

**1107868 [2011] RRTA 1044 (27 December 2011)**

**DECISION RECORD**

**RRT CASE NUMBER:** 1107868

**DIAC REFERENCE(S):** CLF2010/15690 CLF2010/83964

**COUNTRY OF REFERENCE:** Somalia

**TRIBUNAL MEMBER:** Paul Fisher

**DATE:** 27 December 2011

**PLACE OF DECISION:** Melbourne

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

## STATEMENT OF DECISION AND REASONS

### APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Somalia, arrived in Australia on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] January 2010 and applied to the Department of Immigration and Citizenship for the visa [in] January 2010. The delegate decided to refuse to grant the visa [in] July 2011 and notified the applicant of the decision.
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] August 2011 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, *Applicant S v MIMA* (2004) 217 CLR 387 and *Appellant S395/2002 v MIMA* (2003) 216 CLR 473.

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.
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. The expression ‘the protection of that country’ in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.

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.
19. Relevantly to the present application, s.91W(1) authorises the Minister or an officer to request a protection visa applicant to provide documentary evidence of identity, nationality or citizenship, and s.91W(2) provides that if:
  - (a) the applicant has been given a request under subsection (1); and
  - (b) the applicant refuses or fails to comply with the request; and
  - (c) the applicant does not have a reasonable explanation for refusing or failing to comply with the request; and
  - (d) when the request was made, the applicant was given a warning, either orally or in writing, that the Minister may draw an inference unfavourable to the applicant's identity, nationality or citizenship in the event that the applicant refuses or fails to comply with the request;then, in making a decision whether to grant the protection visa to the applicant, the Minister may draw any reasonable inference unfavourable to the applicant's identity, nationality or citizenship.

## **CLAIMS AND EVIDENCE**

20. The Tribunal has before it the departmental files 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.

### **Background**

21. The applicant claims to be a [age deleted; s.431(2)] year old national of Somalia from Baidoa.
22. She arrived in Australia at Tullamarine Airport [in] January 2010 bearing a Bahraini passport issued to a Bahraini citizen of Somali background named [Ms A], and endorsed with a subclass 676 tourist visa.
23. The applicant was interviewed in immigration clearance early [the following day] and initially attempted to maintain that she was the rightful owner of the passport. She also variously asserted that:
  - That she has only \$300, but she knows a person Australia, [Mr B], who has known her father for more than 20 years and will help her and buy a return ticket do she can go back;
  - She came here to visit and work if she can find a job, and plans to stay for three months;
  - (When it was put to her that she does not have work rights) She knows she is no allowed to work here, but if things are good here she will go back and apply to return
  - She was married in 2003 and divorced in 2006 in Somalia;
  - She has been living in Yemen for seven years with her aunty;
  - Her ex-husband "[name deleted: s.431(2)]" would support her during her visit to Australia, that she intended to remarry him when she returned home.
24. The applicant's account was not accepted, the tourist visa was cancelled, and she was refused immigration clearance and advised that she would be removed from Australia. The applicant had in her possession a list of phone numbers, and she was permitted to make some phone calls. She called [Mr B] in Australia, and also made calls to numbers in Malaysia and Bahrain.

25. The applicant was then placed in immigration detention and transferred to the Maribyrnong Immigration Detention Centre (MIDC) pending removal.
26. The applicant then provided what she claims to be her true identity, and indicated that she wished to invoke Australia's protection obligations under the Convention.
27. The applicant was provided with representation under the Immigration Advice and Application Assistance (IAAAS) Scheme, and a protection visa application prepared with the assistance of her representative was lodged [in] February 2010.
28. The applicant's protection claims indicate that she left Somalia in March 2007 due to fear of the Al-Shabaab group, which suspects the applicant and her family of supporting the Somali government. She referred to a number of incidents including one in August 2006 when Al-Shabaab members are said to have come to her house looking for weapons, although she also stated that they were masked and could not be identified. They killed a neighbour who objected to the searching, and the applicant's brothers were temporarily detained and beaten.
29. The applicant arranged to send the applicant away, and she travelled by bus to Bosasso on the north coast of Somalia, from where she was smuggled into Yemen via sea. The applicant spent three months in Yemen before crossing illegally into Saudi Arabia, where she [worked] for six months. From there the applicant crossed the border into Bahrain, again without any legal documents, and again she found [work] .
30. The applicant claims that she worked in Bahrain for approximately two years for an expatriate Somali woman she met by chance, but that she was exploited because she lacked lawful immigration status. A man who befriended her in a local shop offered to help her leave Bahrain, and she stole her employer's passport, which the man used to apply successfully for an Australian tourist visa. The applicant then travelled to Australia under the assumed identity of her employer in Bahrain, using the stolen travel document.
31. The Department conducted extensive inquiries seeking to ascertain the applicant's identity and nationality, and to establish whether she had the right to enter and reside in any other country. Pursuant to these enquiries, the true owner of the passport used by the applicant to travel to Australia was contacted by the authorities in Bahrain, and is said to have told them that that she gave or lent her passport to "a Somali woman from her relatives" so she could travel to Australia, and that the applicant is in fact called [Alias C] and holds a Somali passport in that name. The Bahraini authorities go on to say that they had no record of anyone with the applicant's claimed identity [Ms D], that [Alias C] is recorded as having arrived from Saudi Arabia and been granted a visa in that identity upon her arrival, but that she has no residence right in Bahrain, and was unlawful at the time she departed as her visa had expired. However, enquiries with the Saudi authorities subsequently disclosed that they had no record of the applicant entering or residing there in any of the names provided.
32. A supporting letter was provided by [Mr B] in his capacity as [an office holder] of the Somali Inter-Riverine Community Development Association Inc.
33. Also provided were two birth certificates with authorised translations said to evidence the applicant's identity and Somali nationality, one of which was provided to the Department by [Mr B]. Despite purportedly being issued on the same day by the same authority, and essentially containing the same information, the documents were nevertheless clearly different versions. A forensic examination by the department's Document Examination Unit concluded that the documents were unreliable.

34. The applicant was interviewed in connection with her claims on a number of separate occasions, both by the delegate assessing her protection claims and by the National Identification and Advice (NIVA) section seeking to establish her identity, although there is no record of the delegate's interviews on the departmental files, and the record of the NIVA interview is plagued by distortion.
35. The applicant was also asked to respond in writing to various matters of concern, and in each case comprehensive written submissions prepared by her representatives and addressing those concerns were provided.
36. The application was nevertheless refused [in] July 2011. The delegate was not satisfied that the applicant is a national of Somalia, inferring pursuant to s.91W that she is a national of an unidentified third country.
37. Although the delegate accepted that the applicant was neither [Alias C] nor [Ms A], he was not satisfied that she was who she claimed to be. The delegate noted that the birth certificates were not reliable, and also gave little weight to the evidence of [Mr B], given his evident personal involvement in the case including in the provision of a suspect document.
38. The delegate drew an adverse inference about the applicant's credibility for various reasons including her provision of fraudulent identity documents and her close connection to [Ms A], which the delegate considered to be indicative of a blood relationship which the applicant has tried to conceal to hide the fact that she is a national of a third country.
39. The delegate also considered that the applicant's claims contained internal inconsistencies or errors, including with respect to the journey she is said to have undertaken from Somalia to Yemen. For example, she was said to have been forced to jump into the sea as the boat approached the Yemeni port of Al Jahib, and yet the delegate was unable to find any evidence that there is such place.
40. Finally, the delegate considered the applicant's claims to have been at odds with the country information, including with respect to the capacity of Al-Shabaab fighters to have conducted operations in Baidoa in August 2006, or that if the applicant was in fact a target of that group as claimed it would have been possible for her to have avoided Al-Shabaab checkpoints when she is said to have fled Baidoa in early 2007.

