannot succeed in his appeal on asylum grounds. Therefore, as Mr Gilbert, realistically, does not pursue either any grounds founded upon rights protected by Article 8 of the ECHR we are concerned only with the question of whether, upon return to Mogadishu, the appellant would be subjected to ill-treatment or would find himself living in conditions such as to amount to an infringement of Article 3 of the ECHR.

3. The appellant, who is a citizen of Somalia, was born in 1974 and so is now about 40 years old. He lived with his parents and siblings in Mogadishu. They are of the

Shanshiya clan, which is a sub clan of the Benadiri and so a minority clan. That was a matter of fact initially in dispute but Mr Jarvis does not now pursue that challenge and so the appellant is to be considered to be of the clan he asserts. The appellant's father was a merchant, selling shoes and some livestock. As the appellant confirmed in his oral evidence before us, the family had the patronage of a local Hawiye man as a result of which the appellant's father prospered in his business and the appellant was able to attend school. They owned and lived in their own house, which had six bedrooms.

4. Despite that patronage from a majority clan member, the appellant's family, like many others, felt unsafe as the civil war of the early 1990's took hold. They therefore left Mogadishu and moved to Marka on the south coast of Mogadishu, where the appellant's father rented a house and opened a new shop. Unfortunately, after two years or so, the fighting spread to Marka and so the family moved across the border into Kenya, where they lived in a refugee camp.

5. In 1996 the appellant's parents decided to return to Mogadishu taking the appellant and his siblings with them. He said that other relatives remained in the camp in Kenya. Despite the continuing violence being perpetrated in Somalia, and the precarious position, generally, of members of minority clans at that time in Somalia, the family was able to travel back to Mogadishu by bus. In oral evidence the appellant explained how this was possible, given that they were of a minority clan and on that basis at extreme risk when passing through the many militia controlled checkpoints they encountered on their journey. He said that the bus driver bribed his way through the checkpoints outside Mogadishu and, when asked about how they got through the checkpoints within Mogadishu, the appellant explained that:

> "… the man who father trusted was waiting for us there."

6. The appellant explained that when his father decided that they should return to Mogadishu, he contacted the man of the Hawiye clan, his connection with whom had enabled him to run his business and to own property in Mogadishu, and made with him certain arrangements. The family would return and this man had agreed to buy their house for $40,000. The appellant's father would then rent a house and start a new business. Unfortunately, when they arrived in Mogadishu they found that others from a majority clan had moved into their house and taken it over and so, for a few months, they stayed at the home of the man trusted by his father who had agreed to buy the house. After that man had secured vacant possession, the sale proceeded and so the appellant and his family moved into a rented house.

7. However, the appellant had described also that when he and his brother left Mogadishu in 2008, the family was then living "in an IDP camp" in Mogadishu. In oral evidence he explained that this was because "there was no peace". That decision was certainly not driven by a shortage of funds because they had the proceeds of the sale of their house. It emerged in evidence that the "IDP camp" was a vacant government building, in which the appellant's parents remained resident after their two sons had departed. Each son received from their parents the sum of

$5,000 to fund their journey, their parents retaining for their own use the remaining $30,000.

8. The appellant, who was provided with a Danish passport by the agent, travelled to an airport to the north of Mogadishu from where he travelled by air to the United Kingdom. He claimed asylum, unsuccessfully, on arrival and again, in a false name in 2006. His detailed immigration and appeal history is well known to the parties and it is not necessary to rehearse it here.

9. It is Mr Gilbert's submission that the appellant should succeed in his appeal on the basis that he falls with the category of persons identified in *MOJ & Ors (Return to Mogadishu)* Somalia CG [2014] UKUT 00442 (IAC) as being entitled to international protection in that the appellant will be returning with no clan or family support; not in receipt of remittances from abroad and with no real prospect of securing access to a livelihood on return. This is because the appellant's minority clan will not be able to assist him and without clan or family support he will be unable to find work and so will find himself destitute and living in an IDP camp in conditions that will fall below what is permissible in terms of the protection provided by Article 3.

10. Bringing matters up to date, the appellant confirmed that his father died in 2001 after which his mother remained in the same building, described by him as "living in a refugee camp". He kept in touch with his mother until her death in 2013. He said he lost his faith not long after he arrived in the United Kingdom and so he does not go to a mosque. His brother now lives in Birmingham. Last September the appellant told him that he had become an atheist. He said that his brother "did not like that" and has cut off all ties with him. In oral evidence the appellant said that he had continued to talk to his sister in law and that she was beginning to understand his position.

11. Finally, the appellant says that he would be at risk on return from a revenge attack, because the man he stabbed in committing the offence for which he has been imprisoned is also a Somali national and as news travels fast between the United Kingdom and Mogadishu this man's family would find out where is and would attack and possibly kill him.

12. In Mr Gilbert's submission, the appellant's difficulties on return will be exacerbated by other factors. He has a history of criminal offending, including sexual assault, a category of offence that offends social *mores* in Somalia. He has also a history of addiction to alcohol and, on that basis as well, he will attract severe censure and, as alcohol is illegal but available, this will also act as a barrier to securing accommodation and employment. Mr Gilbert has set out in his skeleton argument a detailed analysis of all of the risk factors he identifies and I have had careful regard to all that he has written.

13. Mr Gilbert relies upon the country guidance provided by *MOJ and Ors* and upon a lengthy written report and supplementary report provided by Ms Mary Harper who was one of three witnesses presented by the appellants in *MOJ & Ors* as expert country witnesses. Mr Jarvis describes Ms Harper's reports as "extraordinary" in

that they are, in his submission, lacking the objectivity demanded of the evidence of a person put forward as an expert witness and because, he submits, she has advanced the same opinions as were rejected by the Tribunal in *MOJ & Ors,* substantially relying upon the same material upon which her evidence in 2014 was based and she has simply expressed disagreement with or simply ignored the findings in the country guidance offered in *MOJ & Ors* where they are contrary to the opinion she expresses.

14. Mr Jarvis invited the Tribunal to categorise these reports not as expert evidence at all but as the expression of an inaccurate journalistic view that should be given no weight at all. On the other hand, Mr Gilbert points out that the Tribunal in *MOJ & Ors* did not reject Ms Harper's evidence in its entirety and he emphasises also that in the present reports Ms Harper deals with areas outside the focus of the country guidance given previously.

15. I shall examine those competing submissions below but as Mr Gilbert correctly points out, the appellant's case is not founded exclusively upon Ms Harper's evidence and so, even if her evidence is not regarded as helpful, that does not mean that on that account alone the appeal must fail.

