

**REFUGEE STATUS APPEALS AUTHORITY**  
**NEW ZEALAND**

**REFUGEE APPEAL NO 76551**

**AT AUCKLAND**

<b><u>Before:</u></b>	B L Burson (Member)
<b><u>Counsel for the Appellant:</u></b>	D Ryken
<b><u>Appearing for the Department of Labour:</u></b>	No Appearance
<b><u>Dates of Hearing:</u></b>	28 & 29 July 2010
<b><u>Date of Decision:</u></b>	21 September 2010

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**DECISION**

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**INTRODUCTION**

[1] This is an appeal against the decision of a refugee status officer of the Refugee Status Branch (RSB) of the Department of Labour (DOL) declining the grant of refugee status to the appellant, a national of Somalia who has spent a number of years in South Africa as a recognised Convention refugee.

[2] This is the second time the appellant has appeared before the Authority. He originally arrived in New Zealand in June 2008 and lodged an application for refugee status. He was interviewed by the RSB in respect of that claim on 31 July and 1 August 2008. By decision dated 21 November 2008 the RSB declined the appellant's claim on the basis that having been recognised as a refugee in South Africa the appellant was entitled to the protection of that country. The appellant duly appealed to the Authority. By decision dated 4 August 2009 the Authority dismissed the appellant's appeal.

[3] On 12 October 2009, the appellant lodged proceedings by way of judicial review in the High Court. By decision dated 4 June 2010 the High Court quashed the decision of the Authority. Although the High Court was satisfied the Authority

had not committed any reviewable error itself, the appellant's previous representative had failed to ensure that a letter from a witness confirming the appellant's clan origins was not placed before the Authority and the High Court reached the view that the Authority should, as a matter of fairness, re-assess the appellant's claim having regard to this evidence.

[4] The matter was duly remitted back to the Authority for rehearing. However, in the interests of minimising further delay in resolution of the appellant's claim, the Authority indicated to Mr Ryken at the commencement of the hearing that all issues were at large and evidence would be heard about his predicaments in both Somalia and South Africa

### **The appellants refugee status and residence in South Africa**

[5] A significant feature of this appeal is that prior to his arrival in New Zealand the appellant lived for a number of years in South Africa. Shortly after his arrival there in February 2000 he applied for refugee status. In September 2000, the appellant was formally recognised as a refugee by the South African Department of Home Affairs ("DHA"). Under s15(2) of the South African Refugees Act 1998, this recognition was of a temporary nature lasting for two years. In accordance with s15(1), during this period the appellant was entitled to remain in South Africa, seek employment, and enjoy entitlement to basic health services and primary education as an 'inhabitant' of South Africa. Under s15(3), if he wanted to remain in South Africa beyond this two year period, he was required to apply for a renewal of his refugee status some 90 days prior to its expiry. This, the appellant did and, his refugee status was extended for a further period of two years with the same rights and obligations attaching. The appellant applied for and was granted further extensions on the same basis. According to documentation submitted by the appellant, his last application for recognition was determined on 2 January 2007 and, accordingly, he was entitled to remain lawfully in South Africa until January 2009. However, in April 2008, the appellant left South Africa because, he says, he feared for his safety if he remained there as a result of an increase in anti-immigrant violence.

[6] This history gives rise to a preliminary issue to be determined as to whether the appellant is, today, able to avail himself of the protection of South Africa. Section 129L(1)(e) of the Immigration Act 1987 ("the Act") sets out some additional functions of refugee status officers. It provides:

**129L Additional functions of refugee status officers**

- (1) In addition to their function of determining claims for refugee status, refugee status officers also have the following functions:

...

- (e) determining, in the case of a person who has already been recognised as a Convention refugee by a country other than New Zealand, whether that person may avail himself or herself of the protection of that country:

[7] Much argument has been devoted to this issue. In its decision dated 21 November 2008, the RSB conducted a full inquiry into the primary protection question and found that the appellant did have a well-founded fear of being persecuted in Somalia. It declined the appellant's claim because it found that s129L(1)(e) of the Act applied and the appellant could avail himself of the protection of South Africa. The nub of Mr Ryken's argument on appeal is that, although the appellant may have been recognised as a refugee in South Africa in the past, that recognition has now lapsed. He has, it is argued, no right of re-entry into South Africa at the present time. Accordingly, South Africa ceases to be what Mr Ryken describes as a 'country of reference' for the purpose of s129L(e) of the Act. Therefore the Authority is required to examine the appellant's claim of being at risk in Somalia.

[8] In short, the Authority accepts Mr Ryken's submission on the application of s129L(1)(e) of the Act. Mindful that we are now very much in the twilight of the 1987 Act and that the Immigration Act 2009 is soon to come into force, little useful purpose is served by embarking on a lengthy examination of the correct approach to be taken in dealing with cases under s129L(1)(e) of the Act. Suffice it to say that, in general terms, the Convention itself recognises that the circumstances giving rise to a grant of refugee status may only be of a temporary nature as conditions in the country of nationality change over time – see Article 1C. In this case, the grant of refugee status to the appellant was of a temporary nature. Whereas, as at the date of the RSB decision in November 2008, his refugee status was still extant, as at the date of this appeal it has expired. The Authority is required to determine appeals on the facts as found as at the date of hearing – see *Refugee Appeal No 11/91 Re S* (5 September 1991); *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (HC:Aus). As at this time, the appellant simply does not have the protection of South Africa. Section 12L(1)(e) of the Act does not apply.

