

0900571 [2009] RRTA 303 (16 April 2009)

DECISION RECORD

RRT CASE NUMBER: 0900571

DIAC REFERENCE(S): CLF2008/154193 CLF2008/158051

COUNTRY OF REFERENCE: Somalia

TRIBUNAL MEMBER: George Haddad

DATE: 16 April 2009

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Somalia, arrived in Australia [in] November 2008 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] December 2008. The delegate decided to refuse to grant the visa [in] January 2009 and notified the applicant of the decision and her review rights by letter [on the same day].
3. The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
4. The applicant applied to the Tribunal [in] January 2009 for review of the delegate's decision.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

RELEVANT LAW

6. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.
7. Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
8. Further criteria for the grant of a Protection (Class XA) visa are set out in Part 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

9. Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any 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.

10. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.
11. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.
12. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
13. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve “serious harm” to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
14. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.
15. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase “for reasons of” serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
16. Fourth, an applicant’s fear of persecution for a Convention reason must be a “well-founded” fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a “well-founded fear” of persecution under the Convention if they have genuine fear founded upon a “real chance” of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A “real chance” is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
17. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if

stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.

18. Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

CLAIMS AND EVIDENCE

19. The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.

The protection visa application

20. In the protection visa application Form B, the applicant provides her name [and family name X] and her date of birth as [deleted: s.431(2)] October 1987. She states that her father was last seen in Somalia in 2007. She also lists the names of her siblings some with [family name X] and others with [family name Y]. She declares all her siblings to be residing in Somalia. In answer to Q14 in Form B, she declares that she cannot provide any documents "as there is no government".
21. In Form C of the protection visa application, the applicant states her name [and family name Y], born in [District 1] Mogadishu in October 1997. She states that she speaks, reads and writes Somali and speaks basic English. She claims to belong to the ethnic group "Habargidir", she is a Somali citizen and never married. The applicant states that her occupation before she came to Australia was "shopkeeper". In answer to Q25 of Form C, which asks country(s) of former habitual residence or transit before arrival in Australia she states Somalia and Malaysia (a note immediately below the question directs that if more than two countries, attach a sheet and include information sought in Qs25...). She claims to have departed Somalia [in] November 2008 and to have departed Malaysia [in] November 2008.
22. The applicant states in answer to further questions in Form C that she entered Australia [in] November 2008 on a "fake Australian passport". She declares that she had also used a Somali passport bearing a name "not known" and that it was taken from her by a "smuggler" She provides her former addresses in the last ten years of six months or longer as: "[District 2], Mogadishu" from October 1987 – January 2007, and "Displaced, mainly outside Mogadishu or around [District 3]" between January 2007 and October 2008. She states that she has had "0" years of education. The applicant states her past employment as "worked in father's shop" from a young age as shop assistant and manager. The shop was located in [District 4] market [in] Mogadishu until 2007 then moved to [District 3]. The applicant states that she departed Somalia through Mogadishu Airport on a "fake passport [which an] airline employee created". In answer to Q49 which asks if the applicant had any difficulty obtaining a travel document, the applicant answered that she did have difficulty as "there is no authority preparing passports". In Form 80 which was submitted in conjunction with the protection visa application, the applicant provides her family name [X] and additional information in relation to her father that he "may be deceased" and lists the name of her mother who she claims died [in her 40's] in August 2003.
23. In relation to her claims for protection and fear of persecution, the applicant refers to a written statement attached to the application forms.