The country guidance: *MOJ & Ors*

16. This is a substantial decision of the Upper Tribunal, running to more than 400 paragraphs. The Tribunal had before it a vast array of documentary evidence as is identified in an annex, that list of materials extending to more than 35 pages. This country guidance decision was considered recently by the ECtHR in *R.H. v Sweden* (Application no 4601/14), published on 10 September 2015. At paragraph 67 the Court said that:

> "… Given the high volume of oral and written evidence examined by the Tribunal, the Court considers that its assessment must be accorded great weight."

The Court set out the country guidance provided by *MOJ & Ors* and went on to adopt and apply it in dismissing the application before it.

17. The headnote reproduced below is the Tribunal's attempt to distil key aspects of the guidance provided into a concise summary but this does not, as we shall see, cover the full extent of the reasoned findings made:

> "(i) The country guidance issues addressed in this determination are not identical to those engaged with by the Tribunal in AMM and others (conflict; humanitarian crisis; returnees; FGM) Somalia CG [2011] UKUT 445 (IAC). Therefore, where country guidance has been given by the Tribunal in AMM in respect of issues not addressed in this determination then the guidance provided by AMM shall continue to have effect.
>
> (ii) Generally, a person who is "an ordinary civilian" (i.e. not associated with the security forces; any aspect of government or official administration or any NGO or international organisation) on returning to Mogadishu after a

period of absence will face no real risk of persecution or risk of harm such as to require protection under Article 3 of the ECHR or Article 15(c) of the Qualification Directive. In particular, he will not be at real risk simply on account of having lived in a European location for a period of time of being viewed with suspicion either by the authorities as a possible supporter of Al Shabaab or by Al Shabaab as an apostate or someone whose Islamic integrity has been compromised by living in a Western country.

(iii) There has been durable change in the sense that the Al Shabaab withdrawal from Mogadishu is complete and there is no real prospect of a re-established presence within the city. That was not the case at the time of the country guidance given by the Tribunal in AMM.

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

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

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

(vii) A person returning to Mogadishu after a period of absence will look to his nuclear family, if he has one living in the city, for assistance in re-establishing himself and securing a livelihood. Although a returnee may also seek assistance from his clan members who are not close relatives, such help is only likely to be forthcoming for majority clan members, as minority clans may have little to offer.

(viii) The significance of clan membership in Mogadishu has changed. Clans now provide, potentially, social support mechanisms and assist with access to livelihoods, performing less of a protection function than previously. There are no clan militias in Mogadishu, no clan violence, and no clan based discriminatory treatment, even for minority clan members.

(ix) If it is accepted that a person facing a return to Mogadishu after a period of absence has no nuclear family or close relatives in the city to assist him in re-establishing himself on return, there will need to be a careful assessment of all of the circumstances. These considerations will include, but are not limited to:

- circumstances in Mogadishu before departure;
- length of absence from Mogadishu;
- family or clan associations to call upon in Mogadishu;
- access to financial resources;
- prospects of securing a livelihood, whether that be employment or self employment;
- availability of remittances from abroad;
- means of support during the time spent in the United Kingdom;
- why his ability to fund the journey to the West no longer enables an appellant to secure financial support on return.

(x) Put another way, it will be for the person facing return to explain why he would not be able to access the economic opportunities that have been produced by the economic boom, especially as there is evidence to the effect that returnees are taking jobs at the expense of those who have never been away.

(xi) It will, therefore, only be those with no clan or family support who will not be in receipt of remittances from abroad and who have no real prospect of securing access to a livelihood on return who will face the prospect of living in circumstances falling below that which is acceptable in humanitarian protection terms.

(xii) The evidence indicates clearly that it is not simply those who originate from Mogadishu that may now generally return to live in the city without being subjected to an Article 15(c) risk or facing a real risk of destitution. On the other hand, relocation in Mogadishu for a person of a minority clan with no former links to the city, no access to funds and no other form of clan, family or social support is unlikely to be realistic as, in the absence of means to establish a home and some form of ongoing financial support there will be a real risk of having no alternative but to live in makeshift accommodation within an IDP camp where there is a real possibility of having to live in conditions that will fall below acceptable humanitarian standards."

18. Mr Gilbert draws on other references and findings that did not find their way into the headnote. Thus:

a. at para 343, the Tribunal cited from a 2014 UNHCR report "that persons belonging to minority clans… remain at particular disadvantage". But here the full extract is necessary to give context to that observation:

> "Persons belonging to minority clans… remain at particular disadvantage in Mogadishu… There remains a low sense of Somali social and ethical obligation to assist individuals from weak lineages and social groups. This

> stands in stark contrast to the powerful and non-negotiable obligation Somalis have to assist members of their own lineage."

From which it can be seen that the disadvantage being referred to relates to a lower sense of obligation to assist clan members.

b. At para 353 that "it may be that, like other residents of Mogadishu, he would be more likely to succeed in accessing a livelihood with the support of a clan or nuclear family." But, again, that observation must be read together with the sentence that precedes it:

> "For those reasons we do not accept Dr Hoehne's evidence that it is only a tiny elite that derives any benefit from the "economic boom". Inevitably, jobs have been created and the evidence discloses no reason why a returnee would face discriminatory obstacles to competing for such employment. It may be that, like other residents of Mogadishu, he would be more likely to succeed in accessing a livelihood with the support of a clan or nuclear family."

c. At para 342 "for a returnee to Mogadishu today, clan membership is not a potential risk factor but something which is relevant to the extent to which he will be able to receive assistance in re-establishing himself on return, especially if he has no close relatives to turn to upon arrival. There remains an aspect of protection to be derived from clan membership."

However, again, that finding was qualified by the final sentence of that paragraph, in which the Tribunal said, explaining that even for those who can expectantly look to clans for support:

> "But this source of assistance must not be overstated. As explained by Ms Harper, in her oral evidence, in response to a question concerning what help a returnee might expect from his clan:
>
> > "None at present. If you arrive in Mogadishu and do not know anyone at all, you might start asking for fellow clan members in the hope that they might do more for you than others. But you could not expect anything from them.""

19. Next, Mr Gilbert draws upon the COIR of March 2015, which of course post dates the decision of *MOJ and Ors.* He points to para 1.3.4 that states that minority clan members, who usually lack the support networks available to those of majority clans as a result suffer discrimination. Mr Gilbert relies upon the observation that follows: "and have experienced human rights abuses…" but that is expressed in the past tense, which is confirmation of that which is not in dispute.

20. Para 1.3.6 of the COIR does not say, as the skeleton argument suggests, that minority clan members *will* find themselves in IDP camps, simply that *those who do may* find themselves exposed to ill-treatment. It is highly relevant in this particular case that the appellant's mother, with whom he remained in contact until her death in 2013, had been living in what the appellant has referred to as either an IDP camp

or a refugee camp for well over ten years since she became a widow yet no suggestion has been made that she was ever subjected to ill-treatment.

