**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: PA/03329/2016

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 12 May 2017** | **On 8 June 2017** |

**Before**

**UPPER TRIBUNAL JUDGE RIMINGTON**

**Between**

**[A A]**
**~~(ANONYMITY DIRECTION NOT MADE)~~**

Appellant

**and**

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

Respondent

**Representation:**
For the Appellant: Mr T Lay of Counsel instructed by TRP Solicitors
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant appeals to the Upper Tribunal, with permission, against the determination of First-tier Tribunal Judge Walters promulgated on 20 December 2016 dismissing the appellant's appeal against the Secretary of State's refusal of his protection claim on 21st March 2016.

Background history

2. The appellant is a national of Somalia born on [ ] 1966. He entered the United Kingdom on 22 January 1994 and claimed asylum at Heathrow on the basis that he was Somalian and that claim the Secretary of State refused. After some protracted litigation his asylum claim was again refused but the appellant was granted Exceptional Leave to Remain on 28 August 1997.

3. On 1 May 1995, shortly after his arrival, the appellant was convicted at Bristol Crown Court of rape and sentenced to 30 months' imprisonment. On 19 March 1999 the appellant committed an offence of assault occasioning actual bodily harm for which he was sentenced on 19 March 1999 to a hospital order at Southwark Crown Court.

4. On 15 March 2000 at Middlesex Guildhall Crown Court the appellant received a further sentence of five years' imprisonment varied to 42 months' imprisonment on appeal, having been convicted of unlawful wounding.

5. The Secretary of State proceeded to issue a notice of liability for deportation which was served on the appellant on 8 February 2008 because of his conviction for rape in 1995 and his conviction for wounding in 2000.

6. In June 2003 the appellant was convicted of failing to supply a specimen and was disqualified from driving and fined. In July 2003 he was convicted of criminal damage and given a 12 months conditional discharge.

7. The appellant appealed a notice of liability for deportation dated 8th February 2008 and a First-tier Tribunal Judge in a decision promulgated on 6 October 2008 (upheld on appeal) rejected the appellant's refugee claim that he would be persecuted as a minority clan member finding in fact that he was a majority clan member – Isaaq. The judge also noted the appellant suffered from mental health problems and HIV but considered that some treatment for HIV and mental illness was available in Somalia. Nonetheless it was found that his family life with his wife/partner a British citizen, (a relationship which is no longer extant), was such that his removal would breach his Article 8 rights even though they did not live together. It was found that the appellant's wife would face insurmountable obstacles in moving to Somalia. The judge also found that the appellant had apparently been rehabilitated.

8. The appellant was then granted discretionary leave on 2 March 2010 until 2 September 2010. On 12 October 2010 the appellant was served with notice of liability for deportation following his conviction on the same date for destroying or damaging property. He was convicted of affray and received a total of twelve months' imprisonment concurrent for both offences. During the course of the twelve months prison sentence imposed on 12 October 2010, the appellant was remanded to a psychiatric hospital but was arrested on the same date for threatening and intimidating behaviour against female nurses. The appellant's licence was

revoked and he was transferred to HMP Ranby on 14 January 2011 to complete his original sentence.

9. The appellant made an application for a further period of discretionary leave on 22 March 2011 but on 4 February 2013 a further notice of liability for deportation was issued whereupon the appellant applied for asylum on 11 December 2013.

10. Finally, on 21 April 2015 a decision to deport the appellant was made.

11. During the period of May to December 2015 the appellant breached his tagging curfew and failed to allow EMS Officers access to the appellant's property and failed to report.

12. In July 2015 the appellant was arrested on suspicion of affray and on 18 September the appellant was sectioned under the Mental Health Act and admitted to St. Anne's Hospital in London until he was discharged on 11 November 2015.

13. On 23 November 2015 a Section 72 of the Nationality, Immigration and Asylum Act 2002 notice was sent to the appellant's representatives and in the same month his Section 4 Support was discontinued as he failed to report to the Home Office and failed to be at his authorised address during curfew times and failed to use the funds available on his 'Azure' card.

14. Finally, on 21 March 2016 the Secretary of State made a decision refusing the appellant's protection and human rights claim which was in turn dismissed by Judge Walters. His decision was the stimulus for an application for permission to appeal by the appellant.

