

**0908985 [2010] RRTA 29 (13 January 2010)**

**DECISION RECORD**

**RRT CASE NUMBER:** 0908985

**DIAC REFERENCE(S):** CLF2009/109745

**COUNTRY OF REFERENCE:** Somalia

**TRIBUNAL MEMBER:** Adolfo Gentile

**DATE:** 13 January 2010

**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 and to have arrived in Australia [in] July 2009 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa[in] August 2009. The delegate decided to refuse to grant the visa [in] October 2009 and notified the applicant of the decision and his review rights by letter [on the same date].
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] November 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.
20. The applicant appeared before the Tribunal [in] January 2010 to give evidence and present arguments. The Tribunal also received oral evidence from [Mr A]. The Tribunal hearing was conducted with the assistance of an interpreter in the Somali and English languages.
21. The applicant was represented in relation to the review and the advisor was present at the Tribunal hearing.
22. The applicant's claims were presented to the Department in a statutory declaration dated [in] August 2009 as follows:
  1. I was born in Mogadishu in [name] Hospital on [date]. I was the oldest of six children born to my father, [name] and my mother [name].
  2. My family belonged to the Hawiye clan. The family are Sunni Muslims.
  3. My father was a merchant and owned two food and garment stores in Mogadishu. My mother worked at home raising the children.
  4. When I was a child the household was occupied by my parents and siblings. The family home was in [Location 1], Mogadishu.
  5. My childhood was relatively peaceful. There was no fighting in Mogadishu. The peace was maintained by a dictator, Mohamed Siyad Barre. The regime was however oppressive and you could not express opinions against the government without trouble. My family kept away from political conflict with the government of the time and did not suffer direct harm from the authorities. However there were difficulties due to the deteriorating economic situation. The government services were very poor.
  6. I enjoyed school. I was a good student. I liked to swim and play soccer. My primary, middle and secondary schools were close to home and I would walk to school and I returned home for lunch.
  7. At the end of 1985 when I was 17 years old I finished secondary school and I did military service for 3 months. After that during the rest of 1986 I taught mathematics at a primary school in [Town A], a town about [number] Kms outside Mogadishu. I lived there for eight months.
  8. In 1986, after I returned from [Town A], I married. My wife was a distant cousin. We had known each other from an early age and the marriage was arranged. I was very happy to marry her. We lived together in my parents' house.

9. At the end of secondary school I decided I to go into a commercial field. I liked mathematics and accounting. I went to a commercial college to undertake tertiary studies in 1987 until 1989. I lived at home through my tertiary education. My parents supported me through my tertiary education.

10. My wife and I had our first child in 1987.

11. After I completed my tertiary education I couldn't find work. I assisted my father at in his stores.

12. The civil war commenced in 1991. I continued to help my father when we could travel to the stores. Sometimes the fighting would prevent us leaving the house. On occasions when the fighting was very intense we were afraid the house would be shelled or that militias would come to the house and attack us. At those times we left to rent another house in either [Location 2] or in [Location 3], suburbs near to [Location 1] in Mogadishu We would spend months or more than a year at these places, depending on the fighting. My father's stores were looted and on one occasion they were completely emptied by a warlord.

13. By 1996 the income from my father's business had decreased and I had to find work myself. I had three children by this time. I found work at "[name] Bank" which managed monetary transfers. I performed financial clerical and accounting work. Sometime I worked full time; at other times I couldn't go to work because of the fighting. They had several branches in Mogadishu. Where I worked there was myself and two others.

14. When I and the family moved from the family home in [Location 1] due to the fighting I couldn't attend work. That meant that I often was unable to go to work for months at a time. However the Bank held my position for me. The branch was usually closed at these times.

15. My wife during these years stayed at home looking after the children. My two brothers were at the family home and helped with the family business. My three sisters who were all married by 2000 continued to live with us.

16. The war impoverished our family. We were lucky to have one meal a day. From time to time my wife obtained food from a World Food Organisation distribution centre where she was registered. Most of the time food had to be bought from shops, but when fighting was intense nothing was open.

17. In 2006 I left [name] Bank and went to work at [employer], a company which sold mobile phones. My job was to run a shop and sell recharge vouchers and phone accessories.

18. In 2007 I had to shut the shop for most of the year due to the intense fighting after the Ethiopian army occupied Mogadishu The Ethiopian army, on the invitation of the Somali government, were asked to assist in suppressing the "Islamic Courts" militia group.

19. In 2007 I and the family moved to [Location 2] and rented a house there because [Location 1] had become very unsafe. It was close to the fighting between the Ethiopians and the Islamic courts. They were using heavy artillery and houses were being hit throughout the suburb.

