



KNOWLEDGE-BASED HARMONISATION OF EUROPEAN ASYLUM PRACTICES

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Case Summary

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| Country of Decision/Jurisdiction | United Kingdom |
| Case Name/Title | AM & AM (armed conflict: risk categories) Rev 1 Somalia CG (27 January 2009) |
| Court Name <i>(Both in English and in the original language)</i> | Asylum and Immigration Tribunal |
| Neutral Citation Number | [2008] UKAIT 00091 |
| Other Citation Number | |
| Date Decision Delivered | 27 January 2009 |
| Country of Applicant/Claimant | Somalia |
| Keywords | Persecution |
| Head Note (Summary of Summary) | <p>In the light of the more recent approach to defining persecution in international human rights law terms and by reference to the laws of war (e.g. in <i>Horvath, Sepet and Bulbul</i> and the Qualification Directive (Regulations 9)), the Tribunal highlighted the need to apply caution when considering the application of <i>Adan</i> [1998] 2 WLR 703 to a refugee protection claim in the context of a civil war. A civilian may in some circumstances be at risk of persecution in a civil war situation by acts of armed conflict which do not accord with the laws of war without needing to show a differential impact.</p> <p>Whilst there will always be heavy factual obstacles in the way of a finding that socio-economic circumstances can constitute persecution, there is no reason of principle why a claim of this kind cannot succeed.</p> |
| Case Summary (150-500) | <p>AM1 was a Somali asylum seeker born on 6 January 1977. He arrived in the UK on 4 June 2005 and claimed asylum soon after. His application was refused. He had several appeal hearings. Reconsideration was ordered on 6 March 2008 and on 4 August 2008 Senior Immigration Judge (SIJ) Storey decided that there was a material error of law: the text of that decision is set out at Annex 1 of the judgement. The Tribunal proceeded on the basis that the only accepted fact was that the appellant was a Somali from the town of Jowhar.</p> <p>AM2 was a Somali asylum seeker born on 1 January 1986 from Mogadishu, of the Sheikhal Logobe clan. He arrived in the UK on 28 October 2003. His asylum claim made on the same day was refused on 25 November 2003 and a further application was refused on 25 April 2007. His appeal against that refusal was dismissed. Following an order for reconsideration made that same month, SIJ Jordan in a decision dated 23 January 2008 found a material error of law. The text of that decision is contained in Annex 2 of the judgement.</p> <p>The appeals were linked and heard as a Country Guidance case on the risks</p> |



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| | to Somali asylum seekers. |
| <i>Facts</i> | <p>In this wide reaching decision, the Tribunal sought to provide guidance on a number of legal and factual issues which arise in protection applications (both in respect of the Refugee Convention and <i>subsidiary protection</i>) from Somalis.</p> <p>This judgement is summarised here for what it says about <i>persecution</i> in the context of risks to civilians in a situation of armed conflict.</p> |
| <i>Decision & Reasoning</i> | <p>The Tribunal [69] considered the leading, but now 10-year-old, authority of <i>Adan</i> [1998] 2 WLR 703, in which the House of Lords had concluded that in a civil war situation the individual or group has to show a well-founded fear of persecution over and above the risk to life and liberty inherent in civil war.</p> <p>In so doing, the Tribunal rejected the Secretary of State's submission that "[t]he killing and torture incidental to a clan and sub-clan based civil war do not give rise to a well-founded fear of persecution when the asylum seeker is at no greater risk of such ill-treatment by reason of her clan or sub-clan membership than others at risk in the war."</p> <p>The Tribunal found that the reference to "civil war" by the House of Lords in <i>Adan</i> would now more accurately be described as "a situation of internal armed conflict".</p> <p>The Tribunal found that the House of Lords in <i>Adan</i> had not intended to say that in a situation of armed conflict there could not be persecution solely because those affected were equally at risk. That they cannot have intended such a reading is clear from their express recognition elsewhere in this decision that (citing Hathaway) "[i]t is not necessary for a claimant to show that he is more at risk than anyone else in his group, if the group as a whole is subject to oppression":</p> <p>The Tribunal was concerned however that,</p> <p>"73...Their lordships [in <i>Adan</i>] appear to have given little thought to the relevance of an international law approach to assessing refugee eligibility in a country of return afflicted by armed conflict.</p> <p>74... Since <i>Adan</i>, the House of Lords has adopted a different approach to the concept of persecution (defining it in <i>Horvath</i>[2000] <i>Imm AR 552</i> (HL) in terms of severe violations of basic human rights) and since October 2006 we must now apply the (highly similar) international human rights-based definition set out in Article 9 of the Qualification Directive as implemented in Reg 3 of the Protection Regulations. Further, the notion that "ill-treatment" (to use the wording of <i>Adan</i>) or "...torture" (to use the word given in the respondent's skeleton at para 23) cannot be persecutory simply because the situation is one of wartime, not peacetime, is contrary not only to international human rights law but also to domestic law, the Human Rights Act 1998 in particular. According to the latter the only human rights guarantees that can cease to apply in time of war are derogable rights: see Article 15 of the ECHR. Whether one treats international humanitarian law or international human rights law as <i>lex specialis</i> in relation to situations of</p> |



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armed conflict, under neither legal framework can violations of nonderogable human rights be permitted in wartime: see NA v UK Application no. 25904/07 17 July 2008, BE (Iran) [2008] EWCA Civ 540 and KApara 48.