[9] The Authority now turns to the issue of whether the appellant has established that he has a well-founded fear of being persecuted in Somalia for a convention reason. In support of this contention, the appellant called Mr Abdi

Kadir Ali Mohamed, the author of the letter as to the appellant's clan which had been mistakenly omitted from the materials placed before the Authority by the appellant's former representative. The appellant also called evidence from Mrs Ardo Abdi.

[10] What follows is a summary of evidence given in support of the appellant's claim. An assessment follows thereafter.

## **THE APPELLANT'S CASE**

### **Evidence of the appellant**

[11] The appellant was born in Hawl-Wadag, a suburb of Mogadishu. He was born into the Ogaden which is a sub-clan of the larger noble Darod clan. The appellant explained his lineage in descending order as follow:

- (a) Darod
- (b) Absami
- (c) Ogaden
- (d) Mohamed Suber
- (e) Sub-clan AA
- (f) Sub-clan BB
- (g) Sub-clan CC
- (h) Sub-clan DD.

[12] In terms of his genealogy the appellant's sub-clan in Mohammed Suber (aka Mohamed Zubeer). In terms of the obligations placed on clan members to look after and assist other clan members the appellant would have the most proximate claim against a member of sub-clan DD. If there was no sub-clan DD in the area able to help him, then anybody from sub-clan CC would assume the obligation. If no sub-clan CC were available someone from sub-clan BB would assume the obligation.

[13] The appellant's father was a policeman. He originated from the city of Afmadow in Lower Juba but, some years prior to the appellant's birth, moved to Mogadishu for employment. The appellant's father had two wives. The first of his two wives was the appellant's mother and from this relationship the appellant has four brothers, two older and two younger. When the appellant was aged 18 years, his father married his second wife. She was from the Haba Gedir clan which is a

sub-clan of the Hawiye clan. The appellant's mother was from Mogadishu and from this relationship the appellant has two stepsisters. The appellant's father has a number of siblings. One sister and one brother live in Kismayo. Another of his sisters and two of his brothers remain living in the Afmadow area.

[14] The appellant's family lived in a compound for police department employees until the outbreak of the civil war in 1990/1991. With the outbreak of civil war following the collapse of the Said Barre regime, the appellant's father was quick to realise that the police compound would be one of the first places targeted. He therefore gathered the family into a truck and made arrangements for them to be taken back to Afmadow.

[15] Unfortunately, as the family was fleeing, the appellant's mother was caught in the crossfire between the two sides to the fighting and died of her wounds. After she was buried the family travelled on to Kismayo, where they remained for one day before travelling on to Afmadow. In Afmadow the appellant and his family were housed by members of their clan, according to Somali tradition.

[16] The appellant and his family lived in Afmadow without particular incident until approximately 2000-2001. Life, however, was difficult. They relied on food aid to sustain them which was distributed by organisations such as the United Nations World Food Programme or the Red Cross. Apart from a period of time in around 1993 when the family was forced to flee into rural areas surrounding Afmadow as a result of the fighting inside the town, the appellant's family remained living in Afmadow. The appellant's two older brothers farmed in Afmadow which assisted the family with their subsistence needs.

[17] In late 1998, the appellant's father requested that the appellant travel to Mogadishu to bring his two stepsisters to Afmadow. The appellant understood that his stepmother had made contact via radio-telephone (the only form of communication at the time) to advise his father that his daughters were now of an age where they were becoming increasingly susceptible to being the victims of sexual violence if they remained in Mogadishu. She pleaded that they be taken to Afmadow for their safety. The Ogaden clan was in control of the Afmadow area to the town of Jilib. After that, clan control passed to the Hawiye clan. It was not possible for the appellant to safely travel through Hawiye-controlled territory and therefore his stepmother arranged that her brother would meet him at the "border" between Hawiye and Ogaden-controlled territory in the town of Jilib. In Jilib the appellant met his stepmother's brother and boarded a truck travelling to

Mogadishu. At all of the checkpoints his stepmother's brother did all the talking and the appellant managed to pass without incident into Mogadishu. However, an outbreak of fighting and financial difficulties meant the appellant could not leave for Afmadow immediately. In fact he was forced to remain in Mogadishu for a number of months until the fighting had abated and Hawiye had resumed control of the road between Mogadishu and Jilib. During this period in Mogadishu the appellant did not venture outside his stepmother's compound. However, from time to time the stepmother was visited by a young Somali woman and she and the appellant became attracted to each other. They agreed to marry even though they knew that the family of the appellant's wife, who were Hawiye, would not agree. It was their plan that when the fighting subsided and the civil war finished that she would come and join him in Afmadow. After some months it became clear that the fighting was not going to end quickly and so the appellant took his two stepsisters to Afmadow. Once again he travelled under the protection of his stepmother's brother.