20. The household made their way to [Location 2] carrying our belongings: my parents, my three sisters, their 14 children, my wife and our seven children at the time, and myself. We waited for a lull in the fighting. The trip took about an hour.
21. For the year and a half we spent in [Location 2] I didn't work. My father couldn't run his business and we relied on savings and food from WFO centres.
22. We returned to the family house in February 2009 after the Ethiopian army withdrew from Somalia My father reopened his stores and I went back to work at the [employer] shop.
23. My eighth child was born in 2008. All our children were born at home besides the oldest child who was born at hospital. Sometimes an older woman in the neighbourhood would assist at the births.
24. None of the children were able to attend kindergarten or school. The older children attended a Koranic School in a Mosque or in a nearby makeshift shelter when it was safe.
25. In March 2009 my father was killed. He had gone to the Mosque in [Location 1] and he had completed the Isha prayers. It was about 7.30pm When he was walking from the Mosque he was shot several times in the head at close range. He died immediately. My brother, [Mr C], was close to the area and heard someone had been shot. He went to the Mosque and saw my father's body. He came home and told me. I told the rest of the family. I went back to the Mosque with my brother. My father's body was lying in the Mosque covered with a sheet. That night [Mr C], two neighbours and I slept in the Mosque to guard to the body. We were armed; some people from the Mosque lent us the guns.
26. Our father was buried after the morning prayers in a soccer field that had been converted into a cemetery. About twenty people attended including my brothers.
27. My mother and the family were in shock.
28. The people who executed my father had prayed at the Mosque before they killed him. No-one knew who they were. We know it was Al Shabab from the way they killed my father.
29. I believe he was shot because he opposed Al Shabab, a fundamentalist Islamic group. I first heard him express views against Al Shabab about three years prior to his death. He disliked the way they treated people; for example the way they abused people who were sick and couldn't fast, or women who didn't observe their strict dress codes. He expressed these views to his family, his friends and members of the public at gatherings of our clan and at the Mosque.
30. Two weeks prior to his death he received a telephone call. The caller told him he must join with Al Shabab, and sacrifice himself for the sake of Allah. They approached him because he is an elder and an influential man in the community. People knew who he was in our clan and in our area and he was respected.
31. After he received this telephone call, he mentioned it to me. He said that he told the caller that he was a good Muslim already and that he did not need to join. He was nearly 70 years old and had been a good Muslim all his life. The caller replied that this is a warning and that if he didn't join Al Shabab he would die.

32. My father did not seem frightened by the call. He thought it was just a threat that wouldn't be carried out.

33. A few weeks after my father's death, a group of Al Shabab members came to our house. They were armed and were driving a car. I was not at home; only the women and children were at home. They came into the house and told them to dress more conservatively; that they must hide their hands and their faces. They pushed my sister and my wife with their guns and said this is what you must do. They threatened them, saying that they would be lashed unless they observed the dress code they prescribed.

34. In April 2009 I received a phone call on my mobile. A man said he was a member of Al Shabab and that "you must join the forces of Allah". They wanted me to fight with them, to recruit members and to raise funds I said I was a Muslim and did not need to join a Muslim group. I was scared but I had to say this. Either way I was going to die - if I joined I would die. I wasn't going to join because they had killed my father and humiliated my wife and sisters. The telephone call lasted several minutes.

35. I knew our lives were at risk so on that day we moved to the adjacent suburb of [Location 3]. We rented a van and all travelled to [Location 3]. My wife, my mother, my sisters and the children all went. We arranged to rent two houses - one in which my wife, three of the children and I stayed, and the other for the rest of the family.

36. After the death of my father I did not work. In [Location 3] I stayed at home all the time besides visits to the Mosque. I was very depressed and worried.

37. There was not any fighting occurring in [Location 3].

38. On [date] May 2009 someone threw three grenades into our house killing my wife and three children. I was at the Mosque at the time. It was about 7.00pm and I was waiting outside the Mosque with some friends to do the Isha prayers. A neighbour, [name], came running to me at the Mosque and said there had been an attack on our house and my wife and the three children were killed. Other neighbours had told my sisters and parents.

39. I was in shock and terrified. My body was cold and I could hardly walk.

40. The neighbour said a Landcruiser drove past our home and the grenades were thrown from the vehicle. The neighbour said the occupants were dressed like Al Shabab with long traditional shirts and red and white turbans.

41. Some of my friends at the Mosque went straight to my home, and I went to see my mother and sisters at their house. I thought that the assailants may be waiting for me at my house, so I didn't return there. I asked my mother and sisters to go to the home and to discuss the burial of my wife and children.