The applicant's statutory declaration dated [deleted: s.431(2)] December 2008

24. The applicant states in this declaration (“the first statutory declaration”) that “we lived close to [a] mosque”. The area was attacked in or about 2007 by troops who stormed the mosque and killed 20 people. Her brother was in the mosque at the time and was detained by the attackers and released later. After the attack an announcement was made on radio telling them to leave the area or they will be killed.
25. The applicant states that “we feared for our lives” and they fled to the outskirts of Mogadishu and lived in a makeshift home in [District 3] where attacks, violence and bombs continued. After a short time, they went to another area within Mogadishu but again had to flee because of violence there. The family returned to [District 3]. Islamist groups hid within the community of displaced Somalis which led to efforts by government and foreign troops to stop terrorism and killed civilians. The Islamist groups also killed civilians if they refused to give their eldest children to fight for them. The Islamists came to take the eldest male from their family but her brother [Person W] had gone into hiding and “[Person V] was only [a teenager] at that time and so they left empty handed”.
26. The applicant “was the face of [deleted: s.431(2)]” (her father’s shop where she worked). As the shop was in [District 4] Market in Mogadishu, foreign troops would sometimes shop there. Around the same time in 2007 as the troops attacked the area, the Islamist group came and threatened her in the shop. They told her that she was “aiding the foreign troops and government troops and so, if I did not close the shop I would suffer the consequences”. They said to her they would blow up the shop. The family had no choice but to close the shop. When they relocated to [District 3], they took the stock with them and continued to sell from their house there.
27. The applicant and her family belong to the Havergidir ethnic group which has been the main target of the foreign and government troops because they are seen as the main opposition to them. Some groups of Havergidir ethnicity have attacked foreign and government troops, so civilians such as the applicant live in fear of retaliation by the troops.
28. The applicant being a female also fears attack because females were being attacked in all areas of Somalia. Her father disappeared, her brother had fled to evade being recruited to fight and she was left with the responsibility for her siblings. There was a lot of rape and attacks on women. The Islamists would kill women in their area that were seen to be more liberal and other troops would rape women who were seen not to have protection from their clan.
29. The applicant states that she fears returning to her country because:
 - She will be killed by either Islamic terrorist groups or the foreign and government troops;
 - She fears harm and mistreatment against her by “the troops in Somalia and the Islamic and/or other terrorist groups;
 - Of her ethnicity, and because she is female and she is seen as a person who has helped the foreign and government troops. Almost all of their neighbours in Mogadishu have been killed.

- There is no authority in Somalia to protect her; the country is in a state of chaos.

The applicant's statutory declaration dated [deleted: s.431(2)] December 2008

30. [In] December 2008 the applicant's representative submitted an additional statutory declaration ("the second statutory declaration") dated [deleted: s.431(2)] December 2008. In this declaration the applicant states that:

- She grew up in Mogadishu with her father, mother, [deleted: s.431(2)] brothers and [deleted: s.431(2)] sisters. She belongs to the Habargidir clan. The civil war in Somalia began a few years after she was born.
- She saw horrific things that she cannot speak of as she grew up during the conflict. One of her most vivid memories is of an occasion when her mother decided they needed to flee Mogadishu around 1992. She was on a truck with many people and the truck tipped over they were trapped under the truck for many hours and many people were badly injured.
- She remembers constantly moving without a year going past when they stayed in one place. Her mother took them to villages in the countryside to escape the conflict largely between the Hagargidir clan and the Abgal clan. Her family was not involved in the conflict but were victims of it.
- They were often assaulted by troops as they tried to escape.
- The family survived by running a stall in the market where her father sold rice, sugar and flour.
- In 2003, her mother was on a bus which was attacked and everyone including her mother was shot dead.
- After her mother died, the applicant assisted her father in the stall. She did not attend school; she helped with home duties; her family could not afford to send her to school; she studied the Koran.
- In 2007 they lived near [a] Mosque. Her father prayed at the Mosque. One day the Mosque was attacked and her father and brother were taken by Ethiopian and Somali men. "[I]t was like ethnic cleansing for our tribe the Habargidir" That was the last time she saw her father.
- In 2007 the applicant was selling goods at the stall and a group of Islamic extremists "came and told me that I had to shut the shop immediately because we were selling goods to foreign and government troops" or she would suffer the consequences. Such threats were made many times and people were killed by Islamic extremists.
- The situation became worse with more bombings and more threats. Her brother was threatened because they wanted to recruit him to fight for the Islamic extremist side.