21. Mr Gilbert draws attention to other reports also, but where those reports were before the Tribunal in *MOJ & Ors* or are based upon source material that was, it is not necessary to discuss it further as it is subsumed within the guidance given.

Evidence of Ms Mary Harper

22. Ms Harper, who describes herself at the head of her reports as:

> "BBC Africa Editor and Somalia Expert
> Fellow of The Rift Valley Institute and the Heritage Institute of Policy Studies
> Author of *Getting Somalia Wrong? Faith, Hope and War in a Shattered State"*

has produced two reports for this appeal. The first is dated 4 March 2015 and runs to 22 pages and the second, an Addendum to the first report, is dated 14 October 2015 and is produced in response to written questions posed by the respondent arising from the first report.

23. Given the challenge raised by Mr Jarvis to the objectivity of Miss Harper's evidence, before descending into a detailed examination of those reports it is helpful to look at what is required of an expert witness.

24. In *MOJ & Ors* the Tribunal said this:

> "Thus in the contemporary era the subject of expert evidence and experts' reports is heavily regulated. The principles, rules and criteria highlighted above are of general application. They apply to experts giving evidence at every tier of the legal system. In the specific sphere of the Upper Tribunal (Immigration and Asylum Chamber), these standards apply fully, without any qualification. They are reflected in the Senior President's Practice Direction No 10 (2010) which, in paragraph 10, lays particular emphasis on a series of duties. We summarise these duties thus:
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> (i) to provide information and express opinions independently, uninfluenced by the litigation;
> (ii) to consider all material facts, including those which might detract from the expert witness' opinion ;
> (iii) to be objective and unbiased;
> (iv) to avoid trespass into the prohibited territory of advocacy;
> (v) to be fully informed;
> (vi) to act within the confines of the witness's area of expertise; and
> (vii) to modify, or abandon one's view, where appropriate."

25. A witness, if put forward as an expert witness, will not be treated as such if he or she does not meet the requirements demanded by the Senior President's Practice Direction. That does not mean that his or her evidence falls to be disregarded, but any opinion offered that is unsupported by a demonstration of the objectivity and comprehensive review of material facts required of an expert witness is likely to be afforded little weight by the Tribunal. In particular, a witness who does not engage

with material facts or issues that might detract from the view being expressed risks being regarded as an informed advocate for the case of one of the parties to the proceedings rather than an independent expert witness.

26. In my judgment Mr Jarvis is correct to say that Ms Harper's reports are quite remarkable. In short, she maintains the views and opinions she expressed in her evidence before the Tribunal in 2014 and where those opinions are contrary to the country guidance that resulted, she either expresses disagreement or simply disregards the country guidance altogether.

27. She insists that some areas of Mogadishu "still harbour significant elements of the Islamist group Al Shabaab" whereas the Tribunal found that the withdrawal of Al Shabaab from the capital was complete and durable. At paragraph 6 of her first report she asserts as if it were an established fact that the appellant's physical appearance would readily disclose the fact that he is of the Reer Hamar and so "would put him at immediate risk of ill-treatment as he would be perceived by others to be a member of a minority clan". At paragraph 337 of *MOJ & Ors* the Tribunal rejected that view, finding that:

> "The evidence establishes clearly that, in Mogadishu, there is no inter-clan violence taking place and no real risk of serious discriminatory treatment being experienced on the basis of clan."

And in the headnote:

> "There are no clan militias in Mogadishu, no clan violence, and no clan based discriminatory treatment, even for minority clan members."

28. At paragraph 6.3 of her report, Ms Harper draws upon the World Directory of Minority Groups and Indigenous Peoples, in which a view was expressed that minority clans "have remained especially vulnerable, even in areas where stability has improved". That, however, was based upon a report written in 2011 and so is simply worthless in informing a discussion of conditions in Mogadishu today.

29. Next, seeking to illustrate her view that minority clans continued to suffer "continued prejudice and disproportionate violence" she cites an incident of an attack upon a minority clan settlement in which people lost their lives. But as this occurred in Jowhar, 50 miles north of Mogadishu and took place in November 2013, it is impossible to see how that is relevant to an assessment of the situation of members of a minority clan living in Mogadishu, a place from which Al Shabaab have completed their withdrawal. Ms Harper does recognise this difficulty but concludes:

> "Although this kind of violence, which specifically targets minority clans, has not to my knowledge occurred on any significant scale in Mogadishu, it is possible that it will do in the near future."

This speculative view is based upon no sound evidential basis whatever. It is remarkable that the witness feels able to express such a view that requires for it to

be accepted a departure from country guidance without offering anything even approaching a proper basis to do so. In my judgment this is not the expression of an expert view but a journalistic opinion by someone with personal knowledge of the city who speaks of what she expects to be the case, even if others have expressed a different view, and its significance is to demonstrate that very little weight can be placed upon this view expressed by the witness in this report.

30. Similarly, in the paragraphs that followed, Ms Harper speaks of the risks posed by clan militias in Mogadishu whereas the clear finding of the Tribunal in *MOJ & Ors* was that there were no longer any clan militias operating in the capital.

31. There are examples of Miss Harper simply disregarding the findings of the Tribunal as to conditions in Mogadishu and reiterating her own view, despite that having been rejected. At paragraph 7 of her first report Ms Harper says:

> "I believe that Al Shabaab would try to execute or assassinate (the appellant) if it discovered he was an atheist."

But the Tribunal found, in *MOJ*, that no such "executions" by Al Shabaab take place in Mogadishu. Miss Harper does not point to a single example of this having happened in the capital since Al Shabaab completed their withdrawal from the capital and so, once again, her opinion is wholly out of step with the position as it has been found to be and she offers no basis at all to depart from the findings of the Tribunal in this respect.

32. Ms Harper records in her report conversations with unidentified sources in Mogadishu who:

> "displayed hostility to the idea of people with a history of criminal convictions being deported to Somalia…. This suggested a hostile predisposition towards such individuals from a wide range of society in Mogadishu. They said such individuals would be rejected by their families, if indeed they had families in Mogadishu. This would lead to their isolation; they may have to live in the streets. This might increase the likelihood of them joining Al Shabaab…"

This evidence chimes with her opinion as advanced in her evidence before the Tribunal in *MOJ & Ors*:

> "Ms Harper said in oral evidence:
>
> > "If the family unit is there in Mogadishu, if that person was involved with criminal activities in the UK they may reject them. Some families live in igloos or smashed up buildings. The immediate family would I believe receive that person.""