42. I knew that the attack was aimed at killing me. Usually I would return home between the prayers of Magrib and Isha, but on that day I had not. I decided I had to flee for my life that night. I went from my mother's house to a clan member's house who lived in [Location 3]. He had a car and provided bodyguards. I stayed at his house until 4am when I left with a driver and four bodyguards. The bodyguards were armed. We drove to [Location 4], a port city about 90kms from Mogadishu. The condition of the road was very bad and the trip took five hours. At [Location 4] I tried to locate some people I knew because I was not safe. I stayed with members of my clan for two days at the back of a store. The store owner's name was [name]. My intention was to reach Kenya. I left [Location 4] on [date] May 2009 and I arrived on

the border at the end of May. I travelled on lorries and sometimes paid the driver. I travelled this way because the lorries have their own armed guards. Taking a bus would not have been safe. I believed I was being pursued.

43. I arrived at the Kenyan border at a small town called [Town B]. I then caught a bus to Nairobi. There is a suburb called [Town C] in Nairobi where most of the Somalis congregate and have businesses. I found some people from my clan there. I explained my situation. I was sick with depression and diabetes and on the second day after my arrival they took me to a Kenyan doctor who treated me with medication for diabetes and with anti-depressants. I stayed in Nairobi for about 50 days. I lived with a relative, [Relative A], who owned clothing stores and who is quite wealthy. [Relative A] helped me by looking at how I could leave Kenya and find a country of asylum. He found an agent. The agent said he could take me to Australia.

44. The agent's fee was US\$6000. [Relative A] raised most of the money and some other clan members also assisted. I had no money

45. I flew from Nairobi to Dubai on [date] July 2009. I was in Dubai for about 20 hours and then I flew from Dubai to Kuala Lumpur I was in KL for less than a day. I flew from KL to Melbourne, arriving on [date] July 2009.

46. I travelled from Kenya with my agent. He accompanied me to Melbourne My agent took me through customs. I did not hold the documents at any time and the agent retained the documents. After we passed through customs, the agent told me there are Somali taxi drivers who will take me to the Somali community. I approached a Somali taxi driver who was standing outside his cab. I spoke with him and I explained to him my situation and how I had no documents. He telephoned someone who picked me up in a private car. This person took me to someone in [Suburb A] who is a member of the Somali community. He arranged somewhere for me to sleep and in the morning he took me to the Red Cross.

47. After I explained about my clan and subclan to the Somali community member, he found a single man from my clan who I could stay with. I now live with this man in [Suburb B].

48. I have not had contact with my family in Somalia yet. I wish to find a way to contact them. I think I can do this through clan contacts.

49. If I returned to Somalia I know that Al Shabab would kill me as they have killed my father, my wife and my three children. My only chance to survive is to seek asylum, and I am respectively requesting the protection of Australia.

23. A submission by the applicant's advisor dated [in] September 2009 argues that the applicant would be persecuted for the Convention reasons of religion and political opinion.
24. [In] January 2010 the Tribunal received a further submission from the applicant's advisor and a statutory declaration from the applicant refuting some of the details of the delegate's decision and clarifying some of his claims.
25. At the Tribunal hearing the applicant reiterated his claims. He is unable to provide any evidence of his identity and he stated that he had not taken any steps since the delegate's interview to attempt to obtain it. He told the Tribunal that there are no functioning institutions in Somalia and neither the hospital where he was born nor the educational institution which



he attended to become an accountant have survived. He explained that the prospects of obtaining any documentation are remote.

26. He recounted that he met his agent (who accompanied him to Australia ) at the Nairobi airport. He was an Ethiopian man; he did not see the passport that was being used for him and this man took him all the way to Melbourne via Dubai and Kuala Lumpur, airports at which he changed aircraft.
27. He is still taking medication for his diabetes and depression; he is undergoing counselling from [agency deleted: s431(2)] and has not seen the psychologist [name deleted: s431(2)] since October 2009.
28. He stated that he and his father were not members of any political group in Somalia. He was asked about the organisation of Al Shabaab and he stated that different tribes make up Al Shabaab. He said that up to 2008 tribes (or clans) had a great degree of authority but since then this has waned.
29. Asked why Al Shabaab would want his father and him to join them, he stated that his father was a respected businessman with a high degree of prestige and personal respect. He thought they might have wanted to capitalize on his prestige and perhaps his money. Also on his influence on bringing more people to Al Shabaab.
30. He stated that Al Shabaab were a radical element in the Islamic Courts. They approach people who are religious and ask them to join them; if they don't, they threaten them and then kill them.
31. He stated that he was targeted after they killed his father as a natural progression since he was the next person in line in the family. Asked why he was not targeted more specifically, like his father, rather than by using a hand grenade which causes indiscriminate damage, he stated that he was usually at home during that particular time but not on this actual evening. He had been in [Location 3] for about one month when his wife and three children were killed.
32. He was asked why he had moved his family only a matter of a couple of kilometres after the threats and not gone further afield to ensure that they and he were safe. He stated that the extended family lives in the same area; he had broader family responsibilities and was not in a financial position to take all his family across the border.
33. He stated that he had been working off and on depending on the security situation and the last time he had worked was at the end of 2008.
34. Asked what he thought would happen to him if he were to return to Somalia, he stated that he would be killed. He said he had not tried to contact his family.
35. The issue which the delegate had mentioned, regarding his immediate escape after the grenade had killed his wife and three of his children, was canvassed by the Tribunal. The applicant stated that he was advised not to go back to the house lest he might be killed; he then went to his mother's who also advised him to leave the country immediately.
36. The Tribunal then heard from [Person 1 who] stated that he had met the applicant in Australia about two months ago. He knew his father and had seen the latter with the applicant when the applicant was young. [Person 1] had left Mogadishu in 1991 and had come to Australia just

