

# Osman Egal v. State Secretary for Justice

## Netherlands

### The Hague District Court (Administrative law sector / Unity of Law Division for Aliens' Affairs)

THE HAGUE DISTRICT COURT

Administrative law sector

Unity of Law Division for Aliens' Affairs

JUDGMENT

pursuant to section 8(77) of the General Administrative Law Act in conjunction with Article 33a of the Aliens Act

Reg. No:	AWB 98/3068 VRWET
In the matter of:	Jama Sheikh OSMAN EGAL, domiciled at Rotterdam, appellant, represented by S. Stenfert Kroese, lawyer established at Rotterdam
versus:	The State Secretary for Justice, respondent, represented by G.M.H. Hoogvliet, lawyer established at The Hague

#### (EXTRACTS)

...

3. By letter of 1 May 1998 the Unity of Law Division of the Supreme Court requested the Representative of the United Nations High Commissioner for Refugees (UNHCR) in the Netherlands, Mr M.T. Jordao, for the UNHCR's position on whether protection under the Refugee Convention could not be invoked as a result of the absence of government authority. By letter of 11 June 1998 Mr Jordao informed the Unity of Law Division that Mr Peter van der Vaart, the UNHCR's Representative in London, would clarify the UNHCR's position during proceedings before the said Division.

4. In its statement of defence of 25 May 1998, the respondent moved for dismissal of the appeal as unfounded. The appellant replied by letter of 23 June 1998. By letter of 30 June 1998 the respondent informed the Unity of Law Division that it would forego making use of the possibility of a rejoinder. The appellant submitted further documents by letter of 1 July 1997.

5. The appeal was heard in open session on 2 July 1998. The appellant, assisted by counsel, appeared before the court. The respondent was represented by its counsel. The court heard the appeal jointly with those bearing the reference numbers AWB 98/3057 VRWET and AWB 98/3072 VRWET. The latter concerns and appeal brought by the appellant's spouse, Z. Ahmed Hussein.

*Mr van der Vaart, aforementioned, clarified the UNHCR's position during the session.*

## GROUNDS

1. The question at issue is whether the disputed decision can be upheld in law.
2. The appellant has based his appeal on his eligibility for admission as a refugee.
3. Pursuant to the introductory phrase and paragraph 2 of Article 1A of the Geneva Convention relating to the status of refugees of 28 July 1951, as amended by the New York Protocol of 21 January 1967, hereinafter referred to as the "Refugee Convention", "refugee" means, insofar as relevant here for purposes of applying the Refugee Convention, any person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country.
  - 3.1 Pursuant to Section 15(1) Vw (Aliens Act) aliens coming from a country in which they have well-founded reasons to fear persecution because of their religious, ideological or political conviction or their nationality, or because they belong to a certain race or a certain social group, may submit a request for admission as refugees.

*According to established case law, this provision covers the same group of persons as that defined in the introductory phrase and paragraph 2 of Article 1A of the Refugee Convention.*

4. This appeal is being heard by the Unity of Law Division further to the judgment first handed down on 6 November 1995 by the Afdeling bestuursrechtspraak van de Raad van State - ABRS (Administrative justice Division of the Council of State) regarding the question of when "persecution" within the meaning of the introductory phrase and paragraph 2 of Article 1A of the Refugee Convention and Section 15(1) Vw can be deemed to occur.

*Under its constant case law the ABRS interprets the term "persecution" as meaning persecution by any government body or by third parties against which the government is unwilling, or unable, to offer adequate protection.*

5. By its judgment of 6 November 1995 in case No. R02.93.4400 (RV 1995,4) the ABRS ruled that there can be no question of persecution within the meaning of the Refugee Convention and the Aliens Act if the country of origin has no government. In support of this ruling the ABRS considered that this view was also consistent with the case law of the central administrative-law bodies in France and Germany, both of which are also parties to the Schengen Agreement.