In rejecting her evidence, the Tribunal said this:

> "Ms Harper made clear that she disagreed with the evidence given by Dr Hoehne to the effect that an "ordinary" conviction in the United Kingdom would have little or no significance in Somalia, although offences involving drugs might be different. However, when invited to give any example of a returnee who upon return was

shunned by relatives on this account she was unable to do so. Therefore, this is yet another example of an opinion being offered that is simply unsupported by any actual evidence of it occurring, being based instead upon what the witness believes would be the case."

33. Addressing next the difficulty the appellant would experience in accessing a livelihood on return to Mogadishu, it was Ms Harper's opinion, expressed at para 10.2 of her first report, that it would be extremely difficult for him to secure accommodation, food or employment:

> "… because he has the physical appearance of a member of a minority clan, has little education and is not part of the Somali "middle class…"

Once again this flies in the face of the country guidance in place without any attempt being made to justify departure from it. In *MOJ & Ors* the Tribunal addressed this point directly:

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

The conclusion reached concerning the view that economic opportunities were available only for "the elite", at para 349, was this:

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

34. Ms Harper simply ignores this reasoning and so we do not know on what basis she departs from it.

35. There are many other examples of such difficulties in Ms Harper's report. At paragraph 11.2 of her report she opines that from the moment the appellant arrives at Mogadishu airport he:

> "… would be vulnerable to abuse or attack by criminals, militias, government troops, African Union soldiers and Al Shabaab. A returnee from Europe or the US would be presumed to have money or access to money through remittances, and would therefore be at risk of being robbed, or abducted or subjected to threats of violence for the purpose of extortion."

Inevitably, citizens of Mogadishu will on occasion be the victims of crime just as they are in London or New York. However, Ms Harper offers no examples of this ever having happened in a manner attributable to the fact of a return from Europe. Once again, this is an example of Miss Harper saying what she thinks would happen rather than giving evidence of something that does generally happen. She attributes as her source for this observation "Current Anthropology, *Embarking on an Anthropology of Removal* by Nathalie Peutz, a PHD candidate in a work published in 2006. This was based upon fieldwork carried out as long ago as 2002.

36. At para 11 of her first report Ms Harper asserts that:

> "Al Shabaab believes returnees from the West to be in a state of apostasy, and therefore subject to punishment. The group considers as a possible spy anyone returning from the West and executes those it finds guilty of spying."

Yet again, this was her view before the Tribunal in *MOJ & Ors* which the Tribunal expressly rejected at para 374:

> "We are satisfied that the evidence does not establish that "ordinary civilians" including diaspora returnees are targeted by anyone. Specifically, we are satisfied that the evidence does not establish that "ordinary civilians" including returnees, are targeted by Al Shabaab or the authorities or criminal elements. We are satisfied that it matters not that a returnee who has been absent for some considerable time would be recognisable as such by his dress, behaviour or language."

37. It is not just what is in Ms Harper's report that is remarkable but, given that she offers it as an objective view of current conditions it is remarkable for one particular omission. In August of 2015 Mogadishu hosted for the first time an International Book Fair. This was a 3-day event attended by a large number of people who travelled from many destinations to attend. The event, by all accounts, was a success and those involved were proud of what had been achieved. Yet the fact that there is no mention of this event in Ms Harper's report constitutes a strong indication that she has sought not to emphasise any positive aspect of life in Mogadishu today.

38. It is not in doubt that she was aware of the event. We know that she was because her article for the BBC has attracted indignant complaints from those involved, because of the negative view expressed of an event that others considered to be an important success story for modern Mogadishu as it emerges from the problems of the past. The report produced by the respondent includes:

> "Angry Somalia took on twitter #SomeTellMaryHarper after her article on Mogadishu International Book Fair dubbed "Somali authors defy militants" was published.
> Somalis on twitter believe BBC Africa editor new story was biased and did not highlight the real environment in the recuperating country."

Complaint was made also that Ms Harper included in the report of this event a photograph of "horrifying scenes at Mogadishu hotel attack earlier this year" when

there was no suggestion from any source that the book fair event in fact attracted any adverse attention from Al Shabaab or anyone else[1].

39. The respondent points out that this was not the only omission from her report of something that might expected to be included. Given that a key issue in this appeal was the question of whether the appellant would be able to secure employment on return to Mogadishu, it is significant that laws have recently been passed restricting reliance on foreign labour in a bid to encourage a higher level of employment of young Somalis who will often be seeking lower grade employment. Evidence of this, which has been provided by the respondent, is not mentioned by Ms Harper.

40. In her supplemental report, addressing questions posed by the respondent, Ms Harper further addresses three topics: the availability of alcohol in Somalia as well as treatment for alcoholism; the likely response to atheism and to those returning after having acquired a history of criminal offending. In so doing she explained that she relied mainly upon mainly unidentified but "tried and tested" sources who she has worked with in the past in her career of journalism. But, as was observed by Mr Jarvis, the assessment of the reliability of a source is a task for the Tribunal and not for a witness offering evidence to it and, if the sources are not revealed, and not even the notes kept of any conversations with those sources are produced, it is hard to see that very much weight can be afforded to views founded upon information provided by such sources.

41. An example of this is to be found in what Ms Harper says about the absence of treatment for alcoholics. Although on this occasion the source is identified, a named doctor working at a Mogadishu hospital, as we do not know the questions asked of that person, nor the answers actually provided, it is impossible to understand what is meant by the reported response that this particular hospital does not offer "specialised" treatment for alcoholics. We simply do not know whether that means that no treatment at all is available or that there is no specific clinic for alcohol related conditions.

42. In this section of her supplementary report Ms Harper cites a comment made to her by another unidentified journalist in Mogadishu that "if you are drunk and you walk in the streets, children will come out and stone you to death". Yet she points

[1] Note that in a BBC news report dated 1 November 2015 by Tomi Oladipo concerning a bomb attack by Al Shabaab carried out in Mogadishu on a hotel said to be popular with Somalia's members of Parliament, it was said that:

> "A website associated with al-Shabab said it was responsible for the attack, which it was said was carried out early in the morning to avoid civilian casualties. This is a clear change in strategy, says BBC World Service Africa editor Mary Harper…": http://www.bbc.co.uk/news/world-asia-34691602

Despite that, in a subsequent news report by Mary Harper herself, dated 7 November 2015, not only did she make no mention of this statement of intent by Al- Shabaab to avoid civilian casualties, but said instead:

> "Like many other insurgent groups, al-Shabab often conducts double suicide attacks, waiting for the emergency services and onlookers to gather at the scene before sending in another vehicle to ensure maximum casualties.": http://www.bbc.co.uk/news/world-africa-34745495

to not one single example of this ever having happened. In fact, her evidence that alcohol, although illegal, is available if one knows where to look and that young people are sometimes arrested by police for being drunk on the streets on Friday and Saturday nights when returning from parties and that there are areas of Mogadishu where it is known that alcoholics congregate to drink suggests that in fact people do not get stoned to death on the streets.