over one year ago. He was in the same business as the applicant's father. He had met the applicant in Australia through the Somali community and the applicant had visited his house.

37. Following an oral submission by the advisor who argued that the applicant's claims were related to more than the attempted recruitment of him by Al Shabaab and were also to do with the perception that the applicant was against or did not agree with Al Shabaab, the applicant was asked to comment on the apparent incongruity that if Al Shabaab regarded the applicant's father and the applicant as enemies, they would have dealt with them as such rather than attempted to recruit them. The applicant stated that because they see themselves as defenders of Islam, the modus operandi arising out of their view of the religion, means that Al Shabaab would always begin by inviting people to collaborate to 'defend Islam', then they would threaten and finally kill people.

## **FINDINGS AND REASONS**

38. The applicant is a male who claims to have been born on [date deleted: s431(2)] in Mogadishu, Somalia and to be a Sunni Muslim. There is no documentary evidence for any of these data and the applicant claims to have been accompanied by an 'agent' from Kenya to Australia and not to have seen the travel document which the other person, described at the hearing as 'Ethiopian', carried at all times. The applicant has produced a witness at the hearing who stated that he knew the applicant's father and the applicant. The applicant speaks Somali and at the hearing answered questions which entailed knowledge of some political and cultural aspects of life in Somalia. The Tribunal is satisfied on the basis of this evidence that the applicant is an ethnic Somali. For the purposes of this review the Tribunal accepts that the applicant is a citizen of Somalia and will consider his claims against that country. In terms of his name and age, the Tribunal makes no finding, however, for convenience, it will continue to use the name which the applicant calls himself.
39. The essence of the applicant's claims is that he will be killed if he returns to Somalia for the Convention reason of political opinion as he has refused to join the radical group Al Shabaab and this refusal indicates that he does not share their view of religion or politics. He claims the chance of his being killed is real because the same group has killed his father and made an attempt on his life which, in fact, killed his wife and three of his children.
40. The situation in Somalia has been documented by a number of sources and the applicant's advisor has also supplied the Tribunal with a number of extracts from relevant reports. In relation to the applicant's claims the following information useful:

CX232751: SOMALIA: Who is fighting whom in Somalia, Integrated Regional Information Network (IRIN) -United Nations, 2 September, 2009. Site: <http://www.irinnews.org/Report.aspx?ReportId=85970>, accessed on 3 September, 2009

Somalia has experienced conflict since 1991 when the late President Mohamed Siad Barre's government was overthrown by opposition forces. Up to 2006, the fighting was largely between clan-based warlords clashing over territory and resources. In the process, one of the worst humanitarian crises in the world was created.

In 2006, Islamic groups in Mogadishu fought fierce battles against a combined force of the warlords and defeated them. The groups, known as the Union of Islamic Courts (UIC), initially enjoyed considerable civilian and business support from a community fed up with insecurity in areas controlled by the warlords, including the capital.

The UIC ranks contained both radical elements, in the form of Al-Shabab, and moderate members, but the radicals were a small minority. From June-December 2006, it brought unprecedented calm to Mogadishu and other areas of south and central Somalia.

In December 2006, Ethiopian forces, with backing from the United States - which regarded the UIC as a terrorist organisation - entered Somalia and installed the Transitional Federal Government (TFG) in Mogadishu, where it had hardly made its presence felt since coming into being in 2004 after two years of talks in Kenya.

Subsequently, fierce fighting continued between UIC remnants, including Al-Shabab and their supporters, and the combined forces of Ethiopia and the TFG. Hundreds of thousands of civilians were forced to flee their homes.

In December 2008, the Ethiopians withdrew from Somalia, leaving a small African Union (AMISOM) force to defend the government.

In January 2009, a peace deal signed in Djibouti between the UN-backed TFG and a faction of the opposition, the Alliance for the Re-liberation of Somalia (ARS) saw the creation of a parliament which elected Sheikh Sharif Sheikh Ahmed as president of the TFG. The former UIC chairman was considered by many as a moderate Islamist.