- The applicant was later told that her father and brother had escaped, “I have now managed to make contact with my brother. [Person W] came back to where we were staying one day. He wouldn’t tell me what exactly happened but that they were taken somewhere outside Mogadishu and he hadn’t seen my father since”.
- After her father and brother were taken, the family house was bombed by government troops but luckily no-one was in the house. As the eldest, she had to look after the family. She moved the family to [District 3] and took the stock from their stall to sell and make ends meet.
- The family suffered persecution from both sides – The Ethiopian and government troops were using power against people, the Islamic extremists called people disbelievers and punished them, and because the applicant sold goods to the Ethiopian and government troops, the Islamic groups were against them in Mogadishu.
- The applicant grew up in constant fear “every day and every hour you could be killed on a bus, or bombed or shot”.
- The applicant fled Somalia because she was not safe. She was at risk from the Islamic extremists. She could not stop selling goods because she had to make a living. The government could not protect her from the Islamic extremists. She always intended and hoped to get out of Somalia but did not have the financial means. A family friend said they would help and gave her money and she saved some money. They also helped her to get a passport and a ticket in exchange for money. She then flew from Mogadishu to Dubai and bought a ticket to Malaysia and then to Australia.
- She does not know where her brothers and sisters are but she assumes they are still in [District 3] She fears for their safety if foreigners interfere and try and look for them.
- Her brothers cannot protect her from the Islamic groups and government troops because they are only members of the general public and are not armed or trained while the extremists and government troops have arms and training and have no mercy or regard for human life. She is constantly at risk as a woman and as a woman from the Habargidir clan.
- The applicant is overwhelmed by her past experiences and never feels that she is in a stable state of mind. She is constantly living in fear here about what might happen in the future. It is very difficult for her to remember properly because of her state of mind. She knows she cannot return to Somalia after what she has been through.

31. The applicant was invited by letter dated [deleted: s.431(2)] February 2009 to appear before the Tribunal at a hearing scheduled [in] February 2009.
32. [In] February 2009, the Tribunal received a submission from the applicant’s representative summarising the applicant’s claims which included the fear of rape as young women in Somalia have been and continue to be the target of sexual assault. The submission

emphasises that young unmarried women without male protection are particularly vulnerable and supports the argument with reference to international reports and case law.

33. The applicant appeared before the Tribunal [in] February and [in] March 2009 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Somali and English languages.
34. The applicant was represented in relation to the review by a registered migration agent. The migration agent attended the hearing.
35. The applicant gave oral evidence and provided a summary of her education background and her claims. She gave an account of the incidents she claimed had led to her fleeing Somalia. She said that their house was bombed in mid 2007 at which time she left Mogadishu to the outskirts and lived as an internally displaced person in [District 3]. She said she lived there for around one and half years and then left Somalia after receiving financial assistance from friends of her father as well as arranging a passport and airline tickets to Malaysia. The applicant referred to the [deleted: s.431(2)] mosque in their neighbourhood having been attacked prior to their house being bombed where 20 people were slaughtered and her brother having been taken from the mosque by the Ethiopian and Somali government forces. She also said that her father had fled but later revised this evidence to say that he too was in the mosque at the time of the attack. She gave evidence about the route she took from Mogadishu through onto Malaysia where she met a man who provided her an Australian passport and an airline ticket.
36. I observed to the applicant that her oral evidence has provided inconsistencies with previous accounts she gave of the same incidents. I indicated to her that I was having difficulty with the credibility of her evidence and pointed to some of the inconsistencies in the accounts she gave such as saying at different times that her father had fled by himself, and that he was in the mosque at the time of the attack and was taken by the Ethiopian and government forces. At different times she had stated that the incidents of the attack on the mosque followed by their house being bombed occurred around the beginning, middle or end of 2007. In her second sworn statement she stated that she had bought the ticket to Malaysia in Dubai, and in her oral evidence to the Tribunal she said she transited through Abu Dhabi. I indicated that her oral evidence included much that was implausible such as the significant financial assistance she received from strangers whom she said knew her father from the market but she could not be sure if they belonged to the same clan.
37. The applicant denied that she had stated that she bought the ticket to Malaysia in Dubai. She reiterated that she fears returning to Somalia because of her imputed political opinion and as a young Somali woman.
38. By letter dated [deleted: s.431(2)] March 2009, the applicant was invited to comment on information in accordance with s.424A of the Act. The information referred to inconsistencies the applicant gave in written and/or oral evidence at various times and to information obtained from open sources that the only reports of an attack on a mosque in the neighbourhood where the applicant claimed to have lived in Mogadishu occurred in late April 2008.
39. [In] April 2009, the applicant replied to the Tribunal's letter of March 2009 through a lengthy submission from her representative which included a report from a clinical psychologist and a further statutory declaration from the applicant.