43. Dealing next with a question about the appellant's prospects of employment in Mogadishu, Ms Harper says:

> "There are few employment opportunities, and those that exist depend upon contacts, clan, family affiliation and marketable skills.
> …
> In my view it would be almost impossible for (the appellant) to find unskilled work in Mogadishu due to the tens of thousands of other people looking for similar employment, most of whom are long terms residents of the city with clan and family contacts…"

I will return to this issue below, when making an assessment of the appellant's prospects of securing a livelihood, but it can be observed that in reaching the conclusion she does, Ms Harper has no regard to the vocational qualifications the appellant has acquired, including City and Guilds certificates in wall and floor tiling and a qualification in information technology. Nor does she have regard to the evidence, discussed in *MOJ and Ors*, that returnees are said to be taking jobs at the expense of long term residents who have never been away, or the evidence that many of the unemployed youth of Mogadishu are simply not looking for work, being content to live idle lives, while being in receipt of support from remittances from abroad, food and other aid available and, in some cases, rental income from agricultural land that they do not wish to work themselves.

44. Addressing next the risks faced by the appellant as an atheist, she quoted unnamed journalists as saying that this would amount to "a death penalty". She provides one example of Al Shabaab having executed a man "for allegedly insulting the prophet". But, although this took place in April 2015, Miss Harper does not say that this was an incident that occurred not in Mogadishu but in Jamame in the Lower Juba region which is some distance away from Mogadishu and an area in which, unlike in the capital, Al Shabaab maintain a physical presence. Therefore, it is impossible to see how this can, properly, be relied upon as evidence of what might occur in Mogadishu.

45. As for the risk from the general community, Ms Harper says that if the appellant refused to pray or to go to the mosque:

> "… I believe people in Mogadishu would become very suspicious of him and possibly accuse him of being an atheist or non believer."

The difficulty with this is that, once again, it is an entirely speculative view unsupported by any evidential foundation. Mr Gilbert confirmed that nothing is disclosed by the evidence to indicate that residents of Mogadishu are under any

obligation to attend mosque. Indeed, there is a very significant Kenyan workforce present in Mogadishu and that country is a predominantly Christian one and so there will be many people who will not attend any mosque.

46. For all of these reasons, I conclude that I am able to attach little weight to Ms Harper's report as the evidence of an expert witness. Her report lacks the objectivity demanded and her review of the country information available is selective. Where she expresses opinions that conflict with current country guidance, she offers no basis upon which her own opinions should properly be accepted to prevail. Therefore, this evidence stands as the view of an experienced journalist with personal experience of the city from her regular visits. It is not to be disregarded, but considered in the round with all of the other evidence available and in the light of current country guidance.

Assessment of this appellant's position upon return to Mogadishu

47. In reaching a conclusion upon the question of whether the appellant will find himself upon return to Mogadishu in circumstances such as to fall below the threshold of Article 3 of the ECHR it is helpful to address the questions posed by the applicable country guidance, so far as they are relevant in this case. It is accepted that the appellant faces the prospect of being returned after an absence of 17 years; that he has no nuclear family or other close relatives in the city and that he is a member of a minority clan. Therefore an enquiry is required of all of the circumstances, including:

    a. his circumstances in Mogadishu before departure;
    b. the length of absence from Mogadishu;
    c. the clan associations he may be able to call upon in Mogadishu;
    d. access to financial resources;
    e. the prospects of him securing a livelihood, whether that be employment or self employment;
    f. the availability of remittances from abroad;
    g. his means of support during the time spent in the United Kingdom;
    h. why his ability to fund the journey to the West no longer enables an appellant to secure financial support on return.

    The country guidance reminds us that it will be for the appellant 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. The country guidance concludes that 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.

48. The circumstances of this appellant before he left Mogadishu have some significance for several reasons. First, his father was able to run his business in

Mogadishu and accumulate the capital that enabled him to acquire a valuable house with six bedrooms because the family had the patronage of a member of the dominant majority clan in the area who was sufficiently powerful and influential not just to secure all of that, until the civil war required them to leave, but also to facilitate the family's return to Mogadishu in 1996, a time when generally, members of minority clans were at grave risk in Mogadishu generally and in particular when encountering majority clan militias at checkpoints. The appellant has explained that because this man "was waiting for us" they were able to pass through the Mogadishu checkpoints without difficulty.

49. Next, having returned to Mogadishu in 1998 under the protection of this man, as their house was occupied by other majority can members, they were invited to stay at the home of their "patron" for several months. This is indicative of the level of support available and no explanation has been offered as to why this man would decline a request from the appellant for help on return, subject to what I say below about atheism and criminality.

50. Also, in this regard, it is notable that the country evidence relating to that time indicated that the homes of minority clan members were indeed simply taken by members of majority clans. That the family's "patron" should not just assist by ejecting the occupants from the house but by paying, in 1996, $40,000 for the house rather than simply taking it for himself, indicates the security of the family's position under this patronage.

51. The appellant's parents both chose to remain in Mogadishu after the appellant and his brother decided to move to Europe. This was despite the fact that their sons were able to make a comfortable journey to their European destinations by each paying agents $5,000. The parents retained the balance of the proceeds of the sale of the house and I do not accept that $30,000 would not have been sufficient to fund their own departure from Mogadishu should the conditions in which they were living have been unsatisfactory.

52. Similarly, we know that the appellant's mother died in 2013 and had remained in the same accommodation that the family had occupied since their house was sold in 1996. Nothing is offered to show that the appellant's mother suffered any real difficulty during this period. That demonstrates, as the appellant says that his mother was living in an IDP camp or in a refugee camp, that accommodation described as thus does not necessarily mean that its occupants suffer Article 3 level harm.

53. For these reasons, I am entirely satisfied that the appellant's circumstances in Mogadishu before his departure were not difficult such as to require him to leave to seek international protection. Rather, he and his brother left to seek to establish themselves in Europe to lead a different sort of life than did their parents.

54. The appellant now has no family remaining in Mogadishu to look to for assistance in re-establishing himself. He is a member of a minority clan and it is submitted on the appellant's behalf, based upon what was said in *MOJ & Ors* concerning the

ability of a minority clan to provide assistance, that he will not be able to look to his clan either for support. On the other hand, Mr Jarvis submits that the appellant's clan is such that the appellant would have resort to:

> "… a well established and pre-dominant Mogadishu community who have, in general, rebuilt their businesses in the aftermath of the initial period of the civil war."