### **Review Application**

41. The review application was lodged with the Tribunal [in] August 2011, and constituted [in] November 2011.
42. [In] November 2011 the Tribunal wrote to the applicant inviting her to attend a proposed hearing scheduled for [a further date in] November 2011.
43. [Prior to the scheduled hearing] the Tribunal received a supporting submission enclosing various pieces of documentary evidence as follows:
  - a) Statutory Declaration of [Ms D] dated [November] 2011;
  - b) The following photographs of our client's father (whose face was seriously injured by a group affiliated with Shatigadud);
    - i) Photograph of our client's father standing up with a hand in front of his nose and mouth;
    - ii) Photograph of our client's father sitting down with his head slightly tilted to his

right;

- iii) Photograph of our client's father standing up with his hands placed at his sides
- c) Statement of [Mr B] dated [in] October 2011;
- d) Letter from [an office holder] of the Somali Australian Council of Victoria, [name], dated [in] November 2011;
- e) Letter from [an office holder] of ESOF Education Skills Development Foundation Inc, [Ms E], dated [in] September 2011;
- f) Statutory Declaration of [Mr F] dated [in] November 2011;
- g) Statutory Declaration of [Ms G] dated [in] November 2011;
- h) Statutory Declaration of [Mr H] dated [in] September 2011;
- i) Letter from [a director] of River Nile Learning Centre, [name], dated [in] November 2011.

### **Identity**

There is a considerable amount of information before the Tribunal to indicate that the applicant is [Ms D], a Somali national. This information includes the **sworn** evidence of [Mr B], [Mr H], [Mr F] and [Ms G], all of whom are prepared to provide further information to the Tribunal if required.

The evidence of the deponents of the statutory declarations is corroborated by a number of other witnesses. [Ms E] has given written evidence that [Ms D] has contributed to the Somali community in Australia and has engaged in things such as the Somali "folklore dances". [Ms E] has also expressed a willingness to provide further evidence to the Tribunal if required.

[Ms E]'s cousin in Malaysia, [Mr I], is in the process of providing a statement that he knew the applicant in Somalia and identifies her as [Ms D]. In accordance with Somali social practices, he refers to [Ms D] as his sister. [Mr I] is also available to give evidence to the Tribunal.

Three of [Ms D]'s neighbours from Somalia can provide evidence as to her identity and presence in Somalia until 2007. These people do not have access to email or facsimile. Consequently, it has not been possible to obtain a statement from them. However, they can be contacted on the following phone numbers:

- a. [Ms J] [phone number]
- b. [Ms K] [phone number]
- c. [Ms L] [phone number]

None of these people have ready access to email or facsimile. Consequently, it has not been possible to obtain a statement from them.

In addition to the evidence of these witnesses, [Ms D]'s ability to speak Somali fluently, her appearance, her knowledge of the circumstances in Somalia and the fact that she has undergone female genital mutilation - a practice that is rife in Somalia - are consistent with her claimed identity.

Whilst it is true that [Ms D] also speaks English fairly well, she has provided a consistent and plausible explanation for her English language ability. In this regard we maintain what was put in our email to [Mr M] on [date] July 2011, namely:

During these proceedings our client has required assistance of an interpreter because of her limited ability to communicate effectively in English

In relation to the English language skills that she does have, our client has instructed us that she learnt English by communicating with her brother in English (from 2001 to 2006), studying English (in 2006), watching English language television while abroad and through the need to communicate in the English language while in Australia. We are further instructed that the pronunciation of letters in the Somali alphabet is often similar to the pronunciation of letters in the English alphabet. Given our client's exposure to the English language during the 9 years prior to her arrival in Australia, including 6 months for formal English language training, we submit that it is not surprising that our client had a fair command of the English upon arrival in Australia.

Our client's English language ability is not perfect, or even of such a standard that would enable her to communicate in a DIAC interview unassisted. It is however of a reasonable standard because she has been able to use the English language on and off for almost a decade. We submit that there is nothing in her English language ability which indicates that raises doubts about her identity.

In relation to the birth certificates provided as evidence, we submit that the contents of these documents are consistent with the evidence of each of the witnesses in this matter. Although the Tribunal may treat these documents with caution since false documents can be readily obtained in Somalia, we submit that you should be prepared to give [Ms D] the benefit the doubt and accept that they are generally accurate and have not been produced to disguise [Ms D]'s identity or enhance her prospects of success in these proceedings.

As to the matters raised by [Mr M] in his email of [date] July 2011, we adopt what was said in our email also dated [date] July 2011 bearing the subject line "[Ms D] - Response to your email of [date] July 2011". In brief, the evidence referred to, and ultimately relied on by [Mr M] is flawed in many respects and does not provide a sound basis for a conclusion that the identity of [Ms D] is not as she claims. This evidence, much of which cannot be tested, must, with respect, yield to the sworn evidence of the witnesses who are available for interviewing by the tribunal member.

We submit that the overwhelming evidence in this matter indicates that the applicant is [Ms D]. To the extent that existing circumstantial evidence may cast doubt on that conclusion, we submit that this evidence cannot be verified and you should be reluctant to attach any weight to it.

### **Our client's identity as a citizen of Somalia -The absence of a right to reside in another country**

A number of the witnesses in this matter have provided, or are able to provide, evidence that they witnessed [Ms D] residing in Somalia for an extended period. This indicates that [Ms D] has a right to reside in Somalia.

[Ms D]'s familiarity with Somalia, including its culture and language, indicates that she has spent a significant period of time in Somalia. Leaving the issue of whether she has a right to reside in another country aside for the moment, based on the available evidence, we submit that you should accept that she is a Somali national.

As to whether [Ms D] has a right to reside in a third country, [Mr M] relied on the following evidence:

- (a) The birth certificates;
- (b) The fact that [Ms D] appears to have relatives abroad;
- (c) The discrepancies in her evidence support a conclusion that she is a national of another country;

to conclude that she is a national of another country.

With respect to [Mr M] there is simply no direct evidence that [Ms D] is a national of another country. The Department of Immigration and Citizenship has undertaken extensive checks with a number of countries. All of these checks have come back negative. This weighs heavily in favour of a conclusion that the applicant is only a national of Somalia and does not have a right to reside in other countries.

There is no evidence that the birth certificates are fraudulent. Whilst the information on the prevalence of fraudulent documents in Somalia might raise the possibility that the birth certificates are not genuine, it does not follow that the documents before the Tribunal are themselves fraudulent. On the contrary, the consistency between the contents of the birth certificates and the evidence of a number of people who knew [Ms D] suggests that the documents are genuine. In any event, the birth certificates do not indicate that [Ms D] has a right to reside in a third country.

[Mr M]'s conclusion that the presence of [Ms D]'s relatives abroad somehow indicates that she is a national of another country is flawed. The evidence before [Mr M] was that [Ms A] is [Ms D]'s "relative" and that she had a relative in Malaysia. There is no credible evidence that [Ms A] or [Mr N] are so closely related to [Ms D] that it might support a finding that [Ms D] has a right to reside in a third country. In absence of this evidence, the mere presence of supposed relatives in Bahrain and Malaysia cannot establish that [Ms D] somehow has a right to reside in another country.



In relation to discrepancies in [Ms D]'s evidence, it must be kept in mind that she is a young woman who has encountered many difficulties recounting her experiences in Somalia and Bahrain. We submit that you should be reluctant to attach significant weight to minor discrepancies in her evidence.

As to [Mr M]'s criticism that [Ms D]'s claims are inconsistent with the independent information, we continue to rely on our earlier submissions to the Department, including independent information indicating that the ICU militia maintained the capacity to conduct operations throughout the south of Somalia into 2007 despite the group's nominal defeat in Baidoa in December 2006. [Ms D]'s knowledge of the situation in Baidoa in 2007 provides compelling support for the conclusion that she was living in Somalia at that time; the inference being that she was able to live there lawfully as a Somali citizen or resident.