Many Somalis hoped Ahmed's election and the departure of Ethiopian troops would end the violence and launch a new era of peace in the country. They were wrong.

Ahmed's government was opposed by a breakaway group from his own ARS, led by his former ally Sheikh Hassan Dahir Aweys. Aweys, who was based in Asmara, Eritrea, returned to Somalia and set up Hisbul-Islam (Party of Islam).

The Djibouti peace deal was also opposed by Al-Shabab, which had long split from the main UIC.

Whereas previous struggles for power in Somalia were fought along the lines of the country's complex clan system, the current conflict is, ostensibly at least, a war between groups with different interpretations of Islam.

The protagonists

TFG forces comprise fighters who used to serve various warlords, former members of the UIC, clan militia and Ethiopian-trained forces. These disparate groups have weak central command and control, despite the government's efforts, so are rarely able to carry out a coordinated attack. There have been incidents of fighting between the different units.

The main threat to the TFG is posed by Al-Shabab. It is on a US terror list and is accused of having links with Al-Qaeda. The group controls much of southern and central Somalia, including parts of Mogadishu. Al-Shabab is reportedly led by a shadowy figure who goes by the name of Abu Zubeyr. His real name, according to Somali sources, is Ahmed Godane and he is originally from secessionist Somaliland. His main contact is through taped messages given to Somali radio stations. The group's professed aim is to spread Islam across the globe.

The movement has been accused of kidnapping, assassinating government officials and journalists, and other criminal activity.

While a keynote of Al-Shabab's official rhetoric is that clan affiliation and geographic origin should play no part in governance, and that any Somali should be able to serve as "amir", or leader, in any part of the country, this policy does not appear to be followed in central Somalia, where only locals are appointed amirs.

Al-Shabab views President Ahmed as a traitor to the Islamic cause and has described him and his government as "Murtadiin" (apostates). It believes in the strict application of Sharia law.

Like Al-Shabab, Hisbul-Islam is also fighting the TFG but is not known to engage in kidnapping and assassinations. It also differs in outlook. Hisbul-Islam is inward-looking and concerned with local rather than international issues, according to Somali analysts. Aweys, its leader, considers the Djibouti peace deal a betrayal. The group is reportedly supported by Eritrea, a charge Eritrea consistently denies.

Hisbul-Islam insists it will stop fighting if all "foreign forces" leave Somalia, including AMISOM troops (see below).

Ahlu Sunna Waljama is a Sufi sect, regarded as more moderate in its interpretation of Islam than Al-Shabab. It joined the fighting in late December 2008, dislodging Al-Shabab from the towns of Guri-Eil and Dusamareb in Galgadud region. It now controls all of Galgadud in central Somalia.

Ahlu Sunna Waljama has two branches. The first was formed by Sufi clerics and enjoys support from Ethiopia. This branch is mainly concentrated in central regions. The other is led by former warlords, who apparently are using the name to reinvent themselves. This group is mainly in the south around Gedo, Bay and Bakol regions. They have some links to the TFG.

African forces

AMISOM, staffed mainly by troops from Uganda and Burundi, has been in the country since 2007. In the past the force was confined to protecting the president and prime minister and vital infrastructure, such as the airport and port. In recent months its troops have been drawn into the fighting as insurgents targeted them. Somalis have accused the force of indiscriminate shelling when responding to attacks, a charge they deny.

The 5,000 or so AMISOM troops, supported by the US and UN, are concentrated in Mogadishu.

Ethiopian troops

In January 2009, Ethiopia said it had completed the withdrawal of its forces from Somalia. Since then there have been reports, denied by the Ethiopians, of Ethiopian troops in parts of central Somalia. Local sources in Beletweyne town told IRIN Ethiopian forces entered the town on 28 August and are still there.

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CX236903: SOMALIA: Mass exodus as militia takes control of southern town, Integrated Regional Information Network (IRIN) -United Nations, 24 November, 2009, , <http://www.irinnews.org/report.aspx?ReportId=87169>  
Site: <http://www.irinnews.org/report.aspx?ReportId=87169>, accessed on 27 November, 2009

NAIROBI - Somalia's Islamist Al-Shabab militia group has taken control of the southern town of Afmadow, 620km south of the capital Mogadishu, causing hundreds of families to flee in fear of violence.

The town fell on 21 November after another Islamist group, Hisbul-Islam, left a day earlier, allowing Al-Shabab to move in without much resistance.

"Sporadic gunfire can be heard today but nothing serious," a resident told IRIN on 24 November. "They [Al-Shabab] are in control."

Most of the fighting took place on the outskirts of the town and has reportedly claimed 15 lives.