He points out that in April 2014 a member of the Benadari was appointed as District Commissioner for Hamar Weyne district of Mogadishu. He submits this illustrates that the Benadari have established themselves as "significant players" both economically and politically and points to country evidence that there has been a significant return to Mogadishu of Benadiri people after the departure from the city of Al Shabaab. He draws attention to the following extract from the 2012 Danish report:

> "A local NGO in Mogadishu stated that many members of the Benadari community have returned to Hamar Weyne. Today there are many Benadari people living in Mogadishu and they are successful business people and some also are engaged or employed in the administration…. Today they are living well in Mogadishu and many have reopened shops or undertaken other business activities…"

55. This evidence indicates that, even if some minority clans have little to offer to those of its members looking for assistance, the Benadari, of which the appellant's clan is a sub-clan, is not in such a position. On the contrary, the economic enterprise of this clan is such that it has created businesses that will inevitably generate employment opportunities and it is not easy to see why this would not be to the appellant's advantage.

56. As for access to financial resources, there is no evidence to suggest that the appellant presently has access to any such. We simply do not know if there remains available any part of the proceeds of the sale of the family home, as we have no information as to whether the appellant's mother had expended that $30,000 in maintaining herself, even if it appears from what we have been told that her outgoings would not have been great. But it would be speculative to assume that the appellant would have access to any such funds upon return and so I proceed on the basis that he would not.

57. He would, though, be entitled to claim £750 under the respondent's Facilitated Return Scheme, should he chose to apply for it. As for remittances, it appears that the only possible source would be his brother in Birmingham but the appellant says that this brother has cut him off because of his atheism and that, in any event, that brother has himself limited resources. The appellant said in oral evidence that he has continued to maintain contact with his sister-in-law who has begun to understand his position. It seems to me that there must be a real possibility, should the urgent need arise, that this brother would reconsider his position and act as do most of the Somali diaspora and provide what help they can to relatives in Somalia. However, once again, I accept that the evidence indicates that the appellant cannot, at least for the time being, rely upon that source of support.

58. Before addressing the key question in this appeal, which is the prospects of the appellant securing a livelihood in Mogadishu by finding work, it is necessary to look at what has occurred while the appellant has been in the United Kingdom. Mr Gilbert submits that for much of the time the appellant has been in the United Kingdom he has been unemployed and homeless. Whilst it is true to say that there have been substantial periods during which the appellant has been without work or accommodation, that has been after his appeal rights have been exhausted and he had no lawful basis upon which to be in employment and was not in receipt of other financial support. Conversely, when he has been entitled to work he has found employment. He has worked at a BMW factory on Oxford for a seven month period and in a car tyre warehouse for 18 months. In addition, while serving his prison sentence the appellant has made good use of his time. In the appellant's bundle are copies of a number of certificates:

    a. City & Guilds Level 2 Diploma in Wall and Floor Tiling;
    b. City & Guilds Level 1 Award in Basic Construction Skills: Paint finishing skills and surface preparation skills;
    c. City & Guilds Level 1 award in Basic Construction Skills;
    d. Cleaning Professionals Skills Suite certificate awarded by the British Institute of Cleaning Science (BICSc);
    e. Licence to Practice, issued by BICSc
    f. OCR Functional` Skills in Mathematics at Entry 3;
    g. OCR Functional Skills in English at Level 3
    h. OCR Level 1 "International Diploma for IT Users";
    i. OCR Level 1 Award in IT User Skills;
    j. NCFE Level 1 Award in Mentoring'

    In addition to which the appellant said in oral evidence that he had completed 8 weeks of a 16 week bricklaying course, that being interrupted by a diagnosis of diabetes so that while being diagnosed and treated for that condition, and learning how to control his blood sugar levels, he had missed the end of that course.

59. All of this indicates that the appellant would be a person who, in seeking low skilled work in Mogadishu would have advantages over those without anything to show a prospective employer, particularly given his construction qualifications. The reasons offered as to why the appellant would have no prospect of securing work on return do not stand up to scrutiny.

60. There is no evidence that the appellant would be at risk on account of his asserted atheism. Despite an invitation to do so, Mr Gilbert has been unable to refer me to any evidence of compulsory or even encouraged attendance at mosque or even of disapproval of those who do not. Put shortly, it is hard to see why anyone would know, unless the appellant volunteered that information, which there is no reason for him to do.

61. Nor has it been established that there is any real risk of difficulty being experienced by the appellant on account of his conviction, in 2010, for offences of sexual assault. Leaving aside the fact that there is scant evidence of anyone ever having been

subjected to persecutory ill-treatment on return to Somalia on that account, it is notable that the appellant faces deportation for an offence disclosing no such characteristics as might offend social *mores*. It is notable also that there is no mention at all in the judge's sentencing remarks of the now 5 year old conviction for sexual assault and it has not been suggested that there were any press reports of that conviction. Therefore, it is not altogether easy to see how or why that information would now become known upon return to Somalia.

62. Ms Harper did cite one example of a man who was said to have been killed on return after having been deported on account of having committed a sexual offence. She said that a colleague in Mogadishu had told her that a "convicted paedophile deported from the US" had been murdered soon after he arrived in Mogadishu. But, as Mr Jarvis pointed out, we do not know when this is said to have occurred, the circumstances in which this happened, who was thought responsible or even the motive for the attack, although the context in which it is cited invited the inference that this was to do with the nature of the offence committed. Also, there is no news or other report of such an incident. For all these reasons, this evidence falls very significantly short of establishing that which is asserted.

63. As for the appellant's previous difficulties with alcohol, the risk alleged now in that regard is simply illusory. The appellant has completed an Alcohol Awareness course and has confirmed, specifically, that he will not drink alcohol in future. He has not consumed any alcohol for the last four years, while in prison, and that period of abstinence, reinforced by his completion of the Alcohol Awareness course and stated resolve to abstain in future, taken together with the fact that in Somalia use of alcohol is illegal and it is not easy to obtain, means that there is no real risk that this will become an issue in the future.