Permission to Appeal

15. The grounds of challenge were that the judge

(i) took an irrational approach to the Section 72 certification;

(ii) failed to apply rationally the country guidance case of **MOJ & Others (return to Mogadishu) CG [2014] UKUT 442 (IAC**;

(iii) failed to have regard to material evidence of the risk to someone with a mental illness of a specific type suffered by the appellant;

(iv) erred in treating of the Article 3 and Article 8 claims as coterminous

(v) failed to consider the appellant's case under Article 15(c) of the Qualification Directive.

(vi) Failed to apply the Ravichandran principle

16. First-tier Tribunal Judge Ford granted permission on the grounds (ii) to (vi) but refused to grant permission in relation to the judge's approach to the Section 72 certification.

The Hearing

*Ground (i) Section 72*

17. Permission to appeal on the Section 72 ground was renewed to the Upper Tribunal and apparently refused by Upper Tribunal Judge Freeman. That application was renewed before me at the oral hearing by Mr Lay. It was submitted that in the ten years preceding the date of the appeal the appellant had been convicted of only one offence of affray and had been living in the community for over four years without attracting another conviction. It was submitted that the judge's finding, that there was a real risk of the appellant stabbing someone, was insufficiently grounded and irrational. Admissions to hospital under Section 3 of the Mental Health Act 1983 to mental institutions were for the protection of the patient and the judge had not properly considered the evidence.

18. At the hearing before me, Mr Lay submitted that there was no consideration of Dr Lorenz' report by the First-tier Tribunal Judge. It was not that the appellant had taken himself outside the Convention but merely that he had undergone a mental health crisis.

19. Mr Jarvis resisted the arguments advanced in relation to the Section 72 ground. The statute, the Nationality, Immigration and Asylum Act 2002, was clear. Although it was argued that the appellant was violent because of his mental crisis, he was still a risk to the community. There was nothing in the papers to indicate that his personal culpability in committing offences was only a consequence of his mental health and the judge had not erred in his approach.

20. I am not persuaded that the first ground, renewed before me, is arguable in light of the decisions of Judge Ford and Freeman. Judge Walters at paragraph 50 of his determination, and at the outset of his decision, directed himself appropriately, clearly setting out Section 72 of the Nationality, Immigration and Asylum Act 2002. It is also clear from the statutory framework that the presumption that the person has been convicted of a particularly serious crime and constitutes a danger to the community derives from the basis of the sentence the appellant received. That is the premise from which it is important to start. The appellant had been sentenced to a period of imprisonment of at least two years albeit that such a sentence was some years previous. Nothing in Section 72 precludes the Secretary of State from relying on an elderly conviction. The judge noted that the presumption could be rebutted and took into account all the relevant evidence including the history of his more recent

and continuing offending and his mental health. The judge specifically stated at paragraph 91 that:

> "*91. Having considered all the medical evidence in relation to the Appellant on the question of whether he constitutes a danger to the community I find that there is a real risk of him committing a particularly serious crime, that is stabbing a member of the public*."

The judge proceeded:

> "*It was not disputed by Mr Lay that the Appellant has two convictions for particularly serious crimes, that is rape on 1 May 1995 and wounding on 15 March 2000*".

21. Having rehearsed the history of the appellant and the medical evidence, the judge specifically referred to the report of Dr Lorenz, did not accept that the appellant had rebutted the presumption. It was open to the judge to conclude that ***even if*** the appellant did experience mental illness and crises, the appellant remained a risk to the community and to conclude that, on the evidence, the presumption had not been displaced.

22. In my view the judge did not err in his conclusions, particularly in the light of the history of the appellant carrying knives. The judge did not misunderstand the law and this ground is not arguable.

23. I turn to the remaining grounds presented by Mr Lay.

*Ground (ii): Failure to rationally apply the country guidance in* ***MOJ***:

24. It was accepted that the judge was obliged to follow and apply the country guidance in **MOJ & Others (return to Mogadishu) CG [2014] UKUT 442 (IAC)**. It was contended, however, that the judge failed to have regard and integrate into his analysis the factors which the appellant had put forward which militated against him living in Mogadishu, that being his 22 years' absence from the city, the absence of his relatives and his severe and enduring mental health problems. It was accepted that country guidance stated there needed to be a careful assessment of the circumstances.