Al-Shabab now controls most of southern Somalia.

Tension had been building between Al-Shabab and Hisbul-Islam in Afmadow since the former allies fell out in October in the coastal city of Kismayo, leading to fighting and Al-Shabab taking Kismayo last month. The two have been fighting for control of the Juba Valley.

The Afmadow resident, who requested anonymity, said many families fled just before the group took control and many more were trying to do the same.

"Many of the most senior elders and business people have fled," the resident said. "They [Al-Shabab] met what is left of the elders and business community and told them they should tell the people not to be afraid and resume their activities."

Aid agencies have also reportedly left the town. On 21 November, the UN World Food programme (WFP) temporarily relocated five national staff based in Afmadow due to security concerns, said Peter Smerdon, WFP spokesman.

Fear of unknown

Mohamed Dahir, a journalist based in the town of Doble, near the Kenyan border, told IRIN the influx of people from Afmadow and surrounding areas had been increasing.

"Our estimate is that around 400 families [2,400 people] have arrived and many more are coming," Dahir said.

He said many people were also arriving from villages located between Afmadow and Doble. "This influx is driven by fear of the unknown," he added.

Dahir said many elders and business people from Afmadow were in Doble, "including some very senior individuals".

So far, the displaced are staying with relatives and friends, "but if the influx continues the town won't be able to cope with them", he said.

An elder, who requested anonymity, said he had left Afmadow "because these people [Al-Shabab] have no respect for tradition or elders. People don't know what to expect from them, so they fear the worst."

Conflict and drought have led to the worst humanitarian crisis the country has faced in nearly two decades. An estimated 3.6 million - almost half the total population - need aid, according to the UN.

The UN Refugee Agency (UNHCR) estimates that the numbers displaced in fighting between government forces and the two Islamist insurgent groups has reached more than 1.5 million.

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SOMALIA: Human Rights Watch World Report Somalia 2009

Events of 2008

An increasingly brutal conflict pits a deeply fragmented insurgency against Somalia's weak Transitional Federal Government (TFG) and Ethiopian military forces that are in Somalia to support it. All sides to this conflict have regularly committed serious violations of international humanitarian law amounting to war crimes with complete impunity and with devastating impact on Somalia's civilian population. The human rights and humanitarian situation in Somalia deteriorated to levels perhaps unseen since the collapse of the country's last unified central government in 1991.

Since the beginning of 2007 more than 870,000 civilians have fled war-torn Mogadishu alone and more than 6,000 civilians have been killed in the fighting. Untold numbers of Somalis bear the scars of seeing family members killed or raped. Several key international players-most notably Ethiopia, Eritrea, and the United States-have exacerbated the crisis through their policies and actions.

In 2008 violence escalated in scale and brutality while internationally supported peace talks struggled to get traction. Even traditional systems of clan protection have broken down in many areas. Key civil society activists whose talents are essential to hopes of rebuilding were killed or driven out of the country. The number of Somalis in need of humanitarian assistance surpassed 3 million, even as criminal violence, rampant piracy off the northern coasts, and targeted attacks on humanitarian workers impeded the flow of aid. Somalis attempting to flee this chaos faced brutal attacks by freelance militias along the roads.

Abuses by TFG Security Forces and Militias

TFG police, military personnel, and militias linked to leading TFG figures such as former Mogadishu mayor Mohammed Dheere are implicated in widespread abuses against Somali civilians. Throughout 2008 these forces carried out killings, murder, rape, and looting during operations across many Mogadishu neighborhoods. Following an insurgent mortar attack launched from near the Al-Mathal school in Mogadishu in June, TFG police sacked the school, smashing and burning educational materials, and shooting one child in the leg.

TFG forces repeatedly killed and wounded civilians during fighting against insurgent forces. In March, following an insurgent ambush, TFG police forces indiscriminately fired their weapons, killing four passengers in a passing minibus and injuring its driver.

TFG police and intelligence officials carried out widespread arbitrary arrests, often for the purpose of extracting ransom payments from detainees and their families. Intelligence operatives under the command of TFG National Security Agency head

Mohammed Warsame 'Darwish' maintain a dungeon-like detention facility in southern Mogadishu. Conditions in this facility are appalling and intelligence personnel subject many detainees to torture during interrogation.

Abuses by Ethiopian Military Forces (see also Ethiopia chapter)

Ethiopian National Defense Force (ENDF) personnel in Mogadishu have continued to use mortars, artillery, and "Katyusha" rockets indiscriminately in response to insurgent attacks, devastating entire neighborhoods of the city. Ethiopian bombardments regularly fall on civilian homes and public spaces, sometimes killing entire families. In July ENDF forces bombarded part of the strategic town of Beletweyne after coming under attack by insurgent forces based there, displacing 75,000 people.