[18] Approximately one year later, in early February 1999, the appellant decided to return to Mogadishu to fetch his wife. He had kept in contact with her via his stepmother who gave him news of her. Once again his stepmother arranged for him to be escorted from Jilib to Mogadishu. Upon his arrival in Mogadishu the appellant travelled to his stepmother's house. He learned from her that some two weeks previously members of his first wife's clan had visited her house and wanted to know about the secret marriage between the appellant and his second wife. The appellant's stepmother denied all knowledge of this and denied that the marriage had taken place. She could not warn the appellant of this development because she herself did not have a radio-telephone but rather made contact with him and his family in Afmadow via a communal radio-telephone. It was now too dangerous for her to talk about the appellant's second wife using this means of communication. She could not, therefore, give the appellant any prior warning. The stepmother was spoken to in a threatening manner.

[19] The appellant remained in Mogadishu for about a month because it was too dangerous for him to travel with the fighting that was taking place. While in Mogadishu he received a telephone call from one of his older brothers to advise him that his father had been taken ill and taken to a hospital in Kismayo.

[20] After waiting for a couple of days for the fighting to subside to a sufficient extent, the appellant managed to travel with an escort from Mogadishu to Kismayo. The appellant visited his father in hospital. However after a couple of

days of being in Kismayo inter-clan fighting also broke out there. At the time the appellant was walking around the central downtown area and because of the fighting was unable to get back to where his father was. As a result of the fighting many people started fleeing for safety towards the port region and the appellant did likewise.

[21] Upon reaching the port, he and a number of others were taken aboard a small boat by a Somali man who took them to Zanzibar, where he traded. The journey lasted about two weeks. Upon reaching Zanzibar, the boat was not allowed to unload its occupants and was diverted to Mozambique. In Mozambique the appellant travelled to Maputo. His stepmother had given him US\$100 to take to Kismayo which he still had on his person. In Maputo he met a number of other Somalis and became aware of an agent who was smuggling people over the land border into South Africa. The appellant paid an agent US\$50 to be smuggled into South Africa. The appellant crossed into South Africa in February 2000, approximately a month or so after he had fled Somalia.

[22] Upon entering South Africa, the appellant went directly to Johannesburg where he was assisted by members of his clan. However, he was informed that there were quite lengthy delays in lodging refugee claims and having refugee claims processed in Johannesburg and that it was far easier in Cape Town. Also, the clan members told him that members of the sub-clan DD were more prevalent in Cape Town and that he should go there. The appellant did so.

[23] In Cape Town he was taken by his clan members to the DHA and he lodged a refugee claim. He was given a refugee identity document and a three month temporary permit. This documentation identified him as a Somali who was seeking asylum. After three months the appellant had a half-hour interview with a DHA official. He told him his clan and how he feared for his safety given there was no government in Somalia. Temporary status was extended for a few months and in September 2000 he received a letter from the DHA advising him that he had been approved as a refugee. This document was valid for two years and approximately 90 days before its expiry the appellant was required to write to the DHA and explain that he still feared for his safety as an Ogaden given there was no central government in Somalia. His refugee status was extended to a further two years without him being subjected to a further interview.

[24] Although the original grant of refugee status indicated that the appellant should apply for a refugee identity document within 14 days, the appellant did not

do so because the South African government was not, at that time, issuing them. This did not happen until 2005. When the government announced that they were now issuing these documents the appellant filled out the necessary form together with a copy of his grant of refugee status and two photographs. He subsequently received a South African identity document.

[25] In 2000, the appellant applied for and was issued with a refugee travel document. This refugee travel document lasted for two years. When it expired in 2002 the government in his area stopped issuing them. The appellant believes that the authorities in Western Cape, where he was residing, were concerned about refugees using them to travel elsewhere.

[26] For his first year in South Africa the appellant was unemployed. He then found employment in Cape Town but life was very difficult. He was often subjected to verbal harassment and racial abuse because of his migrant status. Unlike refugees from countries such as Mozambique or Zimbabwe, Somali refugees who were in South Africa in large numbers were visibly quite different looking and became a target of resentment and hostility. On one occasion the appellant was spat at. He also found it difficult to find work. Once employers saw his refugee identity documents they would refuse to employ him. He eventually found work as a salesman working for a Somali man.

[27] In 2004, a member of his clan suggested that he come with him to a town called Z where his friend was living. The appellant thought that this would be the only way that he could get ahead financially in South Africa and also hope that as this town was smaller than Cape Town he may be subjected to less discrimination. By this time the appellant had saved up approximately R5,000. He used this as his share of the start-up capital and together with his friend opened a small shop selling basic foodstuffs and items in Y, a poor district of Z. The area was largely populated by poor black and coloured people. Within a few months the appellant realised that he was being subjected to as much harassment and discrimination as he was in Cape Town. The customers were poor and he and his business partner came under intimidation from locals who would resent that they were not being given items for free. Again, the appellant and his business partner were subjected to racial abuse. Stones and eggs were thrown at the shop from time to time. Although these incidents were reported to the police who came to the shop no one was ever arrested.



[28] In early 2007, there was an increase in anti-migrant violence in South Africa and Z was no exception. At around this time there had been increasing numbers of attacks on shops owned by Somalis. In February 2007, the appellant was violently assaulted by three Africans who robbed him of approximately R1,500. During this incident the appellant was pistol-whipped, causing one of his teeth to fall out and he was beaten and kicked about his ribs. The appellant was taken to Z Hospital where he was given painkillers and the bleeding to his mouth staunches. By now the appellant had married a Kenyan woman and had a small child. Fearing for his second wife's safety should he lodge a complaint, the appellant decided not to do anything about this. However, he and his business partner took precautions to minimise their exposure and, in particular, did not open the shop after 5pm. This cost them financially as it was in the evening that they did most of their trade from persons returning to their homes following work.