FINDINGS AND REASONS

40. In order to be a refugee under the Convention, it is necessary for the applicant to be outside her country of nationality and for her to hold a well-founded fear of persecution for reasons of at least one of the five grounds enumerated in the Convention.
41. The applicant claimed to be a national of Somalia. On the basis of information on the Department's file, and as the applicant has made no claims against another country, and she is outside her country, I accept that she is a national of Somalia and I have assessed her claims against Somalia.
42. The applicant claims to have a well-founded fear of persecution if she were to return to Somalia for the following Convention reasons:
 - Imputed political opinion; and
 - Membership of a particular social group – “Women in Somalia”, or subgroups thereof.
43. The Tribunal's task in the present case is to consider whether the applicant genuinely fears persecution for the reasons described above, and if so, whether that fear is well-founded. This task requires examining the claims that she has raised and the evidence that she has submitted, in addition to relevant independent country information.
44. I will first address the applicant's claim on the ground of membership of a particular social group.
45. Whether in the present case the applicant has a well-founded fear resulting in harm which can be considered to be “serious harm”; and the fear is well-founded upon a “real chance” of persecution for a Convention stipulated reason will depend on whether it can be established that a group such as that submitted by the applicant as a particular social group exists in the applicant's home country; and further that if such a group is established to exist that the applicant can be identified as a member of the particular social group; and as a member of the particular social group she has a well-founded fear of persecution.
46. In considering the meaning of the expression “for reasons of ... membership of a particular social group”, the Tribunal has had regard, in particular, to the High Court's decisions in *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225 and in *Applicant S v MIMA* (2004) 206 ALR 242. In *Applicant S* Gleeson CJ, Gummow and Kirby JJ gave the following summary of principles for the determination of whether a group falls within the definition of particular social group at [36]:
 - ... 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". ...
47. 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.

48. The characteristic or element which unites the group cannot normally be a common fear of persecution. In *Applicant A*, Dawson J stated at 242:

There is more than a hint of circularity in the view that a number of persons may be held to fear persecution by reason of membership of a particular social group where what is said to unite those persons into a particular social group is their common fear of persecution. A group thus defined does not have anything in common save fear of persecution, and allowing such a group to constitute a particular social group for the purposes of the Convention "completely reverses the statutory definition of Convention refugee in issue (wherein persecution must be driven by one of the enumerated grounds and not vice versa)" That approach would ignore what Burchett J in *Ram v Minister for Immigration* called the "common thread" which links the expressions "persecuted", "for reasons of", and "membership of a particular social group", namely:

"a motivation which is implicit in the very idea of persecution, is expressed in the phrase 'for reasons of', and fastens upon the victim's membership of a particular social group. He is persecuted because he belongs to that group".

49. The claim in the present case is that in Somalia, women, young women, or unmarried young women without male protection constitute a particular social group. The persecution claimed to be feared by the group or subgroups is sexual violence including rape.
50. I have considered many various assessments of the Convention ground of 'particular social group'. The debate continues as to whether women may constitute a particular social group.
51. Gender based groups have been addressed in a number of cases in Australian courts. "Women" in a particular society or subgroups of women, such as those the applicant describes have been accepted as constituting particular social groups in particular societies. In *MIMA v Khawar & Ors* (2002) 210 CLR 1, Gleeson CJ found that it was open to the Tribunal to determine that "women in Pakistan" were a particular social group. His Honour went even further and stated that women in any society are a distinct and recognisable group.
52. Of relevance to the term 'particular social group' is the social group in the particular case. In the present case, the reference or context is Somali society. Although there are reports including the US Department of State report covering 2007 and Freedom House 2007 report 'Freedom in the World' which indicate that the role of women in Somali society is changing and their involvement in decision making is increasing, the change and the areas in which this is occurring is of some significance but has not significantly altered the entrenched subordinate roles that women have traditionally been assigned in Somali society.
53. The United Kingdom (UK) Country of Origin Report on Somalia, 24 February 2009 includes that:

the US State Department's Report on Human Rights Practices covering 2007 noted:

"Women have suffered disproportionately in the country's civil war and inter-clan fighting.

...

“In the country's overwhelmingly patriarchal culture, women do not have the same rights as men and are systematically subordinated...”

54. The same UK Report continues:

The UN Office for the Coordination of Humanitarian Affairs (OCHA), in their Protection Factsheet, dated May 2006, summarised:

“Somali women are systematically discriminated [against] and subordinated... [They face] limited inclusion in decision making structures and leadership roles, limited access to reproductive health, higher rates of stigmatization from HIV/AIDS and sexually transmitted diseases, denial of due process rights, abuse of women's rights in divorce cases, denial of custody of children [and] denial [of] women's rights of property ownership and inheritance under customary law.”