In conclusion, we respectfully submit that the weight of evidence in this matter strongly favours a finding that our client is a citizen of Somalia and does not have a right of residence elsewhere. The evidence that [Ms D] may have such a right is vague and, even considered cumulatively, lacks sufficient probative value to enable you to be satisfied that our client is able to reside lawfully outside Somalia.

### **Journey from Somalia to Yemen**

As to the discrepancies in [Ms D]'s evidence about her journey from Baidoa to Bossaso, it is understandable that a young woman would be reluctant to provide the full particulars of an extremely difficult period, especially in a confronting environment in a foreign country. We therefore submit that you should be reluctant to attach significant weight to any discrepancies between her initial and subsequent evidence in relation to her journey from Baidoa to Bossaso.

[Ms D] understands that she landed in the vicinity of the port of Mukallah, which is on the Arabian Sea. She further understands that the journey from Yemen to Sana'a actually took three days, not one. [Mr M] acknowledged that the journey from Bossaso to Yemen's Arabian Sea coast was a route used to "smuggle people into Yemen." That said, [Mr M] did not accept that [Ms D] could have made the journey from the Arab Sea coast to Sana'a "within the span of one night." With respect, any reference to arriving in Sana'a "the next morning", must be understood in the context of [Ms D]'s unconscious state and is in fact a reference to the first day she regained full consciousness and not a precise measurement of the time it took to get from Yemen to Sana'a.

Although [Ms D]'s evidence about her journey from Baidoa to Yemen is incomplete and has at times been confused, these deficiencies can be explained by her reluctance to discuss what happened on the journey and her impaired faculties as a result of her losing consciousness during the journey. We submit that you should give [Ms D] the benefit of the doubt and accept that she travelled from Somalia to Yemen as claimed.

### **A well-founded fear**

For the reasons set out above, we submit that you should accept that [Ms D] is a citizen of Somalia, who does not have a right to reside elsewhere. Accordingly, you should assess her protection claims against Somalia.

[Ms D] has indicated that she fears that she will be persecuted in Somalia because of her status as a woman and because she will be perceived as being opposed to Al-Shabeab.

A well-founded fear because [Ms D] is a woman

[Ms D]'s status as a woman is beyond question. Similarly, the authorities make it clear the young Somali women can constitute a particular social group for the purpose of the Refugees Convention.<sup>1</sup> We therefore submit that [Ms D]'s claims in this regard are Convention related. There is a wealth of independent information in relation to the ongoing violence against women in Somalia. These include:

UN Security Council, Report of the Secretary-General on Somalia, 30 September 2011, 5/2011/549

"The ongoing conflict has increased the risk of sexual violence for women and children. **There are**

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<sup>1</sup> MIMA v Cali [2000] FCA 1026

**reports of Al-Shabaab recruiting girls for forced marriage to fighters, and allegations of rape by militias allied to the Government in southern central Somalia. Although the United Nations has not been able to confirm widespread cases of sexual violence during flight among newly arrived refugees in Aadaab, Kenya, it is acknowledged that there are high risk areas on the outskirts of the camps and en route to Kenya where women and children may be more exposed to sexual violence by 'bandits' or 'men with guns'**<sup>2</sup>

UN Human Rights Council, Report of the Independent Expert on the Situation of Human Rights in Somalia, 29 August 2011, A/HRC/18/45

**"Domestic violence, sexual violence and such harmful traditional practices as female genital mutilation are some of the most common violations of women's rights reported across all areas of Somalia...**

Access to justice and equality before the law remains a challenge, as exemplified in cases of sexual violence that are settled by tribal elders who disregard the opinion and will of the victim, including with forced marriages between the victim and the perpetrator. In the course of the universal periodic review, several delegations focused on the urgent need to improve the human rights situation of women and children. The Transitional Federal Government delegation committed to eradicating female genital mutilation, and it was recommended that the practice be criminalized and awareness-raising campaigns conducted. Other recommendations on women's rights concerned the urgent need to address violence against women and to include women in political life and the peace process"<sup>3</sup>

Freedom in the World 20.10 - Somalia, 3 May 2010,

"Sexual violence is rampant due to lawlessness and impunity for perpetrators, and rape victims are often stigmatized",<sup>4</sup>

UN Human Rights Council's Compilation: [Universal Periodic Review] : Somalia/ prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1, published on 21 February 2011

"The independent expert raised concerns that there were no credible statistics on violence against women. **Women were often victims of rape by warlords, and reportedly continued to face cruel, inhuman and degrading treatment on a daily basis, particularly in Al-Shabaab controlled areas.** The independent expert stated that no amnesty should be granted for violence against women that qualified as crimes against humanity, in line with Security Council resolutions 1325 and 1820. The Secretary-General also noted that **gender-based violence remained grossly underreported, particularly in southern and central Somalia**"<sup>5</sup>

UN Human Rights Council, Report of the independent expert on the situation of human rights in Somalia, Shamsul Sari, 15 September 2010

"While such violence is normally underreported, according to a likely confidential database kept by United Nations agencies, some **409 incidents of rape, attempted rape/sexual assault, forced prostitution and domestic violence took place in the period January to June 2010 in Somalia.** Assessments conducted revealed that there was a high prevalence of sexual violence in IDP settlements, where victims were generally of minority clan origin, bereft of clan protection and often forced to engage in risky coping mechanisms".<sup>6</sup>

Internal Displacement Monitoring Centre (IDMC), Minority Rights Group International (MRG) individual UPR submission - Somalia, May 2011

"Gender-based abuses: these are prevalent against women in general throughout Somalia, but they can

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<sup>2</sup> UN Security Council, Report of the Secretary-General on Somalia, 30 September 2011, 5/20111549, available at: <http://www.unhcr.org/refworld/docid/4e7b11fb2.html> [accessed 21 November 2011] page 6

<sup>3</sup> UN Human Rights Council, Report of the Independent expert on the situation of human rights in Somalia, 29 August 2011, A/HRC/18/48, available at: <http://www.unhcr.org/refworld/docid/4e733279398.html> [accessed 21 November 2011] page 9.

<sup>4</sup> Freedom House, Freedom in the World 2010 - Somalia, 3 May 2010

<http://freedomhouse.org/template.cfm?page=22&country=7919&year=2010> Date accessed 3 May 2011.

<sup>5</sup> s UN Human Rights Council, Compilation : [Universal Periodic Review] : Somalia / prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1, 21 February 2011, A/HRC/NVG.6/11/SOM/2, p28, <http://www.unhcr.org/refworld/docid/4d9efef52.html> Date accessed 4 May 2011.