64. Drawing all of this together, I reach the following conclusions. The appellant does not face a real risk of being subjected to ill-treatment sufficiently serious to infringe Article 3 of the ECHR on account of any of the reasons asserted. In particular:

    a. There is no reason to suppose that the appellant's atheism would become known and, in any event, the evidence does not establish any real risk of persons in Mogadishu being subjected to ill-treatment on that account;

    b. While it may become known that the appellant has been removed to Mogadishu on account of a deportation order following conviction for a serous criminal offence, the evidence does not establish any real risk to returnees on such account. There is no reason why an earlier conviction for sexual assault would become known and the appellant has identified no reason to suppose anyone who would be able to do so would now wish to make that known and, in any event, the evidence simply does not establish that persons convicted of offences that might be thought to offend social *mores* do in fact face a real risk of Article 3 ill-treatment, even if that matter may have been left open by the Tribunal in *MOJ and Ors*;

c. There is no reason to suppose that the appellant would resort to alcohol upon return. In any event, the evidence does not support the asserted risk of ill-treatment to those in Somalia who do consume alcohol, even to excess;

d. The asserted fear of a revenge attack by family members of the victim of the assault carried out by this appellant for which he was sentenced to 6 years imprisonment is entirely speculative. I have been referred to no evidence of such revenge attacks in fact being carried out in the past in Mogadishu. There is no evidence of any threats have been made to or received by the appellant.

e. The appellant is equipped with skills and qualifications that will assist him in seeking work upon return to Mogadishu, particularly in the construction industry. As was made plain in *MOJ & Ors*, while it may assist a person seeing to find work to have the sponsorship of an established family network of majority clan, absence of that support was not a disqualification to access to work. This appellant has relevant skills and work experience in the United Kingdom and he has not shown that he has no prospect of securing a livelihood. Further, as I have said above, there is evidence of a vibrant Benadiri business community to which the appellant can also look in his search for a livelihood.

f. The appellant has no family accommodation in Mogadishu to return to but, as is evidenced by the experience of his own parents, resort to less formal accommodation does not necessarily mean living in conditions that fall below the Article 3 threshold. This appellant can apply for a resettlement grant and is well placed to secure work in the vibrant construction industry in Mogadishu today.

Summary of decision

1. For the reasons given in the error of law decision annexed to this decision, the First-tier Tribunal made an error of law and its decision has been set aside.

2. I substitute a fresh decision to dismiss the appeal.

3. I make an order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 that nothing is to be published that might lead to the identification of the appellant or any member of his family.

Signed

Date: 23 October 2015
Upper Tribunal Judge Southern

**ANNEX**

Error of Law Decision of Upper Tribunal Judge O'Connor

**Upper Tribunal**
**(Immigration and Asylum Chamber)**

**THE IMMIGRATION ACTS**

**Heard at Royal Courts of Justice**
**On 13 July 2015**

**Decision & Reasons Promulgated**

……

**Before**

**UPPER TRIBUNAL JUDGE O'CONNOR**

**Between**

**AAW**
**(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mr A Gilbert, instructed by Turpin & Miller LLP
For the Respondent: Mr C Avery, Senior Presenting Officer

**DECISION AND REASONS FOR SETTING ASIDE THE DETERMINATION OF THE FIRST-TIER TRIBUNAL**

Introduction

1. The appellant is a citizen of Somalia born on 1 January 1974. He entered the United Kingdom on 11 November 1998 and claimed asylum. That application was refused and an appeal against such refusal was subsequently dismissed. Thereafter the

appellant made a further asylum claim in April 2006, giving a false name and date of birth, but that application was subsequently refused on non-compliance grounds.

2. The appellant has a lengthy history of criminal offending in the United Kingdom. He was convicted of common assault in 2002, two sexual assaults and common assault in 2010, a breach of a community order in 2010 and for both failure to surrender and destroying/damaging property in 2011.

3. Most significantly, however, the appellant was convicted on 27 October 2011 of wounding with intent, and sentenced to a term of six years' imprisonment. This led the Secretary of State to make a decision to deport him pursuant to section 5(1) of the Immigration Act 1971. The First-tier Tribunal identifies such decision as having been made on 5 June 2014 – although on its face it is undated. On this same date a deportation order was signed in the appellant's name.

4. The appellant brought an appeal to the First-tier Tribunal. That appeal was heard by First-tier Tribunal Judge Chohan and Ms V S Street JP ("the Panel") on 11 March 2015 and dismissed on all grounds in a determination promulgated on 29 April 2015.

5. In its determination the Panel concluded that section 72(2) of the Nationality, Immigration and Asylum Act 2002 applied to this appellant and thus he was not entitled to deploy Refugee Convention grounds therein. The First-tier Tribunal also dismissed the appellant's appeal brought on Article 3 and Article 8 ECHR grounds.

6. The appellant appeals to the Upper Tribunal with the permission of First-tier Tribunal Judge Pooler, dated 27 May 2015. He brings challenge only to the Panel's decision made in relation to Article 3.

Submissions

7. The grounds on which such a challenge is brought can be summarised as follows: The Panel erred in either failing to take into account, or failing to provide adequate or any reasons for rejecting, the relevance of: (i) the fact that the appellant is an atheist; (ii) the appellant's history of alcoholism; (iii) the nature of the appellant's criminal offending and in particular his conviction for sexual assault; and, (iv) the length of the appellant's absence from the United Kingdom.

8. It is also submitted that the Panel failed to engage fully or properly with the evidence provided in relation to the prospect of the appellant obtaining employment in Mogadishu.

9. In response Mr Avery submitted that the Panel's determination is clear and adequate and that all of the matters identified above were fully taken into account. He asserted, in the alternative, that the evidential foundation said to provide support for the relevance of the aforementioned matters was so inadequate that any failure by the Panel to engage with them cannot have been material to its determination.

Discussion and Decision

10. Having carefully considered the Panel's determination, the evidence provided by the appellant, the evidence of the expert, Ms Harper - who provided evidence in the form of a report on the appellant's behalf - and the parties' submissions, I conclude for the reasons which follow that the Panel's determination does contain an error of law capable of affecting the outcome of the appeal such that it ought to be set aside.

11. It is prudent for me first to set out the core paragraphs of the Panel's determination upon which both parties sought to rely:

> "38. We cannot conclude definitively that upon return to Mogadishu the appellant would have support from his own clan. According to the appellant's account he has no family members in Mogadishu. However, the appellant is a resourceful individual. He came to the United Kingdom when he was 24 years of age. The United Kingdom, at that time, was an alien country to him and he has managed to survive here without the support of clan and family members. We note that the appellant has a brother in the United Kingdom but according to his account he is not on talking terms. We further note that the appellant has obtained certificates in alcohol awareness; mathematics; basic construction skills; cleaning professionals skills suite; awarded mentoring; a diploma in wall and floor tiling; an awarded functional skills qualification in English; and certificates in information technology.
>
> 39. The appellant originates from Mogadishu and therefore it is not a city that he is unfamiliar with. Upon return to Mogadishu he could put to use the skills and certificates he has obtained in the United Kingdom. We note that the expert report concludes that the appellant may well be at risk upon return due to his atheism, criminal convictions and length of stay in the United Kingdom. However, those conclusions do not fit in with the country guidance case of MOJ & Others. The situation in Mogadishu has significantly changed, certainly with the absence of Al Shabab. There is nothing to suggest that the appellant's past, upon return, would be disclosed to the authorities or any other organisation in Somalia. There is no real explanation, in view of the appellant's subjective fear, why, on at least two occasions he made an application for voluntary return to Somalia. In light of the case of MOJ & Others, we find that the appellant faces no real risk of serious harm or ill-treatment contrary to Article 3 of the ECHR."