75. In addition we must apply Adan knowing that the House of Lords and the Court of Appeal have since applied the laws of war quite readily in refugee claims in the context of armed conflict (see Sepet and Bulbul[2003] UKHL 8 and Krotov[2004] EWCA Civ 69) We have to apply Adan in the context that since then, as the above cases reflect, there have been important developments in customary international law and in international human rights law, with the accretion of considerable case law dealing with armed conflict by the ECtHR in cases where breaches of Articles 2 and 3 are at issue ... In more recent years the resolutions have made abundantly clear the Security Council view that the rules of war do apply to the situation in Somalia. For example, Resolution 1772, 20 August 2007 stresses:

"the responsibility of all parties and all armed groups in Somalia to take appropriate steps to protect the civilian population in the country, consistent with international humanitarian law, human rights and refugee law, in particular by avoiding any indiscriminate attacks on populated areas."

76. The above developments also call in our view for a careful analysis of what their Lordships in Adan should be taken to mean by referring to the "ordinary risks of clan warfare". Whilst it is clear that they did not have in mind specifically any distinction based on the laws or rules of war, we cannot avoid seeking to give ongoing content to the distinction. Bearing in mind the aforesaid developments in international law (and in the Somali context, the clarification by the Security Council of the relevance to Somalia of the rules of war), we consider that, compatibly with the ratio in Adan, the most sensible content to be given to this distinction is between acts of armed conflict which accord with the laws of war and acts which do not. Civilians caught in the crossfire between armed groups will not normally face anything other than the ordinary incidents of civil war. **But if, for example, one of the parties has deliberately stationed themselves next to a crowded marketplace and the other side knows – or ought to know – that, yet launches an attack, then there is a risk to civilians in that marketplace over and above the ordinary incidents of civil war. In the latter type of situation, there is a real risk of serious violations of peremptory norms of international humanitarian law and human rights law.**

77. It follows from the above analysis that when considering the question of whether either appellant is eligible for refugee protection on the basis of exposure to the armed conflict, Adan does not permit decision makers to reject their claim per se".

The Tribunal then considered the Secretary of State's contention that poor socio-economic conditions could not give rise to a fear of *persecution*. The Tribunal found that in extreme circumstances, applying a human rights analysis, such a claim could succeed.



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| | <p><u>Poor socio-economic conditions and refugee protection</u></p> <p>78. In her skeleton argument at para 25 the respondent advanced the contention that it would be wrong "as a matter of principle" to consider that a claim, based on a person's fear of being compelled on return to subsist in an IDP camp, fell within the Refugee Convention. In the same paragraph she added:</p> <p style="padding-left: 40px;"><i>"[T]he prevailing economic conditions in a society which are experienced either by all its members or a section of its members cannot amount to persecution for the purposes of the Refugee Convention. It is clear from a number of authorities that the purpose of the Refugee Convention is not to enable people to escape dire economic conditions, but to protect them from deliberate ill-treatment on Convention grounds."</i></p> <p>79. We disagree, at least insofar as this argument is directed at the meaning of persecution, rather than the requirement under the 1951 Convention to show a Convention ground or reason. The meaning of persecution is set out at Reg 5 of the 2006 Protection Regulations and (we repeat) in terms which in our view can be taken broadly to mirror that which has been accorded by the UK courts and this Tribunal (and its predecessor) since Horvath[2000] Imm AR 552 (HL). Given that persecution must be seen, therefore, as harm in the form of severe violations of basic human rights, it could only be right "as a matter of principle" to exclude claims based on forced subsistence in an IDP camp if human rights law precludes it. But, as we shall go on to explain, human rights law does not preclude it. Albeit holding that claims for protection against refoulement based on dire socio-economic circumstances are normally not decisive when considering Article 3 ill-treatment, the Strasbourg Court has not excluded that in certain extreme circumstances, such circumstances could give rise to a violation of a nonderogable right: see below paras 86-88. Further, as has been made clear by the Court on many occasions (e.g. in Kalashnikov v Russia[2002] ECHR 596) and by UK courts and the Tribunal, for ill-treatment to arise under Article 3, it does not necessarily have to be intentional or deliberate: see R (On the appellant of Adam v Secretary of State for the Home Department[2005] UKHL 66; [2006] 1 AC 396 at [55]. Hence, whilst there will always be heavy factual obstacles in the way of a finding that socio-economic circumstances can constitute persecution, there is no reason of principle why a claim of this kind cannot succeed.</p> |
| <p><i>Outcome</i></p> | <p>The appeal of AM1 was dismissed on asylum, humanitarian protection and human rights grounds. The appeal of AM2 – due to his membership of the Shekhal Loboge clan and the intensity of the fighting in Mogadishu - was allowed on asylum and human rights grounds.</p> <p>One important conclusion of the Tribunal in this case - that where the precise <i>method</i> of returning asylum claimants to their home area was not known, the Tribunal was not in a position to consider the risks attendant on that journey - was overturned by a subsequent judgement of the Court of Appeal(<i>HH (Somalia) & Ors v Secretary Of State for the Home Department</i> [2010] EWCA Civ 426). AM1's appeal was remitted to be reheard by the</p> |



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| | Tribunal to consider the safety of his journey home. His appeal was refused again on the basis that he would not risk persecution on his journey from Mogadishu International Airport to Jowhar. |
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