25. Mr Lay submitted that the evidence, regarding the appellant's mental health gave compelling reasons why the appellant would not be able to subsist in Mogadishu and he referred to the medical evidence which suggested the appellant's mental health would relapse. It was not sufficient to assume that there would be family remittances or that they would be a complete answer to the Article 3 claim. This was not a normal 'return' case and the question was not whether the appellant could be supported at some minimal level but whether his mental health profile would require special support.

26. Paragraph 127, in Mr Lay's submission, was insufficient in that regard as there was no analysis of why it was deemed to be possible or affordable for such events to take place in Mogadishu at the behest of the family in the UK.

*Ground (iii): failure to have regard to material expert evidence*:

27. The appellant had put forward an international protection claim on the basis of his individual symptoms of the enduring and serious mental health problems with which he had been affected for many years; there was the likelihood on the background evidence that he would be ostracised and worse, enchained. The judge did not have sufficient regard to the expert report of Dr Markus Hoehne dated 28 October 2016 and did not sufficiently analyse the evidence from Dr Hoehne which was identified in the written grounds of appeal specifically that:

> *"(i) Mental health personnel in Somalia are ill qualified and poorly trained [AB/40 para 27-28]; equipment is outdated; and psychotropic medication is irregularly unavailable, uncontrolled and maladministered. [AB/40 para 29];*
>
> *(ii) None of the medication of which AA is in receipt appears on a list of the 23 psychotropic drugs said to be available in Somalia [AB/41 para 33-34];*
>
> *(iii) The only modest assistance programmes for mental health in Somalia exist in Somaliland; 'there is no stable existing assistance for mental health institutions in southern Somalia including Mogadishu [AB/40 para 30];*
>
> *(iv) A person showing aggressive behaviour, linked to their mental health, is likely to be imprisoned where the most likely treatment is chaining [AB/42 para 36];*
>
> *(v) Admission to hospital for those suffering with mental illness routinely comprises exposure to inhumane conditions including chaining. [AB/42 para 36];*
>
> *(vi) Somali nationals who are mentally ill-treatment and not hospitalised are treated with either traditional/herbal medicine or subject to various forms of exorcism and, invariably, chained. [AB/41 para 32]."*

28. The judge was obliged to have regard to these arguments in evaluating whether the appellant faced a real risk of harm on return owing to the possible infliction of enchainment and the response of the remittances did not "do the job". The erred in his failure to address the evidence.

*Ground (iv): The judge erred in his treatment of the Article 3 and Article 8 claims as being coterminous when they were in fact distinct*

29. Article 3 entailed a consideration of whether there would be a real risk of serious harm on return whilst in Article 8 the question was whether on the balance of probabilities deportation would be disproportionate in all the circumstances. Paragraphs 116-122 of the decision did not represent a rational approach to the proportionality assessment or a comprehensive analysis of the evidence which included the appellant's mental health, his HIV status, and the secondary mental health support structures available in Mogadishu and the loss of family members and ultimately whether those factors provided very compelling circumstances. There was insufficient reasoning for the weight attached to the factors. The judge was entitled to give particular weight to the purported risk of re-offending but that did not remove the obligation to weigh appropriately all other factors potentially in the appellant's favour. The appellant, Mr Lay submitted, had two decades of lawful residence and the judge had not taken that or all relevant factors into account.

30. There must be a wide-ranging consideration of the appellant's circumstances but there was no test of exceptionality and **Huang v SSHD [2007] UKHL 11** remained good law in the sense that the Rules did not strike a comprehensive balance.

*Ground (v) failed to consider the appellant's case under Article 15(c) of the Qualification Directive.*

31. This was set out in the written grounds.

*Ground (vi): Failed to apply the Ravichandran principle*

32. This ground related to the principle enshrined in **Ravichandran v Secretary of State for the Home Department [1996] Imm AR 97** that human rights claims should be determined in the light of the circumstances as they stood at the date of the hearing. At that date the judge had recognised the appellant was in hospital having been sectioned and his current mental health was one which the Tribunal should integrate into an evaluation of the hypothetical risk to him of being returned. There was speculation that the appellant would be stable when he was returned and it may be the case that he would not be removed until he was fit to fly, and this could not be pleaded, but the role of the judge was nonetheless to assess the circumstances as they pertained at the date of the hearing. The judge had not given adequate regard to the precarious mental health and physical health of the appellant.