*By its judgment of 19 March 1997 in cases Nos R02.93.2786 and R02.93.4013 the ABRS qualified the approach adopted on 6 November 1995, considering that "absence of government" as referred to in the judgment of 6 November 1995 refers to a situation marked by the lack of any form of de facto government authority in the area at issue. In the view of the ABRS that definition of the term "persecution" is consistent with the international-law doctrine of the liability of the state. The ABRS further points out that that definition of the term "persecution" is in accordance with the joint position, since adopted by the Council of the European Union on 4 March 1996, on the harmonised application of the definition of the term 'refugee' in Article 1 of the Refugee Convention, a position subscribed to by the Government on 4 December 1995.*

*Finally, it was considered in the judgment of 19 March 1997 that the UNHCR's position, as set out in the UNHCR Position Paper with regard to persecution by non-State agents of 30 January 1996, which rejects any limitation of the concept of persecution, did not prompt the ABRS to revise its definition in view of, inter alia, the practical drawbacks involved in applying that position in the case of countries granting admission on humanitarian grounds alongside, or in place of, the so-called "refugee status".*

6. The respondent held that, following the ABRS judgment of 6 November 1995, it had (had) no alternative but to align its policy on the above case law.

7. Justifying the disputed decision, the respondent principally referred to the opinion of the ACV of 18 July 1997. The latter held therein that, pursuant to current ABRS case law, the appellant could not qualify as a refugee because he

came from Mogadishu, where de facto government authority was lacking.

*In the disputed decision, the respondent, further to the ACV's opinion, also considered the application for admission as a refugee as to its substance. The respondent maintains that the appellant cannot qualify as a refugee on substantive grounds either.*

8. The appellant disputes that there can be no question of persecution within the meaning of the Refugee Convention if de facto government authority is lacking in the country of origin. The appellant points out that the idea of protection is central to both the introductory phase and paragraph 2 of Article 1A of the Refugee Convention. Indeed, at issue is a situation where someone "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".

*That definition by no means suggests that acts of persecution, whether direct or indirect, have to emanate from the authorities. The appellant emphasises that the UNHCR Handbook on procedures and criteria for determining refugee status also expressly refers to the idea of protection. Thus, paragraph 98 of the Handbook states that: "Being unable to avail himself of such protection implies circumstances that are beyond the will of the person concerned. There may, for example, be a state of war, civil war or other grave disturbance, which prevents the country of nationality from extending protection or makes such protection ineffective". The appellant points out that UNHCR further explicated that standpoint in the letter of 30 January 1996, in which the UNHCR opposes the ABRS' altered viewpoint.*

*The appellant holds that the reference to German and French case law made by the ABRS in its judgment of 6 November 1995 is insufficient. In this connection, it points out that other countries, including Canada, the United Kingdom, Belgium, Greece, Spain, Finland and Sweden do grant refugee status in the absence of de facto government authority, provided, of course, that the criteria in Article 1A of the Refugee Convention are met.*

*The appellant holds that the doctrine of State liability is not relevant for the purposes of applying the Refugee Convention, arguing that the premise whereby only States can be deemed liable for internationally wrongful acts is erroneous. In its view, individuals may also be held liable for human rights violations under international law.*

*The appellant holds that the reference made by the ABRS in its judgment of 19 March 1997 to the common position of the Council of the European Union cannot be deemed adequate justification either. It argues that the joint position in question is not binding, whilst its accuracy is also open to serious criticism. It further points out that the text of the joint position also provides scope for a differing interpretation.*

*Regarding the argument put forward in the judgment of 19 March 1997 that practical objections stand in the way of the approach towards protection advocated by the UNHCR, the appellant points out that it is unacceptable that the ABRS should use an incorrect definition of refugee status for practical reasons.*

*Moreover, according to the appellant, on the basis of Article 35 of the Refugee Convention, the UNHCR is the appropriate agency for supervising the correct interpretation of the Refugee Convention. It considers that the ABRS overlooks this fact.*