<sup>6</sup> UN Human Rights Council, Report of the independent expert on the situation of human rights in Somalia, Shamsul Bari, 16 September 2010, <http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC-15.48> en.pdf Date accessed 4 May 2011.

affect minority women more severely. Minority women face multiple discrimination in that their human rights are violated as women, both from the wider political structures and male social attitudes, as well as within their own communities. Furthermore, a shocking pattern of gender-based violence is taking place against minority women and girls languishing in IDP camps in the Puntland region, in the north-east of the country, perpetrated by majority men and sometimes by members of the Puntland police, army or security service. As stated by Dr Shamsul Sari, UN independent Expert, in reference to Puntland in his 2010 report on the situation of human rights in Somalia "Minorities who lack the protection of the major clans are likely to be victims of the discrepancies between customary, criminal and sharia law"<sup>7</sup>. He further highlighted the plight of minorities in South-Central Somalia in the face of 'Islamic forces' and a deteriorating security situation".<sup>7</sup>

United States Department of State, 2010 Country Reports on Human Rights Practices - Somalia, 8 April 2011

"Laws prohibiting rape exist in Puntland, Somaliland, and TFO'-controlled areas; however, they were not enforced. There were no laws against spousal rape. While there were prosecutions of rape cases in Puntland and Somaliland, there were no reports of the TFG prosecuting rape cases during the year. The UNHCR and UNICEF documented patterns of rape perpetrated with impunity, particularly of women displaced from their homes due to civil conflict or who were members of minority clans. Police and militia members engaged in rape, and rape was commonly used in interclan conflicts. Traditional approaches to dealing with rape tended to ignore the victim's situation and instead communalized the resolution or compensation for rape through a negotiation between members of the perpetrator's and the victim's clans. Victims suffered from subsequent discrimination based on attributions of "impurity." Women and girls in IDP camps were especially vulnerable to sexual violence, contributing to the spread of H/V/AIDS. In 2008 the UNIE reported that in Mogadishu and Kismayo, IDP women and girls, particularly those belonging to minority groups, were increasingly the targets of sexual violence by youth gangs. In Somaliland gang rape continued to be a problem in urban areas, primarily perpetrated by youth gangs, members of police forces, and male students. Many of these cases occurred in poorer neighborhoods and among immigrants, refugee returnees, and displaced rural populations living in urban areas. Many cases were not reported.

In his September 16 report on the situation of human rights in Somalia, the UN independent expert recounted widespread sexual and gender-based violence in all regions of Somalia. Domestic violence against women remained a serious problem. There were no laws specifically addressing domestic violence; however, both Sharia and customary law address the resolution of family disputes. Sexual violence in the home was reportedly a serious problem, linked to general gender discrimination. Women suffered disproportionately in the country's civil war and interclan fighting"<sup>8</sup>

United Kingdom: Foreign and Commonwealth Office, Human Rights and Democracy: The 2010 Foreign & Commonwealth Office Report, 31 March 2011, ISBN: 9780101801720,

"Violence against women, including rape, continues to be widespread".<sup>9</sup>

United Kingdom: Home Office, Operational Guidance Note: Somalia [sic], July 2010, V 20.0

"The human rights situation has deteriorated particularly in areas controlled by al-Shabaab and allied extremist groups. **Al-Shabaab and other armed groups have continued to violate women's rights in southern and central Somalia. Women face arbitrary detention, restriction of movement and other forms of abuse for failure to obey orders, including non-observance of dress codes. There is a rising pattern of inhuman and degrading treatment, including stoning, amputations, floggings and corporal punishment**".<sup>10</sup>

Human Rights Watch, And What About Somali Women?, 9 December 2008

**"Unfortunately, though, urgency demands that we turn our attention to the horrific violence against women in conflicts going on right now around the continent. One such situation, shamefully ignored**

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<sup>7</sup> Internal Displacement Monitoring Centre (IDMC), Minority Rights Group International (MRG) - Individual UPR submission - Somalia, May 2011, available at: <http://www.unhcr.org/refworld/docid/4e3944212.html> [accessed 21 November 2011] page 4.

<sup>8</sup> United States Department of State, 2010 Country Reports on Human Rights Practices - Somalia, 8 April 2011, available at: <http://www.unhcr.org/refworld/docid/4da56d89c.html> [accessed 21 November 2011].

<sup>9</sup> United Kingdom: Foreign and Commonwealth Office, Human Rights and Democracy: The 2010 Foreign & Commonwealth Office Report, 31 March 2011, ISBN: 9780101801720, available at: <http://www.unhcr.org/refworld/docid/f4d9989c72.html> [accessed 21 November 2011] page 278.

<sup>10</sup> United Kingdom: Home Office, Operational Guidance Note: Somalia, July 2010. v 20.0, available at: <http://www.unhcr.org/refworld/docid/4c2d95e92.html> [accessed 21 November 2011] pages 4-5.

**by international media and policymakers, is the brutal armed conflict in Somalia. Escalating fighting between Ethiopian and Somali Transitional Federal Government (TFG) forces on the one side, and insurgent groups on the other, [i] has had a drastic effect on women and girls like Malka who face rape and other forms of sexual and gender-based violence (SGBV) and limited or no access to essential healthcare or justice.**

Since early 2007 hundreds of thousands of Somalis, including women and girls, have fled their homes in Mogadishu and other locations in fear of their lives. But Somali women also face the risk of rape and other SGBV at the hands of Ethiopian troops, Somali transitional government forces, and unidentified militias who take advantage of the growing lawlessness.

There is increasing evidence of a high prevalence of SGBV in south-central Somalia, despite the stigma and silence that usually surrounds rape and sexual assault. However, the voices of the victims and survivors themselves speak loudest. Their stories tell of violations by all sides. A teenage girl who was kidnapped by unidentified militiamen in Mogadishu told Human Rights Watch researchers in July: "[One of the kidnapers] held me by the neck and covered my mouth. I could not breathe. He repeatedly raped me. After a while the other one joined him. The first one raped me for more than an hour while the others were outside playing music in the car. Then they later joined to rape me in turns, including the driver. They raped me up to late evening. I bled profusely."

A young man told Human Rights Watch that Ethiopian soldiers raped his mother and sisters in Mogadishu following fighting between the transitional government forces and insurgent groups, 'Some Ethiopians and government soldiers came to our house. ...The Ethiopians came in one by one and started raping [my sisters] and I was sitting there helpless.'

These women and girls have little access either to essential health care or to justice. Where could Malka turn after her attack if she had been ready to report it since the attackers were government forces?

The same would seem to be true for many other rape victims and survivors in other areas of south-central Somalia. Aisha Ibrahim Duhulow was stoned to death at the age of 14 in October in Kismayo, a city controlled by the militant Al-Shabaab faction of the insurgency. She was reportedly arrested and convicted of adultery when she tried to report a rape to the authorities. Aisha's horrific death is likely to discourage rape victims from reporting rape or seeking justice from the Islamist insurgents, who control an increasing swathe of territory.

Malka's testimony also demonstrates that because of fear of the stigma, rape survivors or their families may not seek services to address the physical and psychological scars that result from SGBV—assuming that healthcare and counseling services exist. In fact, aid workers and human rights activists in Somalia have been the targets of violence themselves in unprecedented numbers in 2008, leaving many civilians without assistance at a time when Somalia is on the verge of the worst famine since the early 1990s".<sup>11</sup>

The Guardian The worst places in the world for women: Somalia - 'No woman in Somalia is happy to be a woman' is the cry of subservient wives and human rights activists' 14 June 2011

"Domestic violence, constant fear of rape, lack of healthcare and basic needs and cultural inferiority are the reality for women in Somalia. They have no voice and little respect [...]

Violence against women in Somalia is the highest in Africa, according Mogadishu's Somali Women Development Centre, which provides support to victims. Nadia Sufi Abdi, the centre's human rights documentation officer, describes the country as 'a woman's hell on earth.'

She says: 'No woman in Somalia is happy to be a woman because, from the cradle to the grave, woman is a victim'.

'The domestic violence, the roping, killing and kidnapping of women is part of the daily life, and there is no authority standing to stop this'.<sup>12</sup>

Given the consistent reporting of widespread violence against women in Somalia, we submit that you should be comfortably satisfied that if returned to Somalia, [Ms D] will face a real chance of being persecuted because of her gender.

Fear of being persecuted because of her perceived opposition to Al-Shabaab and ethnicity

In her attached statutory declaration [Ms D] has given evidence that her father was involved with the Rahweyn Resistance Army ("RRA"). Due to his opposition with the RRA leader, Hasan Muhammad

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<sup>11</sup> Human Rights Watch, *And What About Somali Women?*, 9 December 2008, available at: <http://www.unhcr.org/refworld/docid/49422f2e1a.html> [accessed 21 November 2011]

<sup>12</sup> <http://www.guardian.co.uk/world/2011jun14/worst-places-in-the-world-far-women>

Nur Shatigadud, the applicant's father was imprisoned by those *loyal* to Shatigadud. His previous support for the RRA has also resulted in him being targeted by groups loyal to the enemies of the RRA.