Mr Jarvis' response

33. In response to the various submissions, Mr Jarvis submitted that the case was not advanced on the basis of **N v UK** [2005] UKHL 31 or **D v UK** (1997) 24 EHRR and he remarked that **GS (India) v Secretary of State [2015] EWCA Civ 40** was still binding law. The appellant could not succeed on health grounds and there was no error in the judge's assessment. The judge clearly found the possibility of remittances being

sent at paragraphs 109 and 110 and that was open to him. In line with **TK (Burundi)** v SSHD [2009] EWCA Civ 40 the burden was on the appellant to show that if he returned he would be at serious risk of serious harm. There was a distinct lack of oral evidence from his family members in the UK such that the judge was able to find the appellant had not made out that he would be without adequate financial resources on return.

34. Secondly, the judge did consider the circumstances of the appellant and the medical care available on return. It was not contested that there was a hospital clinic in existence in Mogadishu and although there was some evidence of ostracism and chaining there was evidence of hospital care which did not entail the use of such chaining. The judge had taken into account at paragraph 127 the consequences of family support which he was entitled to do and there was nothing unlawful in the judge's finding in that paragraph. The judge was not saying that there was family there but there was nothing to stop the family from making arrangements for the appellant on his return.

35. I was referred to the judgment in **Said v Secretary of State for the Home Department [2016] EWCA Civ 422** where it was emphasised that the courts had drawn a proper distinction between humanitarian protection and Article 3 and recognised the need for the individual circumstances of the person to be considered. Paragraph 31 stated:

> "*An appeal to Article 3 which suggests that the person concerned would face impoverished conditions of living on removal to Somalia should, as the Strasbourg Court indicated in Sufi and Elmi at para 282, be viewed by reference to the test in the N case. Impoverished conditions which were the direct result of violent activities may be viewed differently as would cases where the risk suggested is of direct violence itself*."

That was not the case here. The appellant could not rely on destitution and as indicated in **Said**, the correct reading of **MOJ** could be discerned at paragraph 42 of that decision. The grounds set out by Mr Lay were really a discussion of destitution which was specifically addressed in **Said**.

36. The First-tier Tribunal judge did look at all of the evidence including chaining and ostracism and the possibility of arrest or chaining was not the same as whether it was reasonably likely which is the applicable standard of proof. The judge dealt with the Hoehne Report at paragraphs 104 to 106.

37. The judge was clearly aware that the appellant was seriously ill. The judge had laid out the serious mental health problems of the appellant and dealt with the suicide risk.

38. In relation to the Article 8 factors the test was whether there were very compelling circumstances which would outweigh the public interest in deportation. I was referred to **NA (Pakistan)** v SSHD [2016] EWCA Civ

662 which confirmed that the approach should not just be a sideline to the relevant 399 findings but the judge had already made relevant findings on the assistance and the availability of medical care and had dealt with the substance of the claim. The appellant's integration in any society was going to be limited wherever he was, bearing in mind his mental health. The judge applied the correct legal schemes and made proper findings regarding the evidence.

## Conclusions

*Ground (i)*

39. I have set out above my reasons for rejecting the challenge to the findings by the First-tier Tribunal Judge in relation to the Section 72 certification. The judge clearly set out the history of the appellant's offending. The appellant has had a history of convictions for violent offences involving rape and wounding, albeit that these date from 1995 and 2000. He has also had subsequent convictions for affray for which he received a nine month sentence and was discharged from HMP Leicester in September 2012. Judge Walters also set out the more recent offending.

40. It was rationally open to the judge to conclude that the appellant had not rebutted the presumption. As the judge found the appellant through his offending constitutes a continuing danger to the community. That is axiomatic to the decision and to be weighed into the factors in relation to the public interest. As Mr Jarvis submitted there was no evidence that his offending was solely as a result of his mental health difficulties and it is clear as the judge recorded that there had already been extensive mental health treatment afforded to the appellant and the appellant experienced periods of lucidity such that he was for example able to marry and live independently of his family in the UK.

*Ground (ii)*

41. In response to ground (ii), that the judge failed to have regard to the country guidance, I was referred to the country guidance head note in paragraphs (vii) to (ix) but I record the whole of the head note for convenience:

> *(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.*

42. Evidently each case is fact specific and the various and particular circumstances of the appellant need to be taken into account. It is not

evident from the determination of Judge Walters that he treated this as a "normal return case". I refer to the head note cited above (ix) for the key factors which should be taken into account together with other relevant evidence.