55. Having regard to Section 91R of the Act, I am satisfied that the persecution feared is systematic and discriminatory conduct against women in Somalia.

56. I have also considered whether a woman in Somalia holding such fear can expect protection from the state. In a society that is male dominated and a culture where the male members deal with matters according to established custom, the role of the state is often unclear in matters relating to women. In addition, the civil war in Somalia has resulted in the absence of effective state institutions and the citizens of Somalia do not enjoy the protection of the state or the rule of law. The same UK Report cites the following summary:

The Foreign and Commonwealth Office (FCO) in its profile of 2 March 2007, (accessed 12 January 2009), stated:

“The human rights situation is defined by the absence of effective state institutions. Somalis enjoy substantial freedoms – of association, expression, movement – but live largely without the protection of the state, access to security or institutional rule of law. Institutions are emerging in some parts of the country, especially Somaliland Islamic courts play a significant role in Mogadishu Overzealous application of supposedly Islamic law in the aftermath of the [Islamic Courts Union]'s successful struggle to secure Mogadishu attracted widespread media attention. Women generally have difficulty making their voices heard in the political arena but are currently playing a very active role in civil society organisations, which are flourishing in the absence of government.”

57. In relation to the effectiveness of the police in Somalia, the USSD 2007 report notes:

The police were generally ineffective, underpaid, and corrupt.

58. I have also considered whether the persecution feared by such a particular social group in Somalia is for the reason of being a woman. Rape is a violent act of abuse and a repugnant form of persecution. It is an act carried out with the deliberate intention of the perpetrator and women are by far the target of rape. It differs therefore from random acts of violence. It may be argued that the act of rape is a crime perpetrated because of opportunity to commit the crime without being liable for the consequences. There are reports that certain elements of the militia and criminal gangs in Somalia commit such acts with impunity. It is also reported that such acts are perpetrated as part of the violence between groups in a conflict. In this regard, and in the Somali cultural context, the raping of women of the opposing group is an act of aggression perpetrated with the intention to cause ‘dishonour’ and to break down the social cohesion within the group.

59. The US Department of State report of 2007 notes that:

“Laws prohibiting rape exist; however, they were not generally enforced. There were no laws against spousal rape. There were no reports that rape cases were prosecuted during the year [2007]. NGOs documented patterns of rape of women with impunity, particularly of women displaced from their homes due to civil conflict or who were members of minority clans. Police and militia members engaged in raped, and rape was commonly practiced in inter-clan conflicts. Traditional approaches to dealing with rape tended to ignore the victim's situation and instead communalized the resolution or compensation for rape through a negotiation between members of the perpetrator's and victim's clans. Victims suffered from subsequent discrimination based on attributions of ‘impurity.’ Women and girls in IDP camps were especially vulnerable to sexual violence, contributing to the spread of HIV/AIDS. Criminal elements attacked and raped some IDPs fleeing from Mogadishu in March and April [2007]. In Somaliland there was an increase in gang rape in urban areas, primarily by youth gangs, members of police forces, and male students. Many of these cases occurred in poorer neighborhoods and among immigrants, refugee returnees, and rural displaced populations. Many cases were not reported.

60. The country information indicates that there is no reasonably effective judiciary or police force in Somalia which would meet international standards. I have also had regard to the reports that rape is perpetrated by members of the police force. I am satisfied therefore that the state will not provide reasonable measures to protect the applicant from the harm she claims to fear.

61. I am further satisfied that rape against women in Somalia may be perpetrated for the essential and significant reason of their gender.

62. I accept also that ‘young unmarried Somali women without male protection’ can constitute a particular social group. I accept that the applicant is a member of this particular social group.

63. Finally I have also considered that not each member of a particular social group may face the persecution feared and I have considered whether the applicant in the present case as a member of the particular social group faces a real chance of persecution. As noted earlier, the applicant described herself as a ‘young unmarried Somali woman without male protection’. As a subgroup of ‘women in Somalia’ having regard to reports of the culture and the current situation in Somalia, I accept that such a subgroup may be particularly vulnerable.

64. I have had regard to a number of international reports on rape in Somalia. The UK report referred to earlier also noted that the Danish Joint Fact Finding Mission report on Somalia published in August 2007 reported that:

“An international organisation (A) explained that rape is no longer widespread in Somalia. Generally it is only members of militias and bandits who would rape a woman. They will do this with impunity.