The Report of the Secretary-General on the situation in Somalia dated 11 October 2001,<sup>13</sup> corroborates [Ms D]'s claim that her father was arrested by those loyal to Shatigadud. At [14] the report states:

"While some of the Rahanwein people and former RRA leaders continued to participate in the TNG and TNA, others, including the RRA Chairman, have continued to reject TNG overtures. In late March, a number of Vigil and Mirifle elders were imprisoned by the RRA leadership. Additional arrests were made in September of clan elders returning from discussions in Mogadishu. According to RRA, the effort by these elders to reconcile RRA with the TNG was unacceptable to RRA leadership since they had no mandate from RRA. Internal divisions within the RRA Executive Committee over calls for a new leadership congress were also reported"<sup>14</sup>

The independent information confirms that there have been conflicts between factions of the RRA, ICU and Al-Shabaab. For example, Project Ploughshares reported:

"Fighting among rival clans continued in central and southern regions, sometimes with the involvement of religious groups. The RRA and its ally, the Digil Salvation Army, clashed with Islamic court militiamen loyal to Hossein Aideed in the early part of the year for the control of Qoryooley in the lower Shabeele region. Mogadishu saw heavy fighting after the election of Abdulgassim Salad Hassan as President, as local militia groups fought against armed groups sympathetic to the new government"<sup>15</sup>

More recently, in *Refugee Appeal No. 76376*, No. 76376, New Zealand: Refugee Status Appeals Authority, 11 May 2010 stated:

"The current protagonists have clan bias. The TFG forces are largely Darod, drawn from the President's home area of Puntland and members of a Rahanweyn militia, the Rahanweyn Resistance Army. Pitted against them are insurgent groups drawn in substantial part from Al-Shabaab, an Islamic militia drawn from the Hawiye and Ogaden clans and clan-based militia associated with the Hawiye".<sup>16</sup>

44. The further statutory declaration of the applicant dated [in] November 2011 reads as follows:

1. I was born in Baidoa on the [date]
2. My father was a businessman who exported [goods]. He worked for a company that was associated with the ' government.
3. When the civil war broke out my father and all of us moved around many times to avoid the conflict. I remember that in 1997 we were living in Mogadishu and before that we lived in different places. I cannot remember the names of these places.
4. In about 1998 my father joined the Rahweyn Resistance Army ("RRA"). The RRA captured Baidoa in 1999. My family returned to Baidoa shortly after the RRA victory.
5. During 2000-2002 it was relatively peaceful in Baidoa but then the clans began fighting again. In 2002, Shatigadud was elected President of the RRA. He belonged to the RRA but he seemed to want power and my father was against him mainly because my father was tired of fighting and he wanted our country to remain peaceful.
6. At the end of 2003-some soldiers came to our house and took my father away in the night-time. He was away for roughly 6 months. He was eventually tracked down by the local clan leader.
7. To the best of my knowledge my father was released after he promised to leave-3aidoa, however he did not leave.
8. Upon his release my father had a number of wounds to his body from the torture he received,

<sup>13</sup> [http://afrol.com/Countries/Somaliadocuments/un\\_sg\\_111001.htm](http://afrol.com/Countries/Somaliadocuments/un_sg_111001.htm)

<sup>14</sup> [http://afrol.com/Countries/Somaliadocuments/un\\_sg\\_111001.htm](http://afrol.com/Countries/Somaliadocuments/un_sg_111001.htm)

<sup>15</sup> <http://www.ploughshares.ca/content/somalia-1988-first-combat-deaths>

<sup>16</sup> Refugee Appeal No. 76376, No. 76376, New Zealand: Refugee Status Appeals Authority, 11 May 2010, available at: <http://www.unher.org/refworld/docid/4cl74eb22.htm> [accessed 21 November 2011 ] page 25

9. In 2003, my half brother was also put in prison and tortured; he was [age] years old.
  10. At the end of 2004 one of the groups loyal to Shatigadud came to our house. They mutilated my father's nose and damaged his face very badly. He had to leave Baidoa and go to the hospital with my mother. At that time his five brothers were also killed.
  11. When the soldiers came for my father, my sister tried to run away. My sister was raped. The rest of us were taken by neighbours to our grandmother's house.
  12. In 2005 our grandmother died of a heart attack because of stress and the neighbours took us back to our area with my aunt. My siblings and I were then spread among different families.
  13. My mother was torn between what to do-remain with my father or come home and look after us. She decided to come home and my father remained in Mogadishu. I was about [age] years of age at the time.
  14. In 2006, from February to the middle of the year, it was a bit more peaceful. Then a big bomb went off in Baidoa killing many people.
  15. In about August/September 2006 soldiers came to our house. In fear, my brother and I leapt from the third floor to the first floor and kept on running. That was when I hurt my back- We stayed away for two days before returning.
  16. About this time the ICU Movement developed. The ICU later became Al Shabaab. People from my father's movement became involved in Al Shabaab and are now very much against my father.
  17. In February 2007 there was another raid. We were fearful all the time. My back was very painful, my mother was nearly crazy-she didn't know whether to stay or go to my father. All this time he was in the movement and he had many death threats. I believe even now he is on the move all the time.
45. The further statutory declaration of [Mr B] is dated [in] October 2011, and reads as follows:
1. I am currently visiting Kenya. I may return to Australia in November 2011
  2. I maintain that the contents of the statutory declaration I provided as part of [Ms D]'s visa application are true and correct in every particular.
  3. Sometime before [Ms D] arrived in Australia I was informed by one of her relatives that she would be travelling to Australia. I think, but cannot be certain, that it was [Ms D]'s cousin in Malaysia who told me that [Ms D] was coming to Australia.
  4. Shortly after [Ms D] arrived in Australia she provided me with her father's mobile phone number. I recall [Ms D] asking me to telephone her father and to tell him what happened.
  5. I telephoned [Ms D]'s father as instructed. I recognised the voice on the line as being that of [Ms D]'s father as soon as I spoke to him. I informed [Ms D]'s father that [Ms D] had arrived safely in Australia and that she was being held in immigration detention. He was glad that [Ms D] had arrived in Australia.
  6. I have not spoken to [Ms D]'s father since that conversation. I have no information in relation to where he is at present.
  7. In relation to the birth certificate to the Department of Immigration and Citizenship, I am not aware of how the birth certificate came into existence and cannot comment on its origin; however, with the exception of the name of [Ms D]'s mother being misspelt, the contents of the birth certificate are consistent with my knowledge of [Ms D]'s circumstances: that is, [Ms D] was born in [year] and her mother is [name].
  8. I have known [Ms D] for a long-time. I know that she grew up in Somalia and that her parents are from Somalia. I have no doubt that [Ms D] is a citizen of Somalia.
  9. The Tribunal can telephone me on [numbers] if further information is required.

## Tribunal Hearing

46. The applicant appeared in person before the Tribunal [in] November 2011 to give evidence and present arguments. The Tribunal also received oral evidence via telephone from [Mr N] in Malaysia, and from [Ms L] and [Ms J] in Somalia. The Tribunal hearing was conducted with the assistance of an interpreter in the Somali and English languages.
47. The applicant was represented in relation to the review by her lawyer and registered [migration agent], who appeared via videolink from Sydney. The Tribunal takes this opportunity to acknowledge the high quality of the written submissions made on behalf of the applicant, and the evidently very considerable effort which went into them both at the primary and review stages, despite the constraints of the IAAAS funding scheme under which the representative was engaged, and the fact that this does not cover appearance at the Tribunal hearing.
48. After explaining its role, the purpose of the hearing, and the Convention definition of a refugee, the Tribunal indicated that it was concerned about whether the applicant's claims and evidence had been truthful, including with respect to her identity and, consequently, whether she might have the right to enter and reside in some other country apart from Somalia where she would not be at risk of persecution.