12. Taking in turn the matters that Mr Gilbert submits the Panel either failed to take into account or failed to provide adequate reasons for rejecting the relevance of, I start with the appellant's claimed atheism.

13. The appellant gave clear evidence in his witness statement to the effect that he is an atheist. He also asserts that his atheism will become apparent upon return to Somalia because, for example, he will not be attending the mosque as others do.

14. Ms Harper produced 'expert evidence' on the appellant's behalf to the Panel. In relation to the appellant's atheism she stated as follows:

> "I believe that Al Shabaab would try to execute or assassinate [AAW] if it discovered he was an atheist. [AAW] would face immense prejudice and possible violence if other people in Mogadishu knew of his beliefs. Somalia has become increasingly religiously

> conservative since the collapse of effective central government in 1991, partly as a result of years of funding from Saudi Arabia for madrasas and mosques at a time when the rest of the world had largely abandoned the country to its own devices."

15. Whilst I accept Mr Avery's submission that Ms Harper's evidence was in large part not accepted in the country guidance decision in MOJ, it was not rejected in its entirety.

16. The Panel in the case rejected Ms Harper's evidence on the aforementioned issue on the basis that "*those conclusions do not fit in with the country guidance case of MOJ*".

17. This though is not correct. Nowhere in its decision in MOJ does the Upper Tribunal consider the potential risk to those who are atheists or even to those who are not of the Muslim religion. Whilst there are passages within MOJ which indicate that Al Shabaab does not target anyone in Mogadishu and, consequently, it can be inferred therefrom that they would not target someone for being an atheist as Ms Harper opines, the following is stated in paragraph 399 of its determination:

> "Absent some aspect of a person's profile making him of particular adverse interest to Al Shabaab or to the authorities as a possible supporter of Al Shabaab there is not a general risk for a civilian simply by being present in the city, of serious harm as a result of indiscriminate violence."

18. This conclusory paragraph leaves open the possibility that there may be a risk from Al Shabaab if a person's profile makes them of particular adverse interest to that organisation. Ms Harper evidence is not inconsistent with this. Given what is said in paragraph 399 of MOJ I conclude that it was not lawful for the Panel to dispose on this limb of the appellant's case on the basis that it did.

19. Moving on to the relevance of the appellant's previous offending. At paragraph 479 of its decision the Tribunal in MOJ said:

> "Mr Toal submitted that SSM [one of the appellants in MOJ] would face further difficulties precisely because he is being deported on account of having committed criminal offences in this country. There was not a clear consensus in the expert evidence about this matter but we are satisfied that, absent some aspect of the offending disclosing characteristics such as to offend core Somalis *mores* (which is not the case here), simple criminality on a returnee's part, even if it somehow came to be known about, would not cause anyone to act any differently towards him."

20. Ms Harper opined in the instant case that the appellant's criminal history would lead him to be at increased risk, ostracised and looked down upon in Mogadishu (which would also have an impact on his employability there) if such history, and in particular the convictions for committing sexual offences, were to become known. As to how this history would become known in Mogadishu Ms Harper provided evidence of significant communication lines between the Diaspora in the United Kingdom and persons in Mogadishu and opined that the appellant would be "unlikely" to be able to hide his history of criminality if her were to be returned.

21. On this issue it can be seen from paragraph 39 of the Panel's determination that it rejected the relevance of the appellant's criminality on the basis that (i) it "*does not fit*"

with the reasoning in the country guidance case of MOJ and (ii) because there was nothing to suggest that the appellant's past would be disclosed to the authorities, or any other organisation, in Somalia.

22. As to the former, once again it is clearly not the case that the evidence of Ms Harper, and the contentions made by the appellant, are inconsistent with the decision in MOJ – and in particular paragraph 479 thereof. As to the latter issue, the First-tier Tribunal provide no reasons for rejecting Ms Harper's evidence and opinion given in this regard.

23. In addition to the clear errors in the Panel's determination previously identified, there is yet a further difficulty therein relating to the how the Panel treated the appellant's resourcefulness and ability to *"survive"* in the UK. As set out above, in paragraph 38 of its determination the Panel observed that the appellant had *"managed to survive here without the support of clan and family members"* and, thereafter, it took this to be a relevant factor in its consideration of the ability of the appellant to survive and/or integrate upon return to Mogadishu.

24. I agree with Mr Gilbert that in doing so the Panel both failed to take into account a material matter, and failed to consider the level of the appellant's resourcefulness in its proper and full context – the appellant having been an alcoholic and homeless in the UK from 2003 to at least 2006, and possibility later. This is clearly a relevant factor in any consideration of the circumstances that the appellant might find himself in if returned to Mogadishu.

25. For all of the above reasons I set aside the decision of the First-tier Tribunal. The re-making of the decision on appeal is to be undertaken by the Upper Tribunal and is limited to Article 3 ECHR grounds

26. Mr Gilbert submitted that should the Panel's determination be set aside, then the re-making of the decision should be adjourned to be heard at a later date. That submission is difficult in light of the directions that were sent to the parties and, in particular, the indication therein that the initial hearing would be limited to determining whether there was an error of law in the First-tier Tribunal's determination, absent there being a need for further oral evidence to be given. However, although no additional witness statement has been provided in this regard, it is envisaged that such further evidence will be given by the appellant.

27. It would also be of great assistance to the Upper Tribunal if further country background evidence, including more detailed evidence from Ms Harper or another 'expert', could be provided by the parties in relation to the relevance of (i) the appellant's atheism (ii) his particular criminal history and (iii) his alcoholism, to the assessment of the circumstances that he will face upon his return to Mogadishu.

**Notice of Decision**

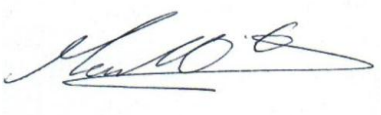
The First-tier Tribunal's determination is set aside. The remaking of the decision will be undertaken by the Upper Tribunal and will be limited to a consideration of whether the appellant's removal will lead to a breach of Article 3 ECHR.

## Directions

1. Any further evidence to be relied upon by the parties is to be filed with the Upper Tribunal (in duplicate) and served on the opposing party no later than 21 days before the date of the resumed hearing

2. The parties are to file with the Upper Tribunal (in duplicate) and serve on the opposing party written submissions of no more than 5 sides of A4 no later than 7 days prior to the date of the resumed hearing.

Signed:



Upper Tribunal Judge O'Connor
Date: 14 July 2015