[29] Throughout 2007, there were further attacks on migrants in Z and elsewhere leading to a general feeling of insecurity. The appellant's second wife became very concerned for her and their daughter's safety and decided to return to Kenya to be with her mother. The appellant organised for money to be remitted from the business in South Africa back to the wife in Nairobi.

[30] Fearing for his safety, the appellant decided that he would leave South Africa and seek refugee status in New Zealand. He therefore spoke to some friends about getting a new travel document. They advised him that although the administrations in Western Cape were not issuing travel documents, an immigration official in another province could issue a renewed copy of it. He therefore paid some money, completed the form and supplied photographs, and his South African refugee travel document was renewed. He told his business partner that he was leaving and that his business partner should continue with the business and send the appellant his share of the earnings. If the shop was sold then the appellant was to get half of the proceeds.

[31] While the appellant was in China en route to New Zealand he contacted his business partner. His business partner told him that the shop had been looted and that not only had the goods been stolen but also things such as fridges. The business had effectively been shut down.

[32] The appellant told the Authority that he fears for his safety both in Somalia and in South Africa. In Somalia he fears that he will be targeted by the *Al-Shabaab* group. They are an extreme Muslim group and he does not share their

views. If people do not agree with him they are executed. He also fears that if he is returned to Somalia he could not safely travel to Afmadow anyway. In Mogadishu he would just be detained and killed at the airport. At the Kenyan border there is fighting between *Al Shabaab* and Kenyan troops. He feels he would be made to join them in their fight and if he refused as he would be inclined to do, he would be shot.

### **The evidence of Mrs Ardo Abdi**

[33] The Authority heard from Mrs Abdi. Mrs Abdi explained that she was a member of the Ogaden clan. She has been in New Zealand for approximately 11 years as a quota refugee. Prior to leaving Somalia in 1991 she lived in Mogadishu and after being displaced went to a refugee camp in 1998.

[34] Mrs Abdi confirmed that she had met the appellant on a number of occasions and has no doubt that he is an Ogaden clan member who is from Somalia. When asked by the Authority to explain why she was so sure of this, she explained that she had had a number of conversations with the appellant and he was familiar with words that were used particularly by the Ogaden clan and also other various cultural norms and traditions particular to the Ogaden clan which would not be known by others. In particular, he spoke openly about a type of theatrical play which is particular to Ogaden from Somalia and not Ethiopia or Kenya.

### **The evidence of Mr Abdi Kadir Ali Mohamed**

[35] Mr Mohamed is a Somali national belonging to the Ogaden clan. He has been in New Zealand since 1998 and is the president of the Somali Federation Community Incorporated. This organisation was previously known as the Auckland Ogaden Community and he had been vice-president of that organisation since its creation. He is viewed as the head of the Ogaden clan in Auckland.

[36] Mr Mohamed explained that the appellant was first brought to him by people from the Ogaden clan living in Auckland who had heard that a member of their clan had been detained at the Mangere Refugee Resettlement Centre. This indicated strongly to him that the appellant was a member of the Ogaden clan. Since that time, the appellant and Mr Mohamed have met on a number of occasions and as a result of these many conversations Mr Mohamed has no doubt that the appellant is an Ogaden clan member from Somalia. He found, in

particular, that the appellant was familiar with specific words used only by the Ogaden of the Lower Juba region in Somalia.

### **Documents and submissions**

[37] On 26 July 2010, the Authority received a memorandum of counsel dated 22 July 2010 together with a bundle of country information. Attached to that memorandum were:

- (a) Original refugee identity document issued to the appellant by the South African DHA dated 19 January 2006;
- (b) Original Republic of South Africa Particulars of Recognised Refugee in respect of the appellant's second wife;
- (c) Certificate issued by the appellant dated 24 July 2010 authorising enquiries to be made as to his immigration status in South Africa;
- (d) Various other items of country information.

[38] During the hearing the Authority was provided with an original letter dated 2 January 2007 issued by the South African DHA confirming approval of refugee status to the appellant.

[39] During the hearing the Authority gave to counsel a copy of the Canadian Immigration and Refugee Board, Research Directorate's *Response to Information Request ZAF35946.E South Africa: The Refugee System, Particularly Refugee Identity Documents* (19 January 2001).

[40] On 12 August 2010, the Authority received a further memorandum of submissions from counsel of the same date, together with further items of country information relating to the position of refugees and migrants in South Africa.

### **THE ISSUES**

[41] The Inclusion Clause in Article 1A(2) of the Refugee Convention provides that a refugee is 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 as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

[42] In terms of *Refugee Appeal No 70074/96* (17 September 1996), the principal issues are:

- (a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?
- (b) If the answer is yes, is there a Convention reason for that persecution?