### *Evidence of the Applicant*

49. The applicant identified herself, and indicated that she is a national of Somalia. Asked whether she is a national of any other country, the applicant replied that she is not. Asked whether she had ever applied for a visa to enter or reside in any other country apart from Australia, the applicant again replied in the negative.
50. The applicant was asked about where she had been born and grown up. She indicated that she was born in Baidoa, and spent most of her life there at a number of different addresses around the city, but had also lived elsewhere in Somalia because of the civil war. From 1997 she lived in Mogadishu for two years before returning to Baidoa in 1999. At that stage all of her family was living together.
51. By the time she left Baidoa in 2007 only her younger brothers were still there, her [older sister and brother] had moved away. Her father had been in Mogadishu and he was also variously in Galkayo, Bosasso and Beledweyne, but at the time she left his last known whereabouts was in Mogadishu. She is not sure where he is at the moment.
52. The Tribunal noted that the applicant had previously indicated that she had had no contact with her father, and yet photographs of him had now been submitted. Asked to confirm that these were in fact his photographs, and how they had been obtained, the applicant confirmed that they were in fact photographs of her father, and that they had been taken in Somalia but she doesn't know exactly where. A neighbour from Baidoa called [Mr O] recently sent them to her.
53. At this point the applicant's representative indicated that there was an error in the applicant's statement, as it had been thought that [Mr O] did not have access to email, but they now understand that he does, and that it may be possible to get a supporting statement from him if required.
54. The applicant indicated that she thinks the photos were retrieved from her house, and may have been taken some years ago. Asked again whether she has had any recent contact with her father, the applicant replied that she had not. Asked how she thought the photos were



relevant, she explained that the photos show that she is a refugee, even though her father received the injuries (apparent from the photos) in the past. If she were not also at risk of harm she would not be here.

55. Asked how her father had received the injuries depicted in the photographs, the applicant explained that he had been a member of the RRA and there was an internal conflict and leadership struggle within that group. The injuries were inflicted on her father in 2003 or 2004, by those linked to the group's leadership, whom he had opposed.
56. Asked when she last had contact with her father, she said it was via telephone when she was in Bahrain, but contact with him is difficult because he is in hiding. Since she last spoke to her father she understands that [Mr B] has also spoken to him, while she was in detention in Melbourne, but she has not actually spoken with her father since she came to Australia.
57. Asked whether she had had any contact with other family members, the applicant replied that she had not. Her neighbour has told her that her [sister] is in [gaol] and is sick. She has no news of her other younger siblings or her mother, except that they are missing in Somalia. Likewise her older brother and sister; they were in Somalia when she left, but she doesn't know if they are alive or dead.
58. The applicant was asked whether she had ever been married. She replied that she had not.
59. Asked whether she recalled the interview which was conducted at the airport when she first arrived in Australia, the applicant indicated that she did, but noted that she had been under stress and depression.
60. The Tribunal noted that in her protection visa application it states that she has married, but that her visitor visa application refers to a husband, and when she arrived in Australia and was interviewed at the airport she claimed that she had been married 2003 in Somalia, that she later divorced, and that she planned to remarry your husband. Asked whether this was correct or not, the applicant replied that she had been scared, as she was facing being placed in detention.
61. The Tribunal noted that same interview she had also claimed to have been living with her aunty in Bahrain. The applicant replied that she could not recall what she had said.
62. After a short adjournment, the applicant's representative submitted on her behalf that she had been told to maintain her false identity upon her arrival in Australia, and that she provided false information in an attempt to appear consistent with that claimed identity. Her intention was to apply for a protection visa once she was in the Australian community. The Tribunal should also take into account her youth, her lack of education, and the stress she was under. Although it is regrettable that the applicant provided false information, it was also understandable in the circumstances, especially as she was facing the prospect of detention.
63. The applicant added that she is sorry for providing misleading information at the airport, but also reiterated that she has no recollection of what she actually said, and the evidence she provided at that time should not negate the statutory declarations of the witnesses
64. The Tribunal noted that the applicant had submitted two quite different birth certificates issued on the same day. Asked to explain how and why this could have occurred, the applicant replied that she was 12 years old at the time the birth certificate was issued, and that her father had organised it. She doesn't know about the legitimacy of the documents, but she does now that she is [Ms D], and she has provided the details of many people who can confirm her identity.



65. The applicant was asked to confirm her claim that her brother had taught her English, and did so. Asked which brother, she indicated that it was [name deleted; s.431(2)]. Asked where and how he had learnt English well enough to teach her, the applicant explained that he had taken an intensive two year English course in Baidoa at the [institute deleted: s.431(2)] with a view to obtaining employment with foreign agencies and also because he wanted to become a teacher. Asked whether he had in fact achieved his goals, the applicant indicated that he did end up doing some voluntary teaching at the institute once he graduated.
66. Asked what had happened to make her leave Baidoa, the applicant explained that in August or September 2006 Al-Shabaab was becoming a dominant force in Baidoa, when they were still known as the Islamic Courts militia. They were recruiting young men, and took two of her brothers and placed them in gaol when they refused to cooperate. Her family opposed these militias, which is why she also opposes them; they were killing and torturing people.
67. The Tribunal pointed out the country information indicated that the TNG was still controlling Baidoa at that point. The applicant acknowledged that this was so, observing that Baidoa was the seat of parliament at that time, but noted that there was little peace, and that in September 2006 there had been a major bomb explosion which was an attempt on the president's life. There were Islamist militias all around, and they were infiltrating Baidoa. Since her father was opposed to these groups, they were all in fear.
68. The applicant was asked who had taken her brothers away, the applicant indicated that they were men but their faces were masked.
69. The Tribunal noted that in her statement [in] January 2010, the applicant had said that the men who subsequently attacked her home were Al-Shabab. Asked how she knew which group the men were from, the applicant conceded that she didn't know, but she had assumed that they were Al-Shabaab. Asked to describe the soldiers who came to her home, the applicant replied that they had also been masked. Asked whether the government forces had ever been masked, the applicant indicated that she didn't know.
70. The Tribunal inquired whether it had been possible at that time to identify who supported the TNG and who was opposed to it, the applicant replied that the Islamists were opposed to the government. When asked how the government supporters and opponents were distinguishable from one another, the applicant replied simply that the Islamist militias were against the government, and they were supporters of the THG. Some people were for the government and some were against, but she only knows about her own family.
71. Asked whether there were any foreign troops in Baidoa at the time, the applicant replied that Ethiopian troops were present.
72. The applicant was asked to explain how she had escaped from Somalia. She described the route she took from Baidoa to Bosasso, travelling by bus via Mogadishu, via Beledweyne and Galkayo. The journey took six days, and was paid for by her paternal uncle. She travelled in a group with six other girls. They then spent one to two weeks in Bosasso before travelling by boat to Yemen.
73. Asked why she had not simply travelled directly from Baidoa to Beledweyne, the applicant explained that the lands in between were controlled by the Islamic Courts Union, and it was not safe to travel through.
74. One of the other girls had a brother in Bosasso, and he arranged the boat trip to Yemen, although he didn't actually accompany them on the voyage. She is not sure exactly how long

the trip took, as she was dizzy, vomiting and scared, but they left at night and she thinks they travelled for around 24 hours. She can recall that they left Bosasso on Thursday and arrived in Sana'a on Sunday or Monday, but she can't be sure as the last thing she recalls of the voyage is that they were thrown into the sea when they were close to the shore of Yemen.