In 2008 ENDF personnel were implicated in numerous acts of murder, rape, and looting of Somali civilians, often alongside TFG forces. In an April raid on a Mogadishu mosque, ENDF soldiers reportedly killed 21 people; seven of the dead had their throats cut.

Since late 2007 ENDF discipline has eroded. Ethiopian soldiers frequently react to insurgent attacks by firing indiscriminately into crowds of civilians. In August a group of ENDF soldiers hit by a roadside bomb near the town of Afgooye responded by firing wildly and killing up to 60 civilians, including the passengers of two minibuses.

Abuses by Insurgent Forces

Insurgent forces have kept TFG and Ethiopian forces pinned down in heavy fighting in Mogadishu for nearly two years, gaining ground in 2008. The insurgents are deeply fragmented, but many of the worst abuses have been committed by groups linked to Al-Shabaab ("Youth" in Arabic), a militant Islamist group.

Insurgents in Mogadishu routinely fire mortar shells from populated areas towards TFG and Ethiopian installations without adequate spotting, indiscriminately killing and wounding civilians, and placing civilians under their control at risk from Ethiopian and TFG counter-battery fire. Insurgent groups, some of which are illegally recruiting-sometimes by force-under 18-year-olds, also use landmines and remote-detonated explosive devices along roads in populated areas. In August a roadside bomb in southern Mogadishu killed 21 women working as street-cleaners and wounded more than 40 other civilians.

Insurgent forces have also carried out targeted killings of civilian TFG officials, perceived TFG collaborators, and individuals the insurgents view as un-Islamic. In January a man working as a messenger among different TFG offices was shot outside of his home in Mogadishu after receiving several death threats ordering him to stop his work. In April Al-Shabaab fighters killed four foreign national teachers in the town of Beletweyne.

In October a simultaneous wave of bomb attacks struck a government office in Puntland as well as government, UN, and Ethiopian consular offices in Hargeisa. At least 28 people died in the attacks.

Attacks against Humanitarian Workers, Civil Society Activists, and Journalists

Humanitarian workers and civil society activists became the targets of an unprecedented wave of attacks in 2008. Between January and November, 25 humanitarian workers were killed in Somalia and at least 24 NGO staff were kidnapped. In January a roadside bomb in Kismayo killed three Medecins Sans Frontieres staff and a journalist. In June armed men assassinated civil society activist Mohamed Hassan Kulmiye in his office in Beletweyne. In July unknown men shot dead Osman Ali Mohamed, the head of the United Nations Development Program (UNDP) office in Somalia, as he left a mosque. The head of the Somalia office of the United Nations High Commissioner for Refugees was kidnapped in June and held for more than two months.

Al-Shabaab and its more militant splinter groups are believed to have carried out many of these attacks. But many Somali activists believe that elements within the TFG are also profiting from the current environment of confusion and impunity to threaten and murder critics in civil society. Prominent activists who fled into exile in 2008 cite their inability to identify the origin of threats as the primary reason they had no choice but to leave.

At least two Somali journalists were killed in 2008, bringing the total number of journalists killed since early 2007 to 10. In June gunmen shot and killed BBC stringer Nasteah Dahir Farah outside of his home in Kismayo. TFG police and intelligence personnel have imprisoned several other journalists. In 2008 TFG security services detained the directors of two independent radio stations, Radio Somaliweyn and Radio Shabelle. A reporter from Radio Somaliweyn was also jailed, for covering an opposition meeting in Asmara. In general, however, TFG Prime Minister Nur Hassan Hussein has made efforts to reduce the level of harassment TFG security forces mete out to Somali journalists.

#### Key International Actors

The US, the United Kingdom, the European Commission and other key donors have failed to condemn ENDF or TFG abuses or address the scale of the Somali crisis. Instead, they have sought to support the TFG even where this risks empowering abusive TFG actors and institutions. In 2008 several donors, including the European Commission, pressured UNDP to pay the salaries of 4,000 Ethiopian-trained TFG security personnel without adequate monitoring.

US policy on Somalia is dominated by counterterrorism concerns and tends towards unwavering support for the TFG and for Ethiopian policy in Somalia. The US military has continued its practice of targeted air strikes on alleged terrorist suspects, launching two attacks on Somali soil in 2008. One attack in March injured six civilians but did not hit any suspected terrorist targets, while another in April killed Al-Shabaab's commander, Aden Hashi Ayrow, as well as several civilians.

Somalia's neighbors have played mixed roles in the ongoing crisis. Eritrea uses Somalia as a convenient theater in its proxy war against Ethiopia. Eritrea hosts a breakaway faction of the opposition Alliance for the Re-Liberation of Somalia (ARS) and actively stokes the violence. Kenya closed its border with Somalia in January 2007, but continues to accommodate nearly 7,000 new Somali refugees each month in the sprawling refugee camps around the northern town of Dadaab.