“AI reported in May 2007 that refugees interviewed in Dadaab refugee camp in Kenya ‘were particularly concerned about sexual and gender based violence against women and girls.’ According to AI these concerns are reflected in reports from NGOs working with IDPs in Somalia. AI reported about the mother of two teenage daughters who were both raped by members of an armed group who were manning a road block that they encountered while fleeing. The mother explained that rape by members of armed groups (mainly clan-based) manning road blocks was common.

“Lazzarini referred to a network called Protection Monitoring Network (PMN), which undertook a research of Sexual Gender-Based Violence (SGBV). The research covered 600 reported cases of rape. After a period of six months 10% of the assaulted women had committed suicide and 25% had disappeared. The culprits were typically militiamen at check points or individual militiamen who would approach their victims when they went to fetch water or went on their own to the toilet during the night. The women are fairly safe inside the settlement where they are together with many other people. The culprits are not prosecuted and enjoy impunity.

“Women who have been sexually abused or raped are stigmatised, according to NOVIB. An unmarried and raped woman will typically meet a demand from her own family and clan to marry the rapist as she will not have a chance to marry anyone else. As a consequence many rapes go unreported by the women. An unmarried woman who gets raped and refuses to marry the rapist may face severe consequences from her own family and clan, and she may be excluded from the clan. A married woman who has been the victim of rape may also risk being divorced by her husband. NOVIB added that divorced women might be stigmatised, depending on their particular situation. NOVIB added that even though rape of women and killings comprise the majority of the reported human rights violations in Somalia many rapes go unreported.”

The Danish fact-finding mission report continued:

“Dr. Bourzat explained that the UIC permitted its Jihad-fighters to spend the night with a girl before they were sent off to fight against the Ethiopian troops and the TFG. This was very dishonourable for the families of these girls and Bourzat described it as rape. This abuse has serious consequences for the victims and their families, especially since the UIC has been defeated”

An article published by UNHCR News, dated 25 October 2007, highlighted that “sexual violence remains part of daily life in many settlements where internally displaced people (IDPs) gather. “ The article explains:

“In a society where rape is taboo, perpetrators are rarely brought to justice. Cases are usually dealt with through traditional means, with the attacker having to pay compensation to the victim's father or husband, but never to her. ‘When raped women come, they are so ashamed that they feel as if they were already dead,’ the nurse explained.

65. I have considered the system of clan structure in Somalia and the protection a woman may expect from her clan against such risk of harm. Reports referred to by the applicant’s representative and found by the Tribunal, such as the UK Home Office 2009 report that “*the dominance of the clan has declined*” and the International Crisis Group (ICG) report of 2008 “*the cliché reduction of everything in the country to the clan dynamic is inadequate to explain power and societal trends... the new reality is murkier and sometimes paradoxical*” puts into question the view that clans are reliably able to provide this protection. Other reports further comment that clan protection is dependent on a number of factors including whether the woman lives within her own clan. As indicated in a report above, internally displaced women are particularly vulnerable. I have indicated in my reference to the applicant’s evidence that I had difficulty with the credibility of her evidence regarding the claim of the attack on the mosque and the bombing of their house which resulted in her fleeing Mogadishu and becoming an internally displaced person. However, I cannot be certain that the applicant is not an internally displaced person and therefore I cannot place sufficient weight on her ability to be protected by her clan.

66. I have also considered the possibility of safe relocation within Somalia. There is no evidence in the available country information that the situation in another part of the country which may be available to the applicant would remove the risk of harm for a young woman without male protection, given the above discussion.
67. While the applicant does not claim to have suffered personal harm in the past, it cannot be ruled out that she may in the reasonably foreseeable future face such harm. I am satisfied that the country information supports a finding that as a ‘young unmarried Somali woman without male protection’, she is a member of a particular social group and faces a real chance of persecution and serious harm because of her membership of the particular social group and her fear of returning to Somalia is well-founded. I am satisfied therefore that she is a refugee. Having made this finding, it is not necessary to consider the applicant’s other claims.

CONCLUSIONS

68. I am satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant satisfies the criterion set out in s.36(2)(a) for a protection visa.

DECISION

69. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

<p>I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the <i>Migration Act 1958</i>. Sealing Officer’s I.D. RCHADW</p>
--