75. At this point of her testimony the applicant was crying, and explained that she could not help it when she recalled how they had been treated. After composing herself, the applicant indicated that she was ready to continue.
76. Asked whether she had any recollection of the journey from the coast to Sana'a, the applicant replied that the people she was travelling with initially thought she was dead, but they got her to the shore and she was then taken to Sana'a. Without them she would be dead. She was only semi-conscious for some time, and it took her weeks to recover from the ordeal.
77. The Tribunal noted that the primary decision suggested that the applicant had come ashore at a place called Al Jahib. The applicant denied that this was the case. She may have been referring to Al Jahim, which is a refugee camp close to Aden. The camp is known as Al Qaras Al Jahim. They had been intending to make their way there and seek asylum.
78. The applicant was asked why she had left Saudi Arabia for Bahrain. She relied that she had been scared that she would be returned to Somalia if she were caught. The authorities there were always deporting people. Asked why, in that case, she had not stayed in Yemen, the applicant replied that conditions there were poor, there was nothing to eat, and
79. The Tribunal asked the applicant if she has any relatives in Bahrain. She stated that she does not, although she has some friends who helped her. She met the woman who employed her at the [bus depot]. She was only [age deleted; s.431(2)] years old, and was distraught and unable to speak Arabic, and another Somali woman realised she was unable to speak Arabic and spoke to her. The applicant related her circumstances, and the woman offered her accommodation and employment at \$100 per month.
80. Asked whether she was claiming that the woman assisted her just because she was a young Somali woman in trouble, the applicant confirmed that she was. Asked which clan the other woman belonged to, the applicant replied that she wasn't sure, but she knows that she came from Mogadishu. She remained in this woman's employment for the remainder of her time in Bahrain. Initially she had been treated well, but then there was a government announcement that people illegally in Bahrain would be deported, whereupon she stopped paying the applicant. She was evidently scared she'd be charged with harbouring an illegal.
81. The applicant was asked how she had obtained the passport and visa used to travel to Australia. She explained that this was arranged by her [friend]. She is not a thief, but she needed a means of escaping her situation, so she took her employer's passport from a cupboard. The Tribunal pointed out departmental records suggesting that the visa approval had been sent by courier directly to the home of the passport holder, [Ms A]. The applicant replied that she was given the passport and visa by [her friend], at his shop near her home.
82. The Tribunal noted that that the applicant had provided the names of a number of witnesses currently living in Somalia, including [Ms J], [Ms K] and [Ms L]. She was asked to explain how she knows these people, and to describe their personal circumstances.
83. The applicant explained that [Ms J] is a neighbour from Baidoa, aged approximately [age deleted; s.431(2)] years. She is married with four children. She understands that her family

has relocated a number of times, and when she spoke to her last week they were living in Baidoa.

84. [Ms K] is another woman the applicant knows from Baidoa. She is about [age deleted; s.431(2)] years of age, and is also married with children, although a number of her children have died and there are only about five surviving.
85. [Ms L] is another woman she knows from Baidoa. She is also married but eh applicant is not sure how many children she has, as some have been born since the applicant left the area. She is about [age deleted; s.431(2)] years of age.

*Evidence of the Witness [Mr O]*

86. The Tribunal telephoned the witness, who identified himself as [Mr O], born in [year deleted; s.431(2)] and currently living in Baidoa. He agreed to give evidence.
87. The witness explained that he knows the applicant, a Somali girl who was his neighbour. He has spoken with her once since he came to Australia, about five months ago.
88. Asked why the applicant had left Baidoa, the witness replied that [Ms D] and her family had experienced a lot of problems, because her father was a member of the Rahaweyn resistance Army and was persecuted for that reason. He can recall that the applicant fell from a building and hurt her back.
89. The witness was asked about the current situation in Baidoa. He replied that it is so horrible that he cannot talk about. Asked whether he thought the applicant would have problems if she returned there, the witness stated that she would not be safe, as people had attacked her house in the past and tortured her father, and he thinks the applicant would also be harmed.
90. The witness was asked whether he knew where the applicant travelled to after she left Somalia. He stated that she had travelled by boat to Yemen and later went to Bahrain. Asked whether he knew who the applicant had lived with in Bahrain, the witness replied that he doesn't know who she was living with, but he was told that she had been [working]. Later he heard that she had reached Australia, and her family and neighbours were relieved.
91. Asked what had happened to the rest of the applicant's family, and whether any are still in Baidoa, the witness noted that the applicant's family had comprised [details of siblings deleted: s.431(2)]. One of her sisters is in [gaol]. Her only offence is that her father is a member of the RRA.
92. Asked how long it is since she heard any news of the applicant's other family members, the witness replied that she doesn't have any current information about the whereabouts of the applicant's other family members, the only one she knows about is the [sister in gaol]. He reiterated that they were relieved when they heard that the applicant had reached Australia.
93. The Tribunal asked the question again, to which the witness responded that he understands that [the sister] was with two of the brothers when she was captured, but that he doesn't know what happened to the brothers.
94. The witness then observed that they are people from Baidoa. When the Somali civil war broke out, it was Australian (peacekeeping) forces which helped save their people. The Rahanweyn people always consider the Australians to be their friends.

95. The witness was asked whether he had sent the applicant any photos. He replied that he had sent her some photos of her father. Asked how she had obtained them he said that they were neighbours, and they know each other. He obtained them for the applicant because he was told that she was having problems having her claims accepted in Australia. He managed to make contact with the applicant's father, and took the photos about ten months ago to show that she was facing persecution.
96. Asked to confirm that he had personally met the applicant's father and taken the photos, the witness confirmed that he had. Asked where the photos were taken, he indicated that it was on the outskirts of Baidoa.
97. The Tribunal inquired whether the witness has had any contact with the applicant's father since that time, to which she replied that he has not. Asked whether she could contact him now by phone if necessary, the witness said that she could make enquiries to try to contact him. Asked whether he actually has the father's phone number, he replied that he does not, although he could make enquiries to try to get it.
98. The Tribunal observed that the applicant might appreciate being able to contact her father by telephone. The witness replied that it would be hard for [Ms D] to find her father, but it is easier for him as he is there in Baidoa.

*Further evidence of the Applicant*

99. The applicant was asked to comment on the fact that the witness had just given evidence that she personally contacted the applicant's father only 10 months ago in Baidoa. The applicant replied that the situation was complicated because her father was still living in hiding.
100. The applicant was asked about some of the other witnesses. Asked about [Ms E], the applicant indicated that she is a community [representative], but that she has only known her since she came to Australia.
101. The applicant's representative then pointed out that the witness in question had provided a supporting statement, which is relevant because it tends to prove that the applicant possesses folkloric knowledge specific to her claimed origins.
102. Asked about proposed witness [Mr I], the applicant explained that he is her cousin in Malaysia. She is happy for the Tribunal to take evidence from him, but that the Tribunal would have to call him through [Mr N].

*Evidence of [Mr N]*

103. The Tribunal called [Mr N] in Malaysia, who confirmed his identity. When the Tribunal explained the purpose of the call, he indicated that [Mr I] was not with him, and provided another phone number where he could be contacted.
104. Asked whether he personally knows the applicant the witness indicated that he does. Asked how he knows her, he stated that they were neighbours in Baidoa. Asked when he himself had left Somalia, the witness said that he departed in 2008. The Tribunal asked whether the applicant was still living in Baidoa at that point, to which he responded in the negative, noting that she had left in 2007. Asked where she had gone, he replied that she had gone to Yemen. He then observed that people leaving Somalia mostly go to Saudi Arabia after they cross into Yemen, but that he doesn't know where the applicant went after that.
105. Asked whether he is related to the applicant, the witness replied that he is not.