## **ASSESSMENT OF THE APPELLANT'S CASE**

### **CREDIBILITY**

[43] The Authority notes that the appellant's claim was found by the first appeal panel not to be credible. However, unlike the panel of the Authority who heard the appellant's first appeal, this panel has had the benefit of hearing from Mrs Abdi and Mr Mohamed about the appellant's clan affiliations. Both these witnesses gave compelling and credible evidence as to the appellant being a member of the Ogaden clan from southern Somalia. Mrs Abdi also gave evidence regarding life in the refugee camps in Kenya for Somalia refugees in relation to matters which had caused the previous panel some concern. As a result of this new evidence, the Authority is driven to a different conclusion as regards the appellant's credibility on his Ogaden origins.

[44] While acknowledging the credibility concerns that arose before the previous panel of the Authority in relation to the appellant's account of his life in South Africa, these concerns do not outweigh the unequivocal, credible and compelling evidence given by the witnesses as regards his Ogaden origins. In this regard, the Authority notes the appellant has given a clear and consistent account to the Authority on two occasions and to the RSB as regards his life in Somalia. The Authority therefore accepts the appellant's evidence on these matters. As no issue of protection in South Africa arises on the facts, it is not necessary for the Authority to reach any conclusion on his claims in relation to his time in that country.

**Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the Somalia?**

*Submissions*

[45] In his opening statement Mr Ryken eschewed any reliance on the presences of the extremist Islamist group *Al-Shabaab* in Somalia. Instead Mr Ryken made the submission that the state of civil war in Somalia was such that all Somali nationals were refugees. This is a bold submission as it is not a view taken generally by the UNHCR – see UNHCR *Eligibility Guidelines For Assessing The International Protection Needs Of Asylum-Seekers From Somalia* HCR/EG/SOM/10/1 (5 May 2010) (“the UNHCR Eligibility Guidelines”) which asserts only that “many”, not “all”, Somali asylum-seekers are in need of international protection – see p9. No country information was filed to establish such a broad proposition. It is rejected.

[46] The appellant, in his evidence, was clear the risk to him were he to return to Mogadishu was simply that he was Ogadeni and his clan was not the dominant clan in the city. He would be without any effective protection. In particular, he thought it would be impossible for him to travel from Mogadishu to Afmadow to reach safety or, indeed, from the Kenyan land border to Afmadow because of the fighting that was taking place and the control exerted by *Al-Shabaab* over this area. Insofar as Afmadow was concerned, the risk to him was not simply because he was Ogadeni, but because he was opposed to *Al-Shabaab*.

**The situation in Mogadishu**

[47] Country information paints a picture of continuing conflict in Mogadishu with an increased frequency of indiscriminate attacks on civilians generally – see Human Rights Watch *So much to fear: war crimes and devastation of Somalia* (December 2008) (“the 2008 HRW report”) and the LanInfo Country of Origin Information Centre Report *Conflict, security and clan protection in south Somalia* (Norway, 12 November 2008). The 2008 HRW report notes, at p19:

In 2008 the human rights and humanitarian situation in Somalia deteriorated into an unmitigated catastrophe. Several thousand civilians have been killed in fighting. More than one million Somalis are displaced from their homes and thousands flee across the country's borders every month. Mogadishu, a bustling city of 1.2 million in 2006, has seen more than 870,000 of its residents displaced by armed conflict. All sides have used indiscriminate force as a matter of routine, and in 2008 violence has taken on a new dimension with the targeted murders of aid workers and civil society activists.

[48] The LanInfo report notes, at page 11, that the situation is more difficult in Mogadishu than it has been for several years and that all of their interlocutors described the situation in Mogadishu "as violent and unpredictable" characterised by indiscriminate violence. In *Refugee Appeal Nos 76335 and 76364* (29 September 2009) at [47] and [48], the Authority noted that the situation in Mogadishu further deteriorated in mid-2009 resulting in large scale displacement.

[49] This trend has continued in 2010. In the two weeks to 19 January 2010, some 14,000 people were displaced from and within Mogadishu – see the UNHCR press release *UNHCR concerned about situation of thousands of Somalis in Mogadishu* (12 March 2010). A general overview of the upward trend in the current scale of displacement from Mogadishu can be obtained from an analysis of data contained in the Nations Office for the Coordination of Humanitarian Affairs ("OCHA") *Somalia Weekly Humanitarian Bulletin* – see [www.ochaonline.un.org/somalia](http://www.ochaonline.un.org/somalia).

<b>Issue Number</b>	<b>Period covered</b>	<b>Total displacement since 1/7/10 (change +/-)</b>	<b>Displacement within Mogadishu (change +/-)</b>	<b>Displacement outside Mogadishu (change +/-)</b>
30	30/7 – 6/8/10	26,400	14,200	12,200
31	6/8 – 13/8/10	27,800 (+1,400)	14,200 (nil)	13,600 (+1400)
32	13/8 – 20/8/10	30,700 (+2,900)	14,500 (+300)	16,200 (+2,600)
33	20/8 – 27/8/10	36,200 (+5,500)	15,700 (+1,200)	20,400 (+4,200)

From this data two salient points emerge:

- (a) Population displacement as a result of conflict and human rights abuses in Mogadishu is not only continuing, but the scale of displacement is trending upwards on a weekly basis;

- (b) Population displacement outside Mogadishu since 1 July 2010 (8,200) is vastly outpacing displacement to relatively 'safer' districts within Mogadishu since the same date (1,500).