43. A careful reading of the decision reveals that the judge did indeed take them into account. Most importantly, there is no doubt that the judge paid careful attention to appellant's mental health condition, and indeed set out the reports and addressed them in detail in relation to the appellant's health between paragraphs 54 and 91 of the determination. The judge recorded the history of the appellant's mental illness as described by Dr Kloocke in a report dated 8 November 2013. This report from Dr Kloocke, as recorded at paragraph 58, referred in turn to a report from a consultant psychiatrist dated 6 May 2011 which states:

> "*That it has proved impossible to effectively manage the appellant's condition in the community or mitigate existing risks to self or others. The appellant has been admitted to a mental hospital on many occasions in Leicester since 2005. He had a history of carrying knives and offensive weapons. He reported that the appellant then lived in a flat in Leicester but in spite of having no recourse to public funds due to his immigration status it was unclear how he funded his accommodation*".

At paragraph 59:

> "*Dr Kloocke commented on a report by a consultant psychiatrist at HMP Ranby on 3 June 2011 which stated that there was a considerable risk of escalation of violence to others*."

At paragraph 62:

> "*62. Dr Kloocke reports that there was an extended home treatment team intervention lasting from October 2012 until March 2013 and during that period a diagnosis of paranoid schizophrenia was made. Dr Kloocke reports on the Appellant's drug and alcohol history and that the Appellant stated that he started to drink alcohol at about age 16 and has begun drinking excessively since he moved to the UK. He has said he consumes between 60 and 80 units between a Friday and a Sunday. There are reports of aggressive and violent behaviour under the influence of alcohol.*
>
> *63. The Appellant used khat for several months in 1998 and then intermittently used cannabis for a period of three years*."

44. The judge engaged in an extensive assessment of the evidence including the references above and noted at paragraph 90 that although the medical records did not state the precise number of hospital admissions the general picture was that he was admitted on average twice a year with

the exception of a period between 2012 and 2015. The judge confirmed that he was satisfied that the majority of those admissions had been made under Section 3 of the Mental Health Act (it is clear from the recording of Section 3 of the Mental Health Act 1983 that it is not just for the health and safety of a patient but also for protection of others that someone may be detained under this Section). The judge clearly addressed his mind to the factors mentioned in the **GS & EO (Article 3 – health cases) India [2012] UKUT 00397** and as Mr Jarvis pointed out this case was not advanced on the basis of health grounds alone.

45. The judge was clearly aware that the appellant had lived in Mogadishu as an adult until he was nearly 30 years old and could speak Somali and indeed took cognisance of the fact that the appellant was a member of a majority clan. The judge recorded that a previous asylum clam had been rejected before the Tribunal. The judge was clear that the appellant had been in the UK for 22 years and further addressed and assessed the support that he would be expected to receive on return.

46. It was for the appellant to put forward evidence in relation to his inability to access support and as pointed out by Mr Jarvis the family did not attend and indeed there was no up to date evidence from his family or friends. The judge cannot be criticised for his treatment of the appellant's relationship with his family. He clearly recorded that the appellant does not live with any of them.

47. As set out in **Said** destitution is not sufficient save in extreme circumstances to reach the threshold required for Article 3 protection and it is clear to me that the judge did address the evidence.

48. I find there is no failure to rationally apply the country guidance in **MOJ**. The judge made a finding at paragraph 110 that it is clear in Somali society families are regarded as being primarily responsible for the care of family members who are ill-treatment and it was illogical but not irrational to find that it could be reasonably expected the appellant's family members in the UK would support him.

*Ground (iii)*

49. In relation to ground (iii), on an overall reading I cannot agree that the judge failed to assess adequately the mental health evidence including that from Dr Hoehne or failed to have regard to material expert evidence. It is a matter for the judge as to the weight he places on that evidence. The determination clearly references the expert report by Dr Hoehne at paragraph 105 which records that

"it states that there is no free medical care, but some hospitals get support from the Somali diaspora. On average a hospital has two nurses and two doctors".

Further at paragraph 106 the judge recorded that Dr Hoehne confirmed that psychotropic drugs are available in Somalia although the supply was not guaranteed, nonetheless medical care and drugs available in Mogadishu. The challenge in relation to the factoring in of the expert evidence in this regard is not borne out by a careful reading of the determination.

50. The judge made careful and specific assessments of the reports on the appellant's mental health throughout the decision and specifically between paragraph 97 and 111, not least the report from Professor David Curtis dated 26 May 2015 noting that the appellant had a diagnosis of paranoid schizophrenia and that if he was not in receipt of antipsychotic medication and could not access healthcare professionals then his schizophrenia would deteriorate and he would become floridly psychotic. The judge also noted that the reports identified that there was a significant possibility that he would fail to take his medication properly.

51. The judge also painted into the picture the reports of Dr Stefan Lorenz such that if the appellant would be threatened with removal he would become more stressed and more likely to act in a way to harm himself and that the appellant had responded well to ARV treatment for his HIV.

52. Having comprehensively assessed the reports on the appellant's mental health the judge turned to assess the medical facilities. The decision at paragraph 100 that there were three mental health centres in Mogadishu to where the appellant would be returned and that the appellant was not a child that would not receive discriminatory denial of medical treatment. He also noted that there was no absence of resources in Mogadishu because of the civil war.

53. The judge was fully aware of the WHO article which stated that there was a practice in Somalia of detaining mentally ill persons in chains but also noted that the Habib Hospital in Mogadishu did not follow this practice. There was inconclusive evidence therefore and only generalised evidence in relation to this practice. The judge made a finding which was open to him that the appellant was not reasonably likely to be exposed to this. Mr Lay considered that this was a matter of speculation which the judge was not entitled to make but rather it was an assessment and weighing of the evidence of Dr Hoehne, which as can be seen from the decision, was comprehensively factored into the analysis. I find the conclusions were open to the judge.

54. The judge clearly addressed the issue of the chaining but noted that the appellant at paragraph 109 was in fact a member of the majority clan on return to Mogadishu which would afford him some protection and of the improvement in the conditions in Mogadishu and that not all hospitals adopted such practices.

55. Specifically the judge took account of the fact that the appellant had family in the UK who could be expected to financially support him on his

return there. I find it was open to the judge to conclude that the appellant would be returned with some drugs which is the practice of the NHS and the finding at paragraph 110 that it could be reasonably expected that the appellant's family members in the UK would send regular remittances to him in Somalia, which would further afford protection despite Dr Hoehne's bleak outlook. The judge noted that the medical evidence was such that the appellant himself stopped complying which his medication in August 2016 and started drinking again (see paragraph 80). There was therefore no confirmation that the appellant would experience durable medical treatment even if in the UK.

*Ground (iv)*

56. In relation to ground (iv) I do not accept the argument that the judge treated Articles 3 and 8 as being coterminous. It is quite clear that the judge made a separate finding in relation to Article 3 at paragraph 111 and many of the factors and the evidence relevant in this appeal were material to both the Article 3 and the Article 8 considerations. As Mr Jarvis pointed out, the case was not put on the basis of **N** or **D** and **GS (India) v Secretary of State** [2015] EWCA Civ 40 remains good law. Foreign nationals may be removed from the UK even where their lives will be drastically shortened to due lack of health care in their own states.

57. The judge clearly set out the fact that the appellant had no family life to speak of with his ex-partner who did not attend to give evidence. He did take into account the appellant's ex-partner's witness statement dated 4 February 2016 and the judge specifically identified that he considered the appellant's HIV status and mental health within Article 8.

58. Notably the judge applied the exceptions in relation to paragraph 399A of the Immigration Rules and although Mr Lay made criticism of the judge's failure to consider his lawful residence that is not substantiated. The judge was aware of the length of time the appellant had been in the UK but made crystal clear he did not accept that the appellant was either socially or culturally integrated into the UK. At paragraph 117 the judge did not accept that the appellant had been lawfully resident in the UK for most of his life and found that his only periods of leave had been approximately 1994 to 2001 and for six months in 2010. Indeed a considerable portion of his time between 1994 and 2001 had been spent in prison.

59. Of relevance is that the judge found that the appellant was 28 years old when he arrived in the UK and is now 50. More than half his life had clearly been spent in Somalia and the appellant spoke Somali. The judge was candid in his finding that the appellant would face obstacles on his return but with the help of regular remittances from his family those obstacles could be overcome. There was much criticism made of the paragraph 127 which I set out in full for consideration:

> *"127. In the present case the Appellant would not suffer any ill-treatment by the state on return to Somalia. As previously stated, with financial support from his family, the Appellant need not be destitute nor find himself in a position where he would be enchained. No doubt he would be supplied by the NHS with a limited amount of ARVs and psychotropic drugs. If his family in the U.K. is properly notified, no doubt it would be possible for them to make private arrangements for him to be met at the airport and possibly be admitted if necessary to the mental health hospital in Mogadishu*."

60. I find it was open to the judge to consider that private arrangements for the appellant could be made for him to be met at the airport and admitted if necessary to the mental health hospital in Mogadishu. Mr Lay considered that this did not answer the extensive evidence in relation to the possibility that the appellant would be chained and mistreated on return but I found that the judge had adopted a lawful and rational approach to the medical evidence and facilities, considered the various and relevant factors and considered overall that the appellant had not shown that there was a real risk bearing in mind he had taken into account the expert and country evidence in relation to the hospitals in Somalia and the treatment of the medically ill that the appellant would be so treated.

61. It is correct that at paragraph 128 the judge slips into a reference of Article 3 threshold being particularly high in relation to inhuman treatment but nonetheless overall the judge had considered the relevance of the mental health treatment in the factors considered in Article 8 in a way which was open to him. There was wide-ranging consideration of the appellant's circumstances in line with **HA (Iraq) [2016] UKSC 60** and clearly the judge did not accept that very compelling reasons were shown following his rejection of the exceptions under the Immigration Rules. Nowhere is the test of exceptionality applied and it is quite clear at paragraph 122 that the judge considered that the factors in relation to the appellant did not outweigh the most important fact that the appellant's presence, as a foreign national, in the United Kingdom poses and continues to pose a real risk and danger to the members of the public.

*Ground (v)*

62. I am not persuaded that there was any material failure to consider the appellant's case in relation to Article 15(c)**.** Humanitarian protection is excluded, owing to the finding that the judge's findings on the Section 72 certificate and he addresses this at [94].

63. Even if this were not the case, the appellant does not reach the threshold which is still extant in relation to medical cases, that being established in **N and D** and although there was a distinct criticism of the judge's approach, in the light of his findings of the possibility of mental health treatment in Mogadishu and the availability of drugs and the possibility of financial support from his family and being a member of a majority clan

although he would face undeniable hardships on return, did not reach the high level necessary for him to succeed on asylum grounds or in relation to Article 3. As stated destitution per se is insufficient to found a claim under Article 3 and as confirmed in **Said** and **MOJ** at paragraph [407] generally speaking an ordinary person 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) or Article 3. It was confirmed that there has been durable change in Mogadishu since the withdrawal of Al-Shabab and there has been a cessation in the confrontational warfare within the city. As noted in MOJ 'the present level of casualties does not amount to a sufficient risk to ordinary civilians such as to represent an Article 15(c) risk. Against this background and the detailed findings in respect of the asylum and Article 3 claim there can be no material error of law.

*Ground (vi)*

64. Finally, in relation to the last ground, there was criticism that the judge had not taken into account the fact that the appellant was ill as at the date of the hearing. It was quite obvious that the judge was aware that the appellant was not present at the hearing because he had indeed been sectioned and he had referred to the report of Dr Stefan Lorenz dated 20 October 2016 which confirmed that the appellant had been admitted on 24 September 2016 after he threatened to kill someone who lived in the same house as him with a knife two days ago.

65. There is no doubt that the judge had taken cognisance of the fact that the appellant was presently admitted and indeed refers to that at paragraph 88 of the determination.

66. On a careful reading of the decision as a whole I find that the judge has addressed all the relevant evidence, expert and otherwise, in relation to this appeal and made findings which were open to him.

67. There is no error of law in this decision. The judge clearly considered grounds of appeal, that were open to the appellant, finding that the level of severity necessary for a breach of Article 3 was not reached and nor indeed were there compelling circumstances such that the decision to remove him was disproportionate in view of the public interest.

## Notice of Decision

The First-tier Tribunal made no error of law and the decision shall stand.

Signed Helen Rimington Date 6th June 2017
Upper Tribunal Judge Rimington