*The appellant holds that the Vienna Convention on the Law of Treaties of 23 May 1969 should serve as a guide for interpreting the Refugee Convention. On the basis of Article 31 of the Vienna Convention, the concept of "persecution" should be interpreted in accordance with the ordinary meaning of the terms of the Refugee Convention in their context and in the light of the object and purpose of the Convention.*

*According to the appellant, the ordinary meaning of the concept of "persecution" is that it should cover all acts of persecution, regardless of whether or not the liability of the State is involved.*

*The appellant finally pointed out that the approach towards protection also found support in specialised literature.*

8.1 Alternatively, the appellant holds that - should it have to be assumed that existence of a State is a precondition for granting admission as a refugee - the absence of central government authority in Somalia cannot be equated with a situation where the State of Somalia is deemed to have ceased to exist. Indeed, the Netherlands has not withdrawn recognition of Somalia. The appellant further points out that Somalia's membership of the UN has not been revoked, a possibility provided for in Article 6 of the UN Charter.

9. In the view of the Court a first question to arise is whether persecution within the meaning of the Refugee

Convention and the Aliens Act can be deemed to exist where it emanates from their parties and no protection can be afforded against it because of the absence of any form of de facto government authority in the area in question.

10. The Court considers that neither the text of the introduction and paragraph 2 of Article 1A of the Refugee Convention, nor the text of Section 15(1) VW lead to the conclusion that persecution within the meaning intended here cannot be deemed to exist where the persecution emanates from third parties and no protection can be afforded against it because of the absence of any form of de facto government authority in the area in question.

*Nor does the way in which the Refugee Convention came about lead to that conclusion.*

*Having regard to the object and purpose of the Refugee Convention, namely affording protection to persons who in their country of origin have a well-founded fear of persecution for one (or more) of the reasons referred to and can obtain no protection or inadequate protection in that country, there is no reason to withhold such protection because de facto government authority is lacking in that country.*

11. Having regard to the preamble and Article 35(1) of the Refugee Convention, the UNHCR is charged, inter alia, with the task of supervising the application of the provisions of the Refugee Convention. On that basis that Court also considers it important that the UNHCR sees no reason for making the reply to the question of whether persecution is involved dependent on the presence of (any form of) de facto government authority.

*The Court points in particular to the following passages of the UNHCR Position Paper with regard to persecution by non-State agents of 30 January 1996:*

“2. There is nothing in the wording of Article 1A of the 1951 Convention to indicate that persons who fear persecution otherwise than by state authorities should be excluded from refugee status.

(...)

3. The general principles of interpretation, as codified in Article 31 of the Vienna Convention on the Law of Treaties, require a treaty to be interpreted in accordance with the ordinary meaning to be given to its terms in their context and in the light of the treaty's object and purpose. The ordinary meaning of the term “persecution”, as explained above, is that it embraces all persecutory acts irrespective of whether or not the complicity of the state is involved. Moreover, the object and purpose of the 1951 Convention is to ensure that individuals, who have a well-founded fear of persecution on the grounds enumerated in the Convention be granted international protection as a substitute for the – lacking – national protection. Having regard to these considerations, a restrictive interpretation, according to which individuals fleeing from the threat of persecution by non-State agents would be excluded from refugee status, would be clearly contrary to the object and purpose of the 1951 Convention.

(...)

In the opinion of the UNHCR, the preambular text of the European Union Joint Position on the harmonised application of the definition of the term “refugee” allows the member States to differ in the practice of refugee law and does not necessarily oblige them to follow the application of Article 1A of Germany or France to its full extent.

In the opinion of the UNHCR, the interpretation of the Afdeling Bestuursrechtspraak van de Raad van State undermines one of the basic principles of refugee law and may result in the denial of refugee status to those who, according to the objective and spirit of the 1951 Refugee Convention, are in need of international protection.”