This data reinforces the view that the ongoing conflict in Mogadishu between *Al-Shabaab* and the TFG is continuing to cause mass displacement. Increasingly, safety is being sought by inhabitants outside the city itself. This suggests the inability of existing clan structures within Mogadishu, including dominant clan structures, to provide protection from harm.

*The situation in the Afmadow area*

[50] The situation here is more complex and difficult to ascertain. The UNHCR Eligibility Guidelines, at p7-8, point to a highly fractured, constantly shifting, landscape of territorial control in central and southern Somalia. UNHCR note:

Presently, the principal parties to the conflict in southern and central Somalia are the TFG, AMISOM, Ahlu Sunna Wal Jama'a (ASWJ), al-Shabaab, and the ARS-Asmara comprised of Hizbul Islam, Ras Camboni, Al Muqawama Islamiya, the Somali Islamic Front (Jabathul Islamiya or JABISO) and Anole Camp. As of February 2010, the TFG, with the support of the AMISOM, has maintained its control of the strategic southern districts of Mogadishu, as well as the airport and seaport. Al-Shabaab is in control of Hiraan, Shabelle Dhexe, Bakool, Bay, Shabelle Hoose, Gedo, Juba Dhexe, Juba Hoose and shares control of Northern Mogadishu with Hizbul Islam. Hizbul Islam controls Belet Weyne, Luuq and Banadir and ASWJ controls Glagaduud. Other parts of southern and central Somalia are controlled by various administrations including the Galmadug, Him/Heem, and Xarardheere which is under clan and pirate control. It is, however, important to bear in mind that control of territory by the different factions is not static in southern and central Somalia and that shifts in territorial control are a common occurrence on the ongoing conflict

[51] Within this highly fractured landscape, the appellant's predicament appears most rooted in the conflict between *Al-Shabaab* and other Islamist parties opposed to the Transitional Federal Government ("TFG"), principally *Hizb ul Islam* ("the Islamic party").

[52] As noted in *Refugee Appeal No 76062* (15 October 2007) at [55] and [84]-[86], while the relationship between clan affiliation and the political landscape in Somalia has changed over time, clan politics and affiliation nevertheless continue to play a significant role in shaping the wider political landscape. That the clan continues to have some significance can be seen in the schism that has appeared in *Al-Shabaab* and its eventual split into warring factions. The International Crisis Group report *Somalia's Divided Islamists* Policy Briefing No 74 (18 May 2010) ("the ICG report") details this split. The ICG report notes how *Al-Shabaab* grew in

influence during the rise of the United Islamic Courts movement. Its recruits are largely recruited from ranks of radicalised young men. With the collapse of the UIC following the intervention of Ethiopian military forces, *Al-Shabaab* captured much of southern Somalia – see p5. The election of an Islamist leader, Sheikh Sharif Sheikh Ahmed, as the new president of the TFG on 31 January 2009 has seen *Al-Shabaab* transform into a more extremist organisation. Under the influence, if not leadership of a small group of foreign jihadis, *Al-Shabaab* has increasingly aligned itself with the global jihadist agenda of *al-Qaeda* in which the dominant policy objectives are the establishment of a new global Islamic caliphate unencumbered by notions of national boundary or clan, and the enforcement of a strict interpretation of Islam in areas under its control. This is not to say that clan is irrelevant in *Al-Shabaab* politics; senior *Al-Shabaab* figures in southern Somalia, appoint loyal commanders to drawn from local clans to implement *Al-Shabaab* policy – see p8.

[53] Nevertheless, these developments and a popular backlash against the strict interpretation of Islam it propagates and enforces, led to tensions within *Al-Shabaab* which eventually have led to its split and open conflict. In May 2009, a rival group, *Hizb al-Islam*, was established in which clan is more widely used as a means to promote the groups strategic aims – see p4. *Hizb al-Islam* is an umbrella alliance of four dissident clan-based groups which opposed the UN sponsored Djibouti peace process which had installed Sheikh as president of the TFG. Significantly, one group – ‘Ras Kamboni’, is lead by Sheikh Hassan Abdullahi Hirsi aka ‘Hasan Turki’, an Ogadeni from the same sub-clan as the appellant – Mohamed Zubeer. Another of Hasan Turki’s “fellow clansman”, Ahmad Madobe, has been at the forefront of Ras Kamboni’s conflict with *Al-Shabaab*.

[54] In late 2009, open conflict erupted along clan lines in Kismayo over administration and revenue distribution. The ICG report states:

Ras Kamboni, keen not to antagonise and alienate its Ogadeni support base, hastily assembled a small force to face down *Al-Shabaab*. Ras Kamboni commander Ahmed Madobe sought help from two of the other *Hizb al-Islam* factions, Anole and Jabhatul Islam, but was rebuffed. Interventions by Aweys and others to avert a showdown failed, and Madobe’s men were decisively routed by a superior *Al-Shabaab* force led by Ibrahim Haji Jama Mee’aad “*Al-Afghani*” (also known in Kismayo as Abubakar al-Zeyli’i), with the support of foreign jihadis. ***Al-Shabaab* quickly followed-up with a series of coordinated attacks all across Ras Kamboni’s heartland in the Lower Jubba Valley, taking control of major towns, like Afmadow, Jilib, Jamame and Doble.**

**The fighting between the former allies, which is still raging in districts near the border with Kenya, has put an end to any prospect of *Hizb al-Islam* and**



**Al-Shabaab mending their rift and re-forging their alliance, at least in the short to medium term.**

(emphasis added)

[55] While the ICG report, at p12, notes there are reports that elements within Ras Kamboni may have returned to the *Al-Shabaab* fold, this does not appear to be Madobe who has been negotiating secretly with the TFG and Kenyan authorities.