106. Asked his status in Malaysia, the witness replied that he had been given UNHCR documents in 2008 but has since lost them, so he remains in Malaysia in a kind of illegal limbo.
107. The Tribunal indicated that it would reserve its decision, and that if further submissions on behalf of the applicant were required, it would notify her representative in writing.

## Country Information

### Somali Identity Documents

108. On 9 May 2000 Refworld republished a document from the US Bureau of Citizenship and Immigration Services entitled *Do any of the self-proclaimed governments and militias, e.g. Somaliland, Puntland, issue birth certificates?* which includes the following, available from <http://www.unhcr.org/refworld/country,,USCIS,,SOM,,3ae6a6a218,0.html>:

A professor at California State University, Chico, states that because there has been no official national government structure in Somalia since the deposition of Barre in 1991, it is difficult to know whether birth certificates are currently issued to the citizens of what was once Somalia, but it is not probable (23 March, 26 May 2000). Prior to 1991, birth certificates were only issued in urban areas in Somalia (Professor 23 March 2000; Researcher 27 March 2000).

A researcher at CERI in France states that people often resort to buying documents "on the market place through private traders" because "there is no alternative" and they must show documents in order to travel (27 March, 4 April 2000). In the absence of an official government in Somalia, it is very easy to obtain documents in Somali marketplaces such as Bakara, Karan, and Monopolio in Mogadishu, and Bosaso and Hargeysa, but these documents are for purposes such as international travel and are worthless in Somalia (Professor 23 March 2000; Researcher 27 March, 4 April 2000).

109. On 27 February 2009, the UNHCR at <http://www.unhcr.org/refworld/pdfid/49ec3b02d.pdf> reproduced the following extract from a report published by the Norwegian Country of Origin Information Centre concerning the possibility of obtaining official documents in Somalia:

Somalia has not had a functioning state government since 1991, and large parts of the territory are under no actual central administration or governing. This means that Somalia's inhabitants have been unable to obtain official documents such as ID cards, passports or various certificates for the past 17 years. (Norwegian Country of Origin Information Centre (Landinfo) (5 January 2009) Documents in Somalia and Sudan, p.7)

### The Current Situation in Baidoa, Somalia

110. In addition to the country information cited by the applicant, the Tribunal notes that on 29 November 2011, the ABC published a report entitled *Al Shabaab loot, expel Somali aid groups*. Accessed from <http://www.abc.net.au/news/2011-11-29/al-shabaab-bans-some-somali-aid-groups/3700506>, it includes the following:

Al Shabaab rebels stormed and looted offices of aid organisations in famine-hit Somalia on Monday, the United Nations said, and the rebels announced a ban on 16 relief agencies from areas they control.

Rebels occupied agency offices and took supplies in southern and central areas at a time when a quarter of a million Somalis face starvation and Kenyan, Somali and Ethiopian forces are fighting the Al Qaeda-inspired group.

Al Shabaab, which controls large areas of the anarchic country, said it had "decided to permanently revoke the permissions of the following organisations to operate inside Somalia", naming 16 aid groups.

These included agencies like the UN refugee agency UNHCR, the World Health Organisation (WHO), the UN children's agency UNICEF and the Norwegian and Danish Refugee Councils.

The International Committee for the Red Cross and Medecins Sans Frontieres escaped the ban.

Aid sources said Al Shabaab rebels had occupied UNICEF, WHO and non-governmental organisation offices in Baidoa and six other the rebel-controlled towns.

"Al Shabaab have just started to loot UNICEF and WHO compounds in the town - they stormed and seized the compounds two hours ago. Now I can see them carrying the agencies' equipment out," Baidoa resident Ali Abdullahi told Reuters.

Another resident in Wajid said he saw Al Shabaab fighters forcing security guards out of UNICEF's compound.

"Immediately, they started looting vaccinations and even the freezers in which they are stored in," Fadumo Ibrahim told Reuters.

UNICEF's Jaya Murthy told Reuters the agency's offices had been occupied by Al Shabaab in Baidoa on Monday.

#### Events in Baidoa in 2006

111. The following are extracts from reports about the events in Baidoa in 2006 published by *Stratfor Global Intelligence*:

*Somalia: Residents Must Hand In Weapons*, 1 August 2006,  
[http://www.stratfor.com/somalia\\_residents\\_must\\_hand\\_weapons](http://www.stratfor.com/somalia_residents_must_hand_weapons)

Somalia's interim President Abdullahi Yusuf Ahmed on Aug. 1 told residents of Baidoa, the only town his government controls, they have one week to hand in all weapons before the government seizes their guns by force.

*Somalia: Ethiopian Troops Arrive*, 21 August 2006,  
[http://www.stratfor.com/somalia\\_ethiopian\\_troops\\_arrive](http://www.stratfor.com/somalia_ethiopian_troops_arrive)

Ethiopian troops arrived Aug. 20 in the Somali city of Baidoa, the seat of the interim government, to guard the city's airport after government soldiers defected to an Islamist militia, the Gulf Times reported Aug. 21.

*Somalia: Police Take Baidoa Airport*, 4 September 2006,  
[http://www.stratfor.com/somalia\\_police\\_take\\_baidoa\\_airport](http://www.stratfor.com/somalia_police_take_baidoa_airport)

The Somali transitional government captured the Baidoa airport Sept. 4, the British Broadcasting Corp. reported. At least seven people died when government police forces expelled a clan-based militia from the airport.

#### Unauthorised Entry of Somalis into Yemen

112. CX237998 is a report entitled *YEMEN: Asylum seekers run gauntlet of abuses*, originally published on 21 December 2009 by Human Rights Watch. It includes the following:

More than 100,000 people - almost all of them from Somalia and Ethiopia - have arrived by boat along Yemen's coast during the past two years. Most are fleeing war or persecution at home or are in search of work. Smugglers take them by boat from either the Somali port city of Bosaso or the town of Obock in Djibouti. Conditions aboard the boats are inhumane and the smugglers - especially those operating out of Bosaso - often treat their passengers with astonishing brutality, robbing, beating, and even murdering them.

Smugglers order passengers on the overcrowded boats not to move, even to stretch cramped limbs, which is impossible since the journey from Bosasso normally lasts one to three days. They routinely beat their passengers with whips and sticks. Many suffer far worse. Human Rights Watch documented cases of passengers being murdered and thrown overboard and of women being sexually assaulted and raped on board the overcrowded boats while other passengers looked on helplessly. Others suffocate, locked into cramped and airless spaces below deck as punishment or simply as a way of cramming more people on board. Hundreds of people die every year during the crossings.

For many, the worst danger lies when the boats are finally in sight of Yemen. Many smugglers, to minimize their own risk of capture, force their passengers to leap into deep water and swim, beating or even stabbing them if they try to refuse. Many, not knowing how to swim or simply too exhausted from their ordeal on the boats, drown within sight of shore. Human Rights Watch interviewed people who watched other passengers - in some cases even their own children - drown less than 200 meters from land..

When we were on the sea, she was sitting near the driver. They wanted to rape the girl. When I heard her scream I stood up, but they beat me with a stick on my neck. They played with her. They raped her. They did what they wanted. And when they raped my sister, they kicked her. I saw her; she was crying. But no one talked. If a person talked, they would kick him or throw him to the sea.

-Young man who witnessed his sister being raped on board a boat from Bosasso to Yemen.

They caught my little girl and dropped her into the sea. She was three years old. I fought with the man, and he hit me with a stick and I lost some of my teeth. After that they started pushing all of us into the sea. They dropped all of my children into the sea - five of them. The three-year-old girl died. She drowned. One almost died because she swallowed a lot of water, but I rescued her and took her to the hