

1114191 [2012] RRTA 443 (22 May 2012)

DECISION RECORD

RRT CASE NUMBER: 1114191

DIAC REFERENCE(S): CLF2010/61637, CLF2010/136343 &
CLF2011/210882

COUNTRY OF REFERENCE: Somalia

TRIBUNAL MEMBER: Giles Short

DATE: 22 May 2012

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies paragraph 36(2)(a) of the Migration Act.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is a review of a decision made by a delegate of the Minister for Immigration and Citizenship on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] December 2011 refusing an application by the applicant for a Protection (Class XA) visa. The applicant was notified of the decision under cover of a letter dated [December] 2011 and the application for review was lodged with the Tribunal on [December] 2011. I am satisfied that the Tribunal has jurisdiction to review the decision.
2. The applicant is a citizen of Somalia. She arrived in Australia in March 2010 and she applied for a Protection (Class XA) visa [in] October 2010.

RELEVANT LAW

3. In accordance with section 65 of the *Migration Act 1958* (the Act), the Minister may only grant a visa if the Minister is satisfied that the criteria prescribed for that visa by the Act and the Migration Regulations 1994 (the Regulations) have been satisfied. The criteria for the grant of a Protection (Class XA) visa are set out in section 36 of the Act and Part 866 of Schedule 2 to the Regulations. Subsection 36(2) of the Act provides that:

‘(2) A criterion for a protection visa is that the applicant for the visa is:

- (a) a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or
- (aa) a non citizen in Australia (other than a non citizen mentioned in paragraph (a)) to whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non citizen being removed from Australia to a receiving country, there is a real risk that the non citizen will suffer significant harm; or
- (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa; or
- (c) a non citizen in Australia who is a member of the same family unit as a non citizen who:
 - (i) is mentioned in paragraph (aa); and
 - (ii) holds a protection visa.’

Refugee criterion

4. Subsection 5(1) of the Act defines the ‘Refugees Convention’ for the purposes of the Act as ‘the Convention relating to the Status of Refugees done at Geneva on 28 July 1951’ and the ‘Refugees Protocol’ as ‘the Protocol relating to the Status of Refugees done at New York on

31 January 1967' Australia is a party to the Convention and the Protocol and therefore generally speaking has protection obligations to persons defined as refugees for the purposes of those international instruments.

5. Article 1A(2) of the Convention as amended by the Protocol relevantly defines a 'refugee' as a person who:

'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.'
6. The time at which this definition must be satisfied is the date of the decision on the application: *Minister for Immigration and Ethnic Affairs v Singh* (1997) 72 FCR 288.
7. The definition contains four key elements. First, the applicant must be outside his or her country of nationality. Secondly, the applicant must fear 'persecution'. Subsection 91R(1) of the Act states that, in order to come within the definition in Article 1A(2), the persecution which a person fears must involve 'serious harm' to the person and 'systematic and discriminatory conduct'. Subsection 91R(2) states that 'serious harm' includes a reference to any of the following:
 - (a) a threat to the person's life or liberty;
 - (b) significant physical harassment of the person;
 - (c) significant physical ill-treatment of the person;
 - (d) significant economic hardship that threatens the person's capacity to subsist;
 - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
 - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
8. In requiring that 'persecution' must involve 'systematic and discriminatory conduct' subsection 91R(1) reflects observations made by the Australian courts to the effect that the notion of persecution involves selective harassment of a person as an individual or as a member of a group subjected to such harassment (*Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 per Mason CJ at 388, McHugh J at 429). Justice McHugh went on to observe in *Chan*, at 430, that it was not a necessary element of the concept of 'persecution' that an individual be the victim of a series of acts:

'A single act of oppression may suffice. As long as the person is threatened with harm and that harm can be seen as part of a course of systematic conduct directed for a Convention reason against that person as an individual or as a member of a class, he or she is "being persecuted" for the purposes of the Convention.'
9. 'Systematic conduct' is used in this context not in the sense of methodical or organised conduct but rather in the sense of conduct that is not random but deliberate, premeditated or intentional, such that it can be described as selective harassment which discriminates against the person concerned for a Convention reason: see *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 at [89] - [100] per McHugh J

(dissenting on other grounds). The Australian courts have also observed that, in order to constitute ‘persecution’ for the purposes of the Convention, the threat of harm to a person:

‘need not be the product of any policy of the government of the person’s country of nationality. It may be enough, depending on the circumstances, that the government has failed or is unable to protect the person in question from persecution’ (per McHugh J in *Chan* at 430; see also *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 per Brennan CJ at 233, McHugh J at 258)

10. Thirdly, the applicant must fear persecution ‘for reasons of race, religion, nationality, membership of a particular social group or political opinion’ Subsection 91R(1) of the Act provides that Article 1A(2) does not apply in relation to persecution for one or more of the reasons mentioned in that Article unless ‘that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution’. It should be remembered, however, that, as the Australian courts have observed, persons may be persecuted for attributes they are perceived to have or opinions or beliefs they are perceived to hold, irrespective of whether they actually possess those attributes or hold those opinions or beliefs: see *Chan* per Mason CJ at 390, Gaudron J at 416, McHugh J at 433; *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 570-571 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ.
11. Fourthly, the applicant must have a ‘well-founded’ fear of persecution for one of the Convention reasons. Dawson J said in *Chan* at 396 that this element contains both a subjective and an objective requirement:

‘There must be a state of mind - fear of being persecuted - and a basis - well-founded - for that fear. Whilst there must be fear of being persecuted, it must not all be in the mind; there must be a sufficient foundation for that fear.’
12. A fear will be ‘well-founded’ if there is a ‘real chance’ that the person will be persecuted for one of the Convention reasons if he or she returns to his or her country of nationality: *Chan* per Mason CJ at 389, Dawson J at 398, Toohey J at 407, McHugh J at 429. A fear will be ‘well-founded’ in this sense even though the possibility of the persecution occurring is well below 50 per cent but:

‘no fear can be well-founded for the purpose of the Convention unless the evidence indicates a real ground for believing that the applicant for refugee status is at risk of persecution. A fear of persecution is not well-founded if it is merely assumed or if it is mere speculation.’ (see *Guo*, referred to above, at 572 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ)

Complementary protection criterion

13. An applicant for a protection visa who does not meet the refugee criterion in paragraph 36(2)(a) of the Act may nevertheless meet the complementary protection criterion in paragraph 36(2)(aa) of the Act, set out above. ‘Significant harm’ for the purposes of that definition is exhaustively defined in subsection 36(2A) of the Act: see subsection 5(1) of the Act. A person will suffer ‘significant harm’ if they will be arbitrarily deprived of their life, if the death penalty will be carried out on them or if they will be subjected to ‘torture’ or to ‘cruel or inhuman treatment or punishment’ or to ‘degrading treatment or punishment’. The expressions ‘torture’, ‘cruel or inhuman treatment or punishment’ and ‘degrading treatment or punishment’ are further defined in subsection 5(1) of the Act.

CLAIMS AND EVIDENCE

14. The Tribunal has before it the Department's files CLF2010/61637, CLF2010/136343 and CLF2011/210882 relating to the applicant. The applicant appeared before the Tribunal [in] May 2012 to give evidence and present arguments. The Tribunal was assisted by an interpreter in the Somali and English languages. The applicant was unrepresented.

The applicant's previous application for a protection visa

15. An application for a protection visa was originally lodged for the applicant [in] May 2010. In that application the applicant said that she belonged to [Clan 1]. She said that she had left Somalia because she had been afraid for her life and there was a civil war. She said that a family friend had offered her the ticket to leave. She said that she feared that she would be killed if she went back to Somalia and she said that there were groups there who were against women who did not cover their faces.
16. The applicant said that there was no government, no law and order and no protection in Somalia. Armed groups were raping, killing and kidnapping people and the Transitional Federal Government (TFG) could not protect themselves, let alone anyone else. She said that her family had been living in the countryside and there had been limited water and food because the militias had taken all the food that had been intended for the displaced people.
17. [In] May 2010 the Department received a typed letter, purporting to be from the applicant but not signed, stating that she had decided not to continue with her application and to go back home to Somalia when her current visa expired. At some time before [June] 2010 the Department received a letter from the applicant's husband saying that the applicant had left him [in] March [sic] 2010 and that he had reported her to the police as missing. He said that he 'would like to inform the immigration that from today I am not responsible for her' and that he felt that she had tricked him and that all she had wanted had been to come to Australia.
18. Since the letter withdrawing the applicant's application was unsigned, the Department attempted unsuccessfully to contact her by telephone and then wrote to her at the address she had given in her application (her husband's family's address). They received in response a copy of the same letter with the applicant's first name printed on it in capitals. Further attempts were made to contact the applicant without success. An officer of the Department spoke to the applicant's husband [in] July 2010 and he said that he and his brother had helped the applicant to complete her application for a protection visa but that she had since left him. He said that she had told him that she was going to [City 6] but he did not have her current address.

The applicant's current application for a protection visa

19. In her current application for a protection visa and in an accompanying statement the applicant said that she was aged in her [age deleted: s.431(2)]. She said that she had been born in [Town 2], [Somalia]. She said that her mother had died when she had been [age deleted: s.431(2)]. She said that her father had been a soldier but that he had lost his work in the civil war in 1991 and had had no income since. She said that she had [four siblings] and that in the household only her [brother-in-law] had a job, driving a lorry.

20. In her statement the applicant said that she had been assisted by an Arabic organisation to go to school from the age of [ages deleted: s.431(2)] although in her application she said in answer to question 36 on Part C of the application form that she had only attended school for eight years, from 1998 until 2006. She said that she had gone to [Country 3] in December 2006 to find work and to help support her family financially. She said that she had [worked] as a housemaid from January to September 2007.
21. The applicant said that when she had been in [Country 3] for three months someone had stolen her passport out of her bag. She said that she had been afraid that she would be in trouble with the authorities so she had decided to leave. She said that while she had been there she had met her future mother-in-law, a Somali woman who had told her that she was living in [Country 4] with her family. The applicant said that she had returned to her home in Somalia in September 2007.
22. The applicant said that her marriage had been arranged at the end of 2007 between her father and her husband's uncle who had lived in the same town. She said that the *Nikah* had taken place [in] February 2008 although her [husband] had not been present. She said that he had been living in [Country 4] but that he and his family had moved to [City 5] soon after the *Nikah*. The applicant said that she had gone to [South-East Asia] [in] August 2008. She said that her husband had arranged for her visa and had paid for her ticket. She said that he had paid for her to study English and she had lived in shared accommodation.
23. The applicant said that her husband had joined her in [South-East Asia] [in] December 2009 (apparently a mistake for 2008). She said that she had ceased her studies when he had arrived and that after he had returned to Australia [in] March 2009 she had done nothing. She said that her visa for Australia had been approved in October 2009. She said that she had gone back to Somalia to visit her family from [November] 2009 until [February] 2010. She said that she had travelled to [Australia] because it had been cheaper to travel this way. She said that her husband had paid for her ticket and had made all the arrangements.
24. The applicant referred to the fact that she had arrived in Perth [in] March 2010. She said that her husband was a student and was dependent on his parents. She said that she had been told by her mother-in-law that she had been brought there to be a good wife and a housekeeper for the whole family. She said that she had only been outside the house on a few occasions and that she had been subject to emotional abuse and exploitation. She said that she had decided to leave and had started to seek out help from Somali communities in other states in May 2010.
25. The applicant said that she had confided in a Somali girl named [Ms A] who had lived a few houses behind her husband's house and whom she had seen taking out the rubbish. She said that [Ms A] had known a Somali family in [City 6] and had suggested that she go there. She said that [Ms A] had bought a plane ticket to [City 6] for her and had driven her to the airport [in] May 2010. The applicant said that she had stayed with the Somali family in [City 6] from [May] 2010 until [July] 2010, during which time she said that she had not left the house.
26. The applicant said that [Ms A] had put her in contact with a Somali family in [City 7] and the family in [City 6] had paid for her ticket to [City 7]. She said that the situation in [City 7] had been almost the same but the family had taken her to the Immigrant Women's Speakout Association and they had in turn referred her to a Salvation Army women's refuge where she had been residing since [August] 2010.

27. The applicant said that after she had arrived at the refuge she had been able to talk to her sister in Somalia who had told her that her husband's uncle had been in contact with her family and had demanded \$35,000 to cover the cost of her migration to Australia. She said that her family did not have this money and her father had been very stressed and had been admitted to hospital. She said that her husband's family belonged to the Hawadle clan which she said was politically and militarily powerful whereas her family belonged to Reer Hamar, the members of which were vulnerable in any area of Somalia. She said that her family was poor and had no power. She said that they would not be able to move to any other part of Somalia because they did not have the money to find accommodation.
28. The applicant said that her husband's uncle could also inform al-Shabaab which she said had control over her home town. She said that they practised strict Sharia law and they targeted women who ran away from their husbands. She said that if she were to return to Somalia she would face a great risk of being stoned to death by al-Shabaab. She said that she was aware of a case of a woman who had been stoned to death for adultery by al-Shabaab although the woman had in fact been raped. She said that since she had left Somalia al-Shabaab had gained more territory and it now controlled around one-third of the country.
29. The applicant said that she believed that if she returned to Somalia she would face persecution by her husband's family, her husband's clan or al-Shabaab and her family would not be able to defend her. She repeated that al-Shabaab was also targeting women in her situation. She said that there was nowhere else to where they could move in Somalia because her clan did not own land and it was a powerless clan and also her family could not afford to relocate. She said that as Somalia had no government or police there would be no one to assist her and her family if they faced persecution.
30. Under cover of a letter dated [October] 2010 the applicant's then representatives quoted information from the US State Department *Country Reports on Human Rights Practices for 2009* in relation to Somalia in relation to human rights abuses committed by al-Shabaab and the situation of women in Somalia.

Psychologist's report

31. In a report dated [November] 2010 a psychologist in [City 6] said that she had completed a psychological assessment of the applicant, that the applicant was experiencing a range of symptoms of Major Depressive Disorder and that she was unfit for work at that time.

Further communication from the applicant's husband

32. [In] February 2011 the Department received documents from the applicant's husband (including documents which he said he had previously sent to the Department including the letter referred to above in which he said that the applicant had left him [in] March 2010 and that he 'would like to inform the immigration that from today I am not responsible for her'). He produced a document dated [December] 2010 (together with a translation) stating that he had divorced the applicant in accordance with Sharia law by pronouncing the *talaq* three times.

The applicant's evidence at the Departmental interview

33. The applicant was interviewed by the primary decision-maker in relation to her application [in] September 2011. The applicant confirmed that all of her family were still living in

[Town 2] in Somalia. She said that her mother had died in 2007 and that her brother-in-law was still supporting the whole family by driving a lorry. She confirmed that she had gone to school from the age of [age range deleted: s.431(2)] and that an [organisation] had helped to pay for her education. She confirmed that she claimed that her family belonged to Reer Hamar. She said that her family had been the only family in the area belonging to this clan and that the main clans in the area were Hawadle and [Clan 1].

34. The applicant said that al-Shabaab did not treat people very well: they killed people for no reason and they stoned women who ran away from their husbands. She said that they ordered women to wear Islamic dress. She said, however, that she had not had problems with al-Shabaab. She said that she had gone to [Country 3] to work because her family had been experiencing financial hardship. She confirmed that her passport had been stolen while she had been in [Country 3]. She said that she had gone back to Somalia at the end of 2007, after she had been in [Country 3] for around nine months.
35. The applicant confirmed that she claimed that she had met her future mother-in-law in [Country 3] and she said that her future mother-in-law had taken the details of her family. She said that about two months after she had returned to Somalia this woman's husband's brother had contacted her family in Somalia to arrange her marriage. She confirmed that she had gone to [South-East Asia] in August 2008 and that she had lived there in shared accommodation with other Somali people. She said that she had been attending English classes which her husband had paid for.
36. The applicant confirmed that her husband had visited her in [South-East Asia] at the end of 2008. She said that after two or three weeks he had started to go out to have fun by himself. She said that after a few days she had realised that they were completely opposite. The applicant said that she had been in contact with her family in Somalia but she had not said anything to them about the way her husband was behaving, especially not to her father because she had not wanted to bother her father.
37. The applicant said that after she had come to Australia it had been hard for her to live with her husband's family. She said that she had not expected to live with her husband's family. She said that she had felt lonely because she had been left at home by herself. She said that she had been doing the housework and cooking and watching television. She said that she had remained in contact with her family in Somalia. She said that she had not been prevented from leaving the house but no one had taken her anywhere and she had not known anyone. She said that she had not felt that she was a member of the family.
38. The applicant said that her mother-in-law had told her that her visa gave her no rights at all. She said that this had been when she had said that she wanted to study. She said that her mother-in-law had said that if she wanted to study they would have to pay and they had no money for her to study. She said that she felt that everything she had been promised had not been fulfilled and that she had been used or cheated.
39. The applicant confirmed that a Somali neighbour had paid for her ticket to [City 6]. Asked why this woman would have helped her the applicant said that Somali women helped each other. She agreed that it was normal for a Somali girl to accept what their parents had arranged for them but she said that what had happened to her with her husband's family had been a shock and she had not been able to stand it. She said that in [City 6] too she had been left alone at the home of the family she had been staying with.

40. The applicant confirmed that the Somali woman in [City 5] had then arranged for her to go to [City 7] where she had been introduced to the [migrant women's association]. She said that she was 'not that much' in contact with the Somali woman in [City 5], then that she did not even know her number or that she had lost it. She said that she was still in contact with the family in [City 7].
41. The applicant said that as soon as she had left [City 5] her husband's family had reported her as a missing person and they had also informed her family in Somalia. She said that around the end of May 2010 she had been contacted by the police in [City 5] and she had told them that she was not missing and that she had left of her own free will. The applicant said that her family in Somalia had been threatened by her husband's uncle who had wanted them to pay back the sum of about \$30,000 which they had spent on bringing her to Australia.
42. The applicant said that anything could happen to her family in Somalia. She said that they could be killed. She said that they were surrounded by al-Shabaab and anyone could talk to al-Shabaab. She confirmed that since her father had been told that he needed to repay this money he had fallen ill. She said that her husband's uncle could talk to al-Shabaab and make a deal to kill her family. She confirmed that her husband's uncle belonged to the Hawadle clan, a powerful clan.
43. The applicant said that in Somalia there was no way a girl could survive if somebody knew that she had run away from her husband. She said that not only al-Shabaab but anyone could kill you.

Letter from [Mr B] and [his wife]

44. Between folios 83 and 84 on the Department's file CLF2010/136343 there is a scanned copy of a letter dated [September]2011 from [Mr B] and his wife, saying that, having learned of the applicant's predicament from their friend [Ms A], they had invited her to stay with them and she had remained their guest from the beginning of July 2010 until [August] 2010 during which time the [migrant women's association] had referred her to [a] refuge where she was currently residing. It appears that this letter was forwarded to the Department by the applicant's then representatives under cover of an email message dated [October] 2011 (see folio 90 of the same file).

Further correspondence between the primary decision-maker and the applicant's representatives

45. [In] November 2011 the primary decision-maker wrote to the applicant referring to the applicant's previous application for a protection visa which had been withdrawn as referred to above. The primary decision-maker referred to the fact that the applicant's husband had told the Department that he and his brother had helped the applicant to complete this application for a protection visa but that she had since left him and that he felt that she had tricked him and that all she had wanted had been to come to Australia. The primary decision-maker put to the applicant that she might disregard her conduct in leaving her husband in accordance with subsection 91R(3) of the Act on the basis that it had been engaged in solely for the purpose of strengthening her claim to be a refugee.
46. In a statutory declaration made [in] November 2011 the applicant said that between April and May 2010 she had asked her husband if he could do something about her visa as her visa did not allow her to study. She said that her husband had brought her some papers and had told

her to sign them. She said that she had not read the application which her husband had asked her to sign and that she had not known what kind of visa she had been applying for. She said, however, that her husband had told her what to write in answer to questions 42 to 46 on the form (seeking her reasons for claiming protection). She said that she had not understood what she had been writing. She said that all of the other writing in the form was not in her handwriting but that of her husband.

47. The applicant said that she had had eight years of education in Somalia as stated in answer to question 36 on Part C of her current application form (although in her statement and at the interview she said that she had gone to school from the age of [age range deleted: s.431(2)]. She said that her husband had submitted the letter withdrawing the application without her knowledge or consent. She said that she had not married her husband for the sole purpose of coming to Australia and that she feared returning to Somalia for the reasons given in her current application.
48. In a further email message sent to the applicant's representative [in] December 2011 the primary decision-maker referred to the fact that in her application for the visa which she had used to travel to Australia and in her previous application for a protection visa the applicant had given the date of her marriage as [February] 2009 in [South-East Asia]. She referred to the fact that in the statement accompanying her current application the applicant had said that the *Nikah* had taken place [in] February 2008 but in answer to question 14 in Part C of the application form she had given the date of her marriage as [December] 2008.
49. In an email message dated [December] 2011 the applicant's representative said that he was instructed that the applicant had been married in Somalia [in] February 2008 but she had been married again to the same husband in [South-East Asia] [in] February 2009 because the [Australian High Commission] had said that the marriage certificate from Somalia was not sufficient. He said that the reference to [December] 2008 in the current application form was a typographical error. The applicant's representative said that the applicant had not been aware until the time of the email message that no conditions attached to her visa and that there was therefore nothing to prevent her from studying.

Further material submitted to the Department

50. In support of the applicant's current application the applicant's representatives also produced a letter dated [September] 2011 from [an official from an Australian Somali Association], who said that the applicant had come to Australia under an arranged marriage which had not worked out, that she came from [Town 2], an area which was under the control of al-Shabaab, and that the applicant was fearful that if she returned to Somalia she would face al-Shabaab's version of Sharia law for women who disobeyed their husbands which included death by stoning.
51. The applicant's representatives also produced a report dated [September] 2011 prepared by a psychologist who said that she had seen the applicant for initial assessment [in] September 2010 and that since then the applicant had been treated for symptoms of [Major Depressive], which the psychologist said had developed after she had separated from her husband. The psychologist said that the applicant had attended nine sessions of psychotherapy since September 2010. She described the applicant as a victim of human trafficking and said that she believed that she had been a victim of abuse, disadvantaged socio-economic conditions and exploitation.

52. The applicant's representatives also produced a statutory declaration made [in] September 2011 by a social worker employed by [a charity organisation], [Ms C] (who attended the Departmental interview in the capacity of the applicant's representative). [Ms C] referred to the applicant's claim that she belonged to Reer Hamar and that her husband belonged to the Hawadle clan which controlled [Town 2]. She said that if the applicant returned to Somalia she would have little protection from the Hawadle clan should they persecute her for leaving her husband.
53. [Ms C] also referred to the applicant's fear of al-Shabaab, noting that it imposed restrictions on women and penalised conduct it deemed immoral. She referred to the fact that Human Rights Watch had reported that al-Shabaab had reportedly stoned to death a divorcee in November 2009. [Ms C] also referred to the fact that the applicant had described her marriage as having been arranged by her father which she noted was customary in Somalia and she referred to the passage in the applicant's statement in which she had said that she had been subjected to emotional abuse and exploitation by her husband's family. [Ms C] said that the applicant had exhibited indicators of exploitation and domestic/family violence including depression, anxiety, confusion and withdrawal.
54. [Ms C] also referred to the low status of women in Somalia where women were viewed as subordinate to men and had been systematically discriminated against. She noted that there was no legislation specifically covering domestic violence and that family conflicts were addressed under customary and Sharia law. She said that the applicant's family were not in a position to provide support to her. She said that in her opinion the applicant feared persecution for reasons of her membership of a particular social group.
55. [Ms C] attached copies of a paper by Abdi Abby on a 'Field Research Project on Minorities in Somalia' (October 2005), highlighting references to the Reer Hamar clan as oppressed and marginalised, 'A Study on Minority Groups in Somalia' prepared by UNCU/UN-OCHA Somalia in July 2002, a research response prepared for the Canadian Immigration and Refugee Board, 'Somalia: Update to SOM18933.E of 10 November 1994 on the current situation of the Hawadle (subclan of the Hawiye) and their allies', 29 May 2002, SOM39059.E, a backgrounder on al-Shabaab prepared by the Council on Foreign Relations in August 2011, a Human Rights Watch report, *Harsh War, Harsh Peace: Abuses by al-Shabaab, the Transitional Federal Government, and AMISOM in Somalia*, April 2010, a research response prepared for the Canadian Immigration and Refugee Board, 'Somalia: Prevalence of forced or arranged marriages in Somalia; consequences for a young woman who refuses to participate in a forced or arranged marriage', 20 September 2007, SOM102612.E, excerpts from the UK Home Office *Country of Origin Information Report - Somalia*, 30 July 2008, relating to the situation of women in Somalia, and information from the Social Institutions and Gender Index in relation to Somalia.

The applicant's evidence at the hearing before me

56. At the hearing before me the applicant said that she had had the assistance of an interpreter when she had prepared her current application to the Department for a protection visa and that all the answers in that application were correct and complete. She said that she had written the statement accompanying her application in her own language and then it had been translated but the translation had not been read back to her. She said that so far as she was aware the statement accurately reflected her claims for refugee status.

57. The applicant confirmed that her father and her two brothers and two sisters were living in Somalia. She said that they were still living in [Town 2] but she said subsequently that now they were outside [Town 2], in the countryside. She said that she was in contact with them by mobile phone. She said that there had been a lot of bomb attacks around the area where her family lived and they had gone out of the city as a result of their fear of these bomb attacks. She said that the Ethiopian troops now controlled the city but al-Shabaab were making bomb attacks on the Ethiopian troops.
58. The applicant confirmed that she claimed that her family belonged to the Reer Hamar clan. I noted that my understanding was that 'Reer Hamar' actually meant 'people of Mogadishu' (Immigration and Refugee Board of Canada, 'Somalia: Update to SOM29646.E; SOM29316.E; SOM27138.E; SOM24663.E; SOM19731.E on the Reer Hamar clan of Somalia including, its subclans, regions where the clan member live in Somalia, language and cultural characteristics of the clan, and the treatment of clan members in Mogadishu, elsewhere in Somalia, and refugee camps in Kenya', 1 March 1999, SOM31307.E). The applicant said that they did not only live in Mogadishu but everywhere in Somalia.
59. I noted that the information available to me indicated that the Reer Hamar could not live safely elsewhere in Somalia (Immigration and Refugee Board of Canada, 'Somalia: Update to SOM29646.E; SOM29316.E; SOM27138.E; SOM24663.E; SOM19731.E on the Reer Hamar clan of Somalia including, its subclans, regions where the clan member live in Somalia, language and cultural characteristics of the clan, and the treatment of clan members in Mogadishu, elsewhere in Somalia, and refugee camps in Kenya', 1 March 1999, SOM31307.E). The applicant said that her family lived in [Town 2] and they had all been born there.
60. I noted that in the application which had been lodged on the applicant's behalf in May 2010 it had said that she belonged to the [Clan 1]. The applicant denied this. I noted that this would make much more sense if her family was from [Town 2] (Immigration and Refugee Board of Canada, 'Somalia: Update to SOM18933.E of 10 November 1994 on the current situation of the Hawadle (subclan of the Hawiye) and their allies', 29 May 2002, SOM39059.E). The applicant said that she had had nothing to do with this application. I noted that she had signed the application and she had said that she had written at least part of it herself. The applicant said that she had been told to sign it and she had written what her husband had told her to write.
61. The applicant said that she had completed around nine years of schooling in Somalia. She confirmed that she had been aged about six years old when she had started school and she confirmed that she had continued attending school until she had left Somalia. She said, however, that she had not finished her education. She said that she had completed up to Year 8 and a half. The applicant said that there had been fighting in the city so sometimes when she had gone to school she had had to stay at the school until the fighting had stopped. She said, however that her family had not had to leave [Town 2] when she had been growing up as they had now. She said that when there had been fighting people had stayed in their houses but this time it was different because there were bomb attacks which could affect a lot of people.
62. I referred to the applicant's evidence that she had gone to [Country 3] in December 2006 to work, that she had been employed as a housemaid in Sharjah from January to September 2007 and that during this time her passport had been stolen. I asked the applicant how she had been able to return to Somalia if her passport had been stolen. The applicant said that she

had been issued with a 'go home' letter from [Country 3] which she said was a letter stating that she was no longer allowed to live there and that she had to leave. She said that this letter had enabled her to board a flight back to Somalia. She said that she had returned to Mogadishu Airport.

63. The applicant confirmed that she had remained in Somalia from September 2007 until August 2008. I asked her if she had had any particular problems living in [Town 2] during this period. The applicant said that it was always difficult in terms of fighting and financial things but she had been happy living with her family. She said that the fighting had not caused particular problems for her. The applicant said that when she had left Somalia in August 2008 she had left from the airport in [Town 8] (in the self-declared republic of Somaliland) which had been a bit safer than the south of Somalia. She said that there were big lorry cars which travelled from [Town 2] to [Town 8] and that her younger brother had accompanied her to [Town 8].
64. I referred to the applicant's evidence that, although she had got married in Somalia in 18 February 2008, she had got married again in Malaysia on 18 February 2009. The applicant said that this had been to give the Australian High Commission in Malaysia a recognised certificate of marriage. She said that they had had a handwritten letter from Somalia that said that they were married but her husband had told her that they needed something more than this handwritten letter. I noted that it seemed curious that they had got married on exactly the same day of the year one year later. The applicant said that she did not know about this.
65. The applicant confirmed that after she had been issued with her visa to travel to Australia in October 2009 she had returned to Somalia again to visit her family. She confirmed that, as stated in her passport, she had returned in November 2009 and had remained there until February 2010. She said that she had gone back to [Town 2] and that she had not had any problems on this visit. She said that there had been two groups controlling the city at the time, al-Shabaab and Hizbul Islam, but she had not had particular problems with either of these groups. She said that there had been huge fighting at the time and some of her family had left the house but she and her father and brother had stayed at home. She said that after a month and a half, after the fighting had stopped, the other members of her family had come back. She said that she had been at home all the time and she had not liked to go out. She said that her brother-in-law had taken her to the airport in Mogadishu when she had left Somalia in February 2010.
66. I asked the applicant what she feared would happen to her if she returned to Somalia now. The applicant said that she felt too scared and that anything could happen to her. She said that she would be killed by al-Shabaab because they did not like women who ran away from their husbands or who separated from their husbands. I noted that there was a lot of information about the fact that al-Shabaab imposed a lot of restrictions on women but there was nothing in particular about women running away from their husbands. The applicant said that al-Shabaab forced women to wear certain clothes and things which might not be stated were also happening. She said that they were forcing women to stay with their husbands even if their husbands were abusive.
67. The applicant indicated that she was aware that her husband had given the Department a document saying that he had divorced her. I noted that this meant that if she returned to Somalia she would not be a woman running away from her husband but a woman whose husband had divorced her. The applicant said that she was scared not only of al-Shabaab but

also of her husband's family because they were demanding money from her family and her family were not able to pay this amount of money. I noted that she had said that they had demanded this money after she had left her husband in May 2010 and I asked her if her family had had any problem with her husband's family since then. The applicant said that they had not got anything from them since then but if she went back to [Town 2] they might say that now she was back they wanted this money back.

68. I referred to the fact that, as the applicant had said, al-Shabaab was no longer in control of [Town 2] [news article and URL deleted: s.431(2)]. The applicant said that they still had the ability to harm her and she felt scared.
69. I explained to the applicant that, if her husband's family was pursuing her and her family because they believed that they owed them this money, this in itself would not bring her within the definition of a refugee. The applicant repeated that her family could not afford to pay this money. I noted that the applicant's then representatives had provided material to the Department in relation to the situation of women in Somalia. I noted that al-Shabaab had imposed a restrictive dress code and they imposed what they regarded as Sharia law punishments on women.
70. I noted, however, that the applicant had gone back to Somalia in November 2009, at a time when al-Shabaab had been in control of [Town 2]. The applicant said that at that time it had not been the same situation because she had been married. I put to her that being married in itself would not have protected her from the sorts of problems people had with al-Shabaab. The applicant said that at that time she had been married and there had been no demands for money but this time they would know that she had run away from her husband and she feared that they were going to kill her.
71. The applicant said that her brother-in-law was not working at the moment and she was sending her family money. I asked the applicant if there was anything else she wanted to tell me in relation to the situation in [Town 2] or the problems she felt she would have if she went back to Somalia. The applicant said that it was not safe. She referred again to the fact that she was no longer married and she said that she would face a lot of harm and she might be killed. She said that her family had no financial support and their lives were in danger. She said that they were not able to stay in the same place all the time and they had to go around the town to be safe.
72. I explained to the applicant again that the problems with her husband's family in and for themselves did not appear to bring her within the terms of the definition of a refugee because the reason they were pursuing her was they felt that they had spent a lot of money on bringing her here and they wanted this money back. I explained to the applicant that one or more of the five Convention reasons did not appear to be the reason why her husband's family were pursuing her. The applicant referred to the fact that she came from the Reer Hamar clan and she said that the other clans had power over them and they could not protect each other or fight back. She said that the members of the Reer Hamar clan were targeted.
73. I noted that [Ms C], who had provided some material to the Department on the applicant's behalf, had suggested that the applicant feared being persecuted for reasons of her membership of a particular social group, namely women in Somalia. I noted that there was a lot of information about the situation of women in Somalia but I would also have to take into account in that context the fact that the applicant had returned to Somalia in November 2009 for around three months.

74. The applicant said that the situation now was different from when she had gone back in 2009 because at that time no one had been targeting them specifically, she had not owed any money to anyone and she had been married. She said that the situation was different now because her husband's family was demanding that they pay this money. She said that they knew that she had been divorced and had run away from her husband so this would make it difficult for her to go back. She repeated that she feared that she would be killed and that because the Reer Hamar were a small clan they could not defend themselves.
75. I noted that in the context of the Refugees Convention I had to look at whether the authorities in Somalia would fail to provide her with protection for one of the five Convention reasons, for example because she belonged to the Reer Hamar clan or because she was a woman. I explained that the difficulty with this in the context of a place like Somalia was that there was really no government to speak of at all in Somalia so there was really no protection for anyone. It was not, in other words, a question of the authorities failing to protect her because she belonged to the Reer Hamar clan or because she was a woman: they failed to protect anyone. I noted that this made it difficult to fit this situation within the terms of the definition of a refugee in the Refugees Convention.
76. I noted that, as I had explained to the applicant at the beginning of the hearing, if I considered that she did not meet the definition of a refugee then I would consider her situation in accordance with the legislative provisions in relation to complementary protection. I indicated to her that in this context I would look at whether there were substantial grounds for believing that, as a necessary and foreseeable consequence of her being removed from Australia to Somalia, there was a real risk that she would suffer significant harm which included being arbitrarily deprived of life. I indicated that if I accepted, therefore, that there was a real risk that her husband's family or al-Shabaab would kill her, I would have to consider this under the legislative provisions relating to complementary protection.
77. I indicated that I would also consider, however, whether the applicant was entitled to refugee status on the basis that she was a woman from Somalia and in this context I would be looking at the material which [Ms C] had provided to the Department.

FINDINGS AND REASONS

78. I accept that, as stated by the two psychologists in their reports referred to in paragraphs 31 and 51 above, the applicant exhibits symptoms of Major Depressive Disorder. She was able to answer my questions and she addressed the issues I raised with her although her manner was subdued. Her evidence has been internally consistent and (save as to the issue of her clan membership) it is consistent with the independent evidence available to me. She has not exaggerated or embellished her evidence and I found her to be a credible witness.
79. I accept that the applicant is a national of Somalia and that she comes from the town of [Town 2] in the Hiraan region. She produced her passport at the hearing before me, she speaks the Somali language and she demonstrated a knowledge of events in the recent history of [Town 2]. As referred to above, I have some difficulty with the applicant's claim that her family belongs to the Reer Hamar clan, given that this clan lives in cities like Mogadishu, Merca and Brava on what is referred to as the Benadir coast and that, on the information available to me, the members of this clan are unable to live safely elsewhere in Somalia (Immigration and Refugee Board of Canada, 'Somalia: Update to SOM29646.E; SOM29316.E; SOM27138.E; SOM24663.E; SOM19731.E on the Reer Hamar clan of Somalia including, its subclans, regions where the clan member live in Somalia, language and

cultural characteristics of the clan, and the treatment of clan members in Mogadishu, elsewhere in Somalia, and refugee camps in Kenya', 1 March 1999, SOM31307.E).

80. I accept that the application for a protection visa which was lodged on the applicant's behalf on 6 May 2010 was filled out by or with the assistance of the applicant's husband's brother, as indicated in the form, but the applicant's husband's family must have been aware of the applicant's clan. As I put to the applicant, given that her family comes from [Town 2], it would make more sense if they belonged to [Clan 1], as indicated in that application (Immigration and Refugee Board of Canada, 'Somalia: Update to SOM18933.E of 10 November 1994 on the current situation of the Hawadle (subclan of the Hawiye) and their allies', 29 May 2002, SOM39059.E). The applicant confirmed that she claimed that her family belonged to the Reer Hamar clan and given the favourable view I have formed of her credibility I accept her evidence in this regard although for the reasons given below nothing turns on this issue.
81. The primary decision-maker said that she was unable to be satisfied that the applicant had entered into a genuine marriage but that she was also not satisfied that the applicant's subsequent separation from her husband was genuine. As she had foreshadowed in her letter dated 2 November 2011 she stated that she was not satisfied that the separation had occurred otherwise than for the purpose of strengthening the applicant's claim to be a refugee and she therefore disregarded that conduct in accordance with subsection 91R(3) of the Act in determining whether the applicant had a well-founded fear of being persecuted for one of the Convention reasons if she returned to Somalia.
82. As I indicated to the applicant in the course of the hearing before me, the fact that she left her husband and that her husband has divorced her will not in itself bring her within the definition of a refugee. I accept that her husband's family may want her and her family to repay the money which they expended on bringing her to Australia but the essential and significant reason for the persecution which she fears from her husband's family is not one or more of the five Convention reasons as required by paragraph 91R(1)(a) of the Act. (As I noted, different considerations apply in relation to complementary protection but subsection 91R(3) has no application in this context anyway.)
83. I accept that the applicant's marriage was an arranged marriage as she herself has said and it is obvious that one of the motives involved was that the applicant would be able to come to this country and would thereby be in a position to assist her family in Somalia. However, as the Full Court of the Federal Court observed in *Minister for Immigration, Local Government and Ethnic Affairs v Dhillon* (unreported, Northrop, Wilcox and French JJ, 8 May 1990): 'It is not necessarily inconsistent with a genuine marriage relationship that it was entered into by one or both parties with a view to material benefit or advancement, as for example with the hope of becoming eligible to reside in a particular country.'
84. I do not attach any great significance to the fact that the applicant went through a second marriage in Malaysia and that this was not mentioned in the applicant's current application for a protection visa. I accept the applicant's evidence that her husband told her that they needed something more than the handwritten letter which she had from Somalia and that this was why they obtained a certificate of marriage in Malaysia to show to the Australian High Commission. I accept that from the applicant's point of view the date of her marriage was 18 February 2008 and it appears to have been merely a coincidence that the second marriage ceremony was held on exactly the same day of the year one year later.

85. The fact that the applicant's husband and his family then proceeded to lodge an application for a protection visa on behalf of the applicant suggests to me that the marriage was genuine because if it had simply been a sham engaged in purely for the purpose of assisting the applicant to enter Australia then they could presumably have cut their ties with the applicant once that purpose was achieved. It is evident that neither the applicant nor her husband nor her husband's family appreciated that there were no conditions attaching to the visa on which she had travelled to Australia and it is also evident from the terms of the protection visa application which was lodged on the applicant's behalf [in] May 2010 that they did not seek professional advice in preparing that application. The claims made in that application relate to the general situation in Somalia and no attempt was made to link the feared persecution with one or more of the five Convention reasons.
86. I do not accept that the applicant's subsequent separation from her husband was a sham engaged in for the purpose of strengthening her claims to be a refugee. Quite apart from the fact that for the reasons given above I do not consider that it had that effect, I consider that if the separation had simply been a sham the applicant's current application would have been made much sooner after the separation. The applicant's evidence with regard to her travel to [City 6] and then to [City 7] where she was put in touch first with the Immigrant Women's Speakout Association and then with the Salvation Army (who assisted her in lodging her application for a protection visa) is partially corroborated by the letter from [Mr B] and his [wife], dated [September] 2011. I do not accept that all of this was really an elaborate subterfuge and I accept that the applicant left her husband for the reasons she has given and that he has since divorced her in accordance with Sharia law.
87. As I put to the applicant, there does not appear to be anything in the independent evidence which specifically addresses the situation of women in Somalia who leave their husbands or indeed women who are divorced by their husbands. The applicant said that al-Shabaab was forcing women to stay with their husbands even if their husbands were abusive and I accept that, as referred to in [Ms C]'s statutory declaration, there are no laws in Somalia specifically addressing domestic violence and family conflicts are addressed under Sharia and customary law (US State Department, *Country Reports on Human Rights Practices for 2010* in relation to Somalia, Section 6, Discrimination, Societal Abuses, and Trafficking in Persons - Women). However in the applicant's case her husband has divorced her under Sharia law and she will be returning to Somalia while he will be remaining in Australia.
88. I accept that, as referred to by both the applicant and [Ms C], al-Shabaab reportedly stoned to death a divorcée in November 2009 but this punishment was imposed not because she was a divorcée but because she was alleged to have had an affair with an unmarried man (Human Rights Watch, *Harsh War, Harsh Peace: Abuses by al-Shabaab, the Transitional Federal Government, and AMISOM in Somalia*, April 2010, pages 34-35). As I indicated, I accept that al-Shabaab has imposed a restrictive dress code and they have imposed what they regard as Sharia law punishments on women (Human Rights Watch, *Harsh War, Harsh Peace: Abuses by al-Shabaab, the Transitional Federal Government, and AMISOM in Somalia*, April 2010, pages 27-32, 34-35). I consider it appropriate to consider these matters in the context of the situation of women in Somalia.
89. As I indicated to the applicant, I consider it relevant that she returned to Somalia for around three months from November 2009 to February 2010. (I note that the primary decision-maker said in the decision under review that the applicant had also returned 'willingly' to Somalia in 2007 but I accept the applicant's evidence that on that occasion she did not return voluntarily but because the authorities in [Country 3] had given her a letter stating that she

was no longer allowed to live there and that she had to leave.) The applicant has not referred to specific difficulties she faced while living in Somalia although she has referred to the fact that there has always been fighting. However an applicant does not have to show that they have been persecuted in the past in order to establish that they have a well-founded fear of being persecuted in the future: see *Abebe v The Commonwealth* (1999) 197 CLR 510 at [192] per Gummow and Hayne JJ.

90. I accept that the applicant returned to Somalia from November 2009 to February 2010 to see her family. I do not regard her decision to return on this occasion and for that reason as inconsistent with a genuine subjective fear of being persecuted if she returns to that country now. I accept that, as the applicant herself mentioned, al-Shabaab is no longer in control of [Town 2] [news article and URL deleted: s.431(2)]. However, having regard to the fact that control of [Town 2] has changed hands numerous times in the course of the civil war in Somalia, I do not consider that I can safely conclude that the town will not once again come under the control of al-Shabaab or some similar Islamic movement in the reasonably foreseeable future.
91. I accept that, as referred to by [Ms C], women are systematically subordinated and discriminated against in Somalia and that there is widespread sexual and gender-based violence in all regions of Somalia. I likewise accept that women have suffered disproportionately in the civil war and inter-clan fighting in Somalia (US State Department, *Country Reports on Human Rights Practices for 2010* in relation to Somalia, Section 6, Discrimination, Societal Abuses, and Trafficking in Persons - Women; UK Home Office, *Somalia - Country of Origin Information (COI) Report*, 27 May 2011, Section 21, Women). I consider that there is a real chance that the applicant will be a victim of violence for reasons of her membership of the particular social group of 'women in Somalia' if she returns to that country now or in the reasonably foreseeable future.
92. In *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387 at [36], Gleeson CJ, Gummow and Kirby JJ gave the following summary of principles for the determination of whether a group falls within the definition of a particular social group:

'First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large. Borrowing the language of Dawson J in *Applicant A*, a group that fulfils the first two propositions, but not the third, is merely a "social group" and not a "particular social group".'
93. Whether a supposed group is a 'particular social group' in a society will depend upon all of the evidence including relevant information regarding legal, social, cultural and religious norms in the country. However it is not sufficient that a person be a member of a particular social group and also have a well-founded fear of persecution. The persecution must be feared for reasons of the person's membership of the particular social group.
94. Women in a particular society may form a 'particular social group' for the purposes of the Refugees Convention in that they have identifiable characteristics or attributes common to all members of the group and which distinguish them as a group from society as a whole: see *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at paragraphs [32] to [35] per Gleeson CJ, and at paragraphs [81] to [83] per McHugh and Gummow JJ. I accept that 'women in Somalia' as a group have been singled out for reasons

of their membership of that group as victims of violence including sexual and gender-based violence (US State Department, *Country Reports on Human Rights Practices for 2010* in relation to Somalia, Section 6, Discrimination, Societal Abuses, and Trafficking in Persons - Women; UK Home Office, *Somalia - Country of Origin Information (COI) Report*, 27 May 2011, Section 21, Women).

95. The High Court has said in this context that '[n]o country can guarantee that its citizens will at all times, and in all circumstances, be safe from violence'. It has said that the State is obliged 'to take reasonable measures to protect the lives and safety of its citizens, and those measures would include an appropriate criminal law, and the provision of a reasonably effective and impartial police force and justice system' (per Gleeson CJ, Hayne and Heydon JJ in *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 205 ALR 487 at [26]). However, as I indicated in the course of the hearing before me, I accept that there is really no government to speak of at all in Somalia so there is really no protection for anyone.
96. The independent evidence indicates that, due to a lack of functioning institutions, human rights abuses are rarely punished and that those responsible for violence against women in particular are not prosecuted and enjoy impunity (US State Department, *Country Reports on Human Rights Practices for 2010* in relation to Somalia, Introduction; UK Home Office, *Somalia - Country of Origin Information (COI) Report*, 27 May 2011, paragraph 21.26). I do not accept on the evidence before me that the Transitional Federal Government of Somalia meets international standards as referred to in *Respondents S152/2003* at [26] and [27] per Gleeson CJ, Hayne and Heydon JJ with regard to the protection it affords to women in relation to the violence they face for reasons of their gender.
97. I consider that the harm which the applicant fears amounts to persecution involving 'serious harm' as required by paragraph 91R(1)(b) of the Act in that it involves a threat to her life or significant physical harassment or ill-treatment. I consider that her membership of the particular social group of 'women in Somalia' is the essential and significant reason for the persecution which she fears, as required by paragraph 91R(1)(a) of the Act. I further consider that the persecution which the applicant fears involves systematic and discriminatory conduct, as required by paragraph 91R(1)(c), in that it is deliberate or intentional and involves her selective harassment for a Convention reason. Since the evidence shows that the problem of violence against women prevails throughout Somalia, I consider that there is no part of Somalia to which the applicant could reasonably be expected to relocate where she would be safe from the persecution which she fears.

CONCLUSIONS

98. I find that the applicant is outside her country of nationality, Somalia. For the reasons given above, I find that she has a well-founded fear of being persecuted for reasons of her membership of the particular social group of 'women in Somalia' if she returns to that country now or in the reasonably foreseeable future. I find that the applicant is unwilling, owing to her fear of persecution, to avail herself of the protection of the Government of Somalia. There is nothing in the evidence before me to suggest that the applicant has a legally enforceable right to enter and reside in any country other than her country of nationality, Somalia. I therefore find that the applicant is not excluded from Australia's protection by subsection 36(3) of the Act (see *Applicant C v Minister for Immigration and Multicultural Affairs* [2001] FCA 229; upheld on appeal, *Minister for Immigration and Multicultural Affairs v Applicant C* (2001) 116 FCR 154). It follows that I am satisfied that

the applicant is a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. Consequently the applicant satisfies the criterion set out in paragraph 36(2)(a) of the Migration Act for a protection visa.

DECISION

99. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies paragraph 36(2)(a) of the Migration Act.