The African Union has authorized a force of 8,000 peacekeepers for Somalia, but thus far only 2,450 Ugandan and Burundian troops have been deployed. Those troops are largely limited to protecting a few key installations in Mogadishu.



The United Nations' Special Representative of the Secretary-General for Somalia, Ahmedou Ould-Abdallah, has successfully brought together the Djibouti-based ARS with TFG representatives for peace talks. The talks, hosted by the government of Djibouti, currently represent the best hope for a negotiated end to the armed conflict in Somalia. However, thus far there has been a lack of concrete progress and they have been hobbled by the fact that some factions within the TFG, along with Al-Shabaab and other powerful opposition groups, have rejected the process altogether.

41. The applicant's evidence has been internally consistent and congruent with available country of origin information. The behaviour which he has ascribed to the group Al Shabaab is consistent with what has been reported about this group and the Tribunal finds it credible that, given the status and occupational category of his father, he would be approached with a view to 'recruiting' him to the cause; this would add leverage to the group and be used as an example for others to follow. The fact that the applicant's father did not agree to join the group caused him to be killed. The Tribunal accepts that the applicant's father was killed by Al Shabaab and for this reason. The Tribunal also accepts that the applicant represents the logical next target for the group given the family and clan practices in Somalia. Whether the *modus operandi* of Al Shabaab represents a way of legitimising (in terms of religion) their killing of people seen as their opponents or whether the actual purpose was to recruit first the applicant's father and then the applicant, is not central to the fundamental concern of the Tribunal in assessing future risk to the applicant in terms of whether he would be seriously harmed.
42. The Tribunal accepts that the applicant's wife and three of his children were killed in a hand grenade attack where he was also the target.
43. The Tribunal makes reference to the above-cited country information which illustrates a number of characteristics of the social and political structure of Somalia at the moment. There has not been a viable government in existence since 1991; there are no legal, police or other structures of civil society in existence or functioning; the power of the clans, which was once seen as a contributor not only to strife, but also a restraining influence in that some measure of control was able to be applied by them, has drastically diminished. Thus, in terms of considering state protection, the Tribunal concludes that not only does this not exist but the concept itself cannot be fairly said to apply to the Somali situation where the idea of it being a state is not a foregone conclusion.
44. Where persecution occurs in a context of widespread conflict, it would be wrong to require a claimant to establish a risk of persecution over and above the risks faced by others caught up in the conflict. The principle of "differential impact" was espoused by the House of Lords in *Adan v SSHD*. [1998] 2 WLR 702. It was held that, in circumstances of civil war such as inter-clan fighting in Somalia, the individual or group had to show a well founded fear of persecution *over and above* the risk to life and liberty inherent in the civil war or a fear of persecution for Convention reasons over and above the ordinary risks of clan warfare. The High Court has however ruled that the "differential impact" principle does not form part of Australian law and should not be used (*MIMA v Haji Ibrahim* (2000) 204 CLR 1). Justice McHugh explained:

It is not the degree or differentiation of risk that determines whether a person caught in a civil war is a refugee under the Convention definition. It is a complex of factors that is determinative – the motivation of the oppressor; the degree and repetition of harm to the rights, interests or dignity of the individual; the justification, if any, for the infliction of that harm and the proportionality of the means used to achieve the justification.

45. In the present case the Tribunal considers that the applicant has been targeted by a ‘non-state agent’ for reasons of his religion and real or imputed political opinion, in that the applicant and his family espouse a moderate form of Islam which the politically more powerful Al Shabaab wished them to follow.
46. The Tribunal has considered whether the applicant could ‘reasonably’ relocate to another part of the country in order to avoid the harm and it recalls the applicant’s actions already taken to avoid further harm after the killing of his father by relocating to another suburb of Mogadishu which were not only futile but disastrous. The Tribunal finds that the situation faced by the applicant in Somalia, as exemplified in the cited country information, in light of his role and responsibilities as the head of his extended family, makes any further relocation not only unreasonable but also ineffective. The Al Shabaab movement has gained control of more territory and there is no immediate prospect of any political solution to the governing of Somalia.
47. In light of the above evidence and discussion the Tribunal finds that there is a real chance that the applicant would face serious harm amounting to persecution, now or in the reasonably foreseeable future, should he return to Somalia; that this persecution involves systematic and discriminatory conduct and that the convention reasons of political opinion and religion are the essential and significant reasons for the applicant’s persecution. Thus it finds that his fear of persecution is well-founded.

## **CONCLUSIONS**

48. The Tribunal is 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**

49. 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.

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 *Migration Act 1958*

Sealing Officer’s I.D. prrt44