*The UNHCR Representative in London repeated that position in court.*

12. The Court points out that the ABRS's case law up to the judgment of 6 November 1995 was fully consistent with the UNHCR's abovementioned position. It sees no compelling reason for finding fault with that position which - as argued above - does not conflict with the text, object or purpose of the Refugee Convention. In the Court's view, the fact that administrative-law bodies and/or the administration in some Member States of the European Union rule out refugee status if de facto government authority is lacking in the country of origin cannot constitute such a reason. Indeed, in yet other Member States of the European Union, no specific requirements are laid down regarding the existence of forms of

de facto government authority for deciding whether there can be any question of refugee status within the meaning intended here. The Court would refer in this connection to the report entitled "Persecution by Third Parties" by B. Vermeulen, Th. Spijkerboer, K. Zwaan and R. Fernhout - KU Nijmegen - May 1998, submitted by both parties.

*Neither can the joint position on the harmonised application of the definition of the term "refugee" in Article 1 of the Refugee Convention, adopted by the Council of the European Union on 4 March 1996 (OJ L 63,p.2), be regarded as such a reason. It should first and foremost be noted here that the said joint position explicitly states that it was adopted within the limits of the constitutional powers of the Governments of the Member States; it is not binding upon the legislative authorities and is without prejudice to the decisions of the judicial authorities of the Member States. The Court further points out that currently some 130 States are party to the Refugee Convention, and that it seems unlikely that the abovementioned joint position will be subscribed to in the broad sense by those States not forming part of the European Union.*

*It is furthermore apparent from the respondent's current decision-making practice that although the respondent has become reconciled to the ABRS' current view, it nevertheless consistently tends to assess applications for admission as a refugee as to their substance.*

*Finally, the potential practical objections which would be involved in acceptance of the UNHCR's position also constitute insufficient grounds for departing from that position – which was also implemented by the respondent until 6 November 1995.*

*The Court does, however, see practical objections which, in its view, attach to implementation of the position taken by the respondent since 6 November 1995 in compliance with the ABRS. The Court would submit the following considerations on this matter.*

*The question as to whether or not any (forms of) de facto government authority can be deemed to exist is of a factual nature. In the case of countries marked by greatly fluctuating unstable situations, the reply to that question may vary within a short space of time, depending on whether the instability is increasing or decreasing. Were it to be assumed that refugee status can (only) be considered subject to the existence of (forms of) de facto government authority, this would imply that persecution within the meaning of the Refugee Convention may be deemed to be involved at one stage in the procedure, but not at another.*

13. Further to grounds 10, 11 and 12 the question of whether and, if so, since when and in which region forms of authority exist once again in Somalia need not be considered.

14. Where persecution emanates from third parties and no protection can be provided by the government because there is no government, the question still needs to be answered as to whether refugee status is nonetheless ruled out if protection is afforded by parties other than the government.

15. The court is of the opinion that the text of the introductory phrase and of paragraph 2 of Article 1A of the Refugee Convention does not rule out the possibility that, where there is no government, protection may be forthcoming from parties other than the government. That Article refers to protection by the country of the alien's nationality, a broader concept than protection by the government. Moreover, the idea of protection enshrined in the Refugee Convention also implies that protection by parties other than the government may be deemed adequate, provided that such protection may be considered to be effective and lasting in relation to the persecution feared. Whether the latter is the case will always have to be assessed individually. Consequently, regarding the respondent's assessment that rejected asylum-seekers from Somalia - apart from the categories of Somalis referred to in the official report of 9 January 1997 - generally no longer qualify for a provisional residence permit because their security is adequately guaranteed in their clan areas, the Court points out that this does not mean that a Somali asylum-seeker who has made a reasonable case for fearing persecution by a hostile clan will still enjoy in his (sub-) clan area the effective and lasting protection to which he is entitled under the Refugee Convention.

...

*hereby declares the appellant's appeal to be unfounded.*

Handed down by A.C.J. van Dooijeweert, A.H.Schotman and W.J. van Bennekom and pronounced in open session on 27 August 1998 by A.C.J. van Dooijeweert in the presence of the registrar R. Depping.

Registrar

President