[56] Similarly, OCHA *Somalia: Humanitarian Overview notes:*

(a) Vol 3, Issue 2 ( February 2010)

Insecurity continues in other parts of South Central Somalia, although at a lower level. In Doble and Afmadow districts, displacement of civilians was reported following clashes between Hizbul Islam and al Shabaab

(b) Vol 3, Issue 4 (April 2010)

According to media field reports, in the Lower juba region where Hizbul Islam and Al Shabaab forces have been battling, movement of people in this region has been restricted as the security situation remains tense.

[57] Furthermore, the ICG report at, p16 details various operations being undertaken by international organisations such as the African and European unions and regionally proximate states such as Uganda and Kenya to undermine the influence of *Al-Shabaab* in the wake of its alignment with the global jihadist agenda of Al-Qaeda. Importantly for present purposes, the ICG report notes:

Kenya has covertly trained some 2,500 militia to help the TFG's campaign against Al-Shabaab in the south.

[58] By way of footnote [94] further details are given of this operation:

The operation has seriously strained the once good ties between the Sharif government and Kenya. The plan, according to credible sources, was first conceived by former Somali Defence Minister Gandi, with his Kenyan counterpart, Yusuf Haji, an ethnic Somali and fellow clansman. **The aim was to recruit a largely Ogadeni force from both sides of the border and deploy it in the Jubba Valley to challenge Al-Shabaab. The even more ambitious hope was it could form the nucleus of a regional Ogadeni clan enclave, (Jubbaland), modelled on Puntland.** Supporters said the dispute is between far-sighted leaders who want to speed up federalism and those within the TFG reluctant to break with the centralised model. Kenya, they said, is assisting those who favour the "building blocks" approach. Critics said it was a cleverly-designed stratagem primarily to advance Ogadeni clan interests. Sharif recently took the unprecedented step of writing to ask the Kenyan president to hand over the force to the TFG so it could be integrated into the regular army. Nairobi flatly declined. It has raised concerns in Ethiopia of an Ogadeni-dominated local administration in southern Somalia, which might support kin in the Ogaden National Liberation Movement.

(emphasis added)

[59] At page 12, the IGC report states that this force has been recruited, trained and remains “ready for deployment to fight alongside TFG forces in southern Somalia”.

[60] That an underlying precariousness of security in Southern Somalia is generated by ongoing fighting between *Hizb al-Islam* and *Al-Shabaab* is reflected in the fact that OCHA lists the Afmadow district as having a humanitarian ‘access coefficient’ value of ‘1’ – the lowest in a range of values spanning 1-100 – see OCHA *Humanitarian Access Map as of July 2010* ([www.ochaonline.un.org/somalia](http://www.ochaonline.un.org/somalia)). OCHA explain:

OCHA monitors access conditions to assess changes and trends. The “Access Coefficient” is based on eight indicators: international staff presence (UN & INGOs), UN staff movements, security assessments, humanitarian flights, check-points, security incidents (last six months), and stability of the area....

In broad terms, access in the North and North/East (Somaliland and Puntland respectively) is better than any region in South/Central Somalia. While numerous factors might explain this difference, a dominant factor is that the North and North/East are governed and controlled by a single political entity, with no serious challenger to that authority.

South/Central has significant and on-going power struggles that directly or indirectly impact humanitarian workers and activities. In isolation, indicators such as staff presence and road blocks could suggest that access has improved; however, reviewed as a whole, the indicators indicate a more nuanced picture....

In areas where access was very limited, such as in Mogadishu or in the South, inroads were either made, or stifled, because of general insecurity and direct targeting. While the humanitarian community was able to maintain its programmes primarily through the work of national staff or Somali NGO partners, there is still limited capacity to ensure programmatic follow-up and monitor activities.

### *Large scale displacement*

[61] Unsurprisingly given the precarious security situation in Mogadishu and southern Somalia, there has been large scale displacement both internally and across land borders into both Ethiopia and Kenya. According to UNHCR, some 63,000 people have been displaced overall in southern Somalia in 2010 – see UNHCR press release *Conflict displaces 63,000 civilians in southern Somalia so far this year* (19 January 2010). Insofar as cross-border displacement is concerned, according to the OCHA *Somalia Humanitarian Overview*, Vol 3, Issue 2 (February 2010) some 2,000 crossed into Kenya during February due to fighting in Doble on the Kenya-Somalia border. Such displacement appears to be continuing. OCHA *Weekly Humanitarian Bulletin* No 32 (13-20 August 2010) OCHA notes:

UNHCR Kenya reported that 1,957 individuals were registered at Dadaab camps in Kenya during the week of 9-13 August, of which 1,868 were Somali nationals. This is the highest number of newly-registered in 2010. **According to UNHCR Kenya,**

**this upward trend is expected to continue in August, due to fighting in Doble, near the Kenyan-Somali border.**

(emphasis added)

### *Claims from countries suffering civil war – general principles*

[62] Somalia is plagued by a violent civil war. In *Refugee Appeal 76376* (11 May 2010), the Authority observed at [99]:

By any description Somalia continues to be plagued by civil war. As the discussion in *Refugee Appeal No 71462/99* (27 September 1999) at [49]-[76] shows, assessing whether a claimant from a country or locality suffering civil war requires no difference of approach in terms of the assessment of risk to that taken in other cases. This, however, cuts both ways. While the claimant must only establish on the evidence the 'ordinary' real chance of being persecuted and not some increased level of risk or that he/she has been singled out for persecution, nevertheless, the claimant must still establish that the risk they do face arises by reason of their civil or political status as protected by one of the five Convention grounds. It cannot be assumed that simply because the claimant is a national of a country suffering even lengthy periods of civil war that, by this reason alone, the claimant is entitled to refugee status. Cases from civil war countries raise complex factual issues and are highly context dependent, turning on the particular characteristics, attributes, and background of the claimant viewed against the underlying drivers of the civil war and the resulting human rights landscape.

### *Application of relevant principles to facts*

[63] As far as Mogadishu is concerned, it is clear that the appellant would not be safe there. As the analysis of the OCHA data reveals, safety is increasingly sought by inhabitants outside the city. Yet, travel in and out of Mogadishu for the appellant as an Ogadeni man has proved problematic in the past. On each of his two previous journeys there after his family were displaced to Afmadow at the onset of the civil war, he had to obtain the protection of a Hebr Gedir person related to his father by marriage to guarantee his safety at Hebr Gedir controlled checkpoints. Even then he had to hide his Ogadeni origins, instead being passed off as a fellow Hebr Gedir traveller to remain safe from serious harm. There is no reason to suppose that his journey in and out of Mogadishu would be any safer now.

[64] As for his returning to Afmadow, both the appellant and his witnesses agreed that Afmadow was an area in which the Ogaden clan were dominant. All agreed this is an area where the Ogaden currently live, albeit that they are subjected to the vicissitudes of the ongoing civil war. No country information has been filed or exists of which the Authority is otherwise aware to show that simply being an Ogadeni male in Afmadow would expose the appellant to a risk of serious harm from *Al-Shabaab* at the real chance level.

[65] That said, however, in order for the appellant to access the relative safety of Afmadow, he must travel there. Having regard to the finding that his returning there via Mogadishu is neither practicable nor safe, the only other possibilities are via Kenya or Ethiopia. It is impossible for the Authority to try and predict with any certainty what may happen along the route. Nevertheless, the following factors need to be weighted in the calculus of risk to the appellant:

- (a) Kenya has covertly planned to organise and train an Ogadeni militia to fight against *Al-Shabaab*. This militia is ready for deployment into southern Somalia;
- (b) Fighting between Ogadeni groups aligned to *Hizb al-Islam* and *Al-Shabaab* may well be continuing on an intermittent but regular basis along the border region with Kenya and in the area surrounding Afmadow;
- (c) The leader of one of the groups with *Hizb al-Islam* fighting *Al-Shabaab* comes from the same Ogadeni sub clan as the appellant;
- (d) Large cross-border displacement from Somalia seems to be the predominant form of cross-border population movement rather than a return to Somalia for resettlement purposes.

[66] Combining these factors leads the Authority to draw the following conclusion: the appellant would be travelling to Afmadow against the predominant flow of cross-border population movement. This itself is likely to raise his profile at *Al-Shabaab* checkpoints. Given the existence of Kenyan-backed Ogadeni militia ready to deploy from Kenya to assist the TFG fight against *Al-Shabaab*, there is some risk that his travel from Kenya into Somalia may raise suspicions against him that he is returning to fight against *Al-Shabaab* as part of this militia. Furthermore, irrespective of whether he can try and return to Afmadow via Ethiopia or Kenya, his sub-clan is the same as one of *Al-Shabaab's* chief antagonists inside Somalia, whose Ogadeni militia may well have been recently fighting with *Al-Shabaab* in the Afmadow area. While travel overland from Kenya or Ethiopia to Afmadow is theoretically possible, the combination of the above factors supports a finding that is hardly practicable and safe.

[67] In the context of the highly fluid, but regularly violent milieu of southern Somalia, the notion that such a combination of factors might expose the appellant

to a risk of serious harm at the hands of highly radicalised *Al-Shabaab* fighters is one which the Authority finds cannot fairly be categorised as remote.

[68] Allowing some latitude for the extreme difficulty the Authority faces in obtaining detailed up-to-date information on what is happening on the ground in Lower Juba between Kenya/Ethiopia and Afmadow, by a narrow margin, the Authority finds that the appellant has a well-founded fear of being persecuted. The first principal issue is answered in the affirmative.

#### **Nexus to Convention ground**

[69] The appellant's membership of his clan and sub-clan are both contributing to the risk to him. Each comprises a particular social group for the purposes of the Convention. The second principal issue is also answered in the affirmative.

#### **CONCLUSION**

[70] It is to be regretted that the corroborating evidence of the appellant's clan origins were not placed before the previous panel of the Authority for its consideration. Nevertheless, now having received and considered that evidence, for the above reasons, the Authority finds that the appellant is a refugee within the meaning of Article 1A(2) Refugee Convention. The appeal is allowed. Refugee status is granted.

"B L Burson"

B L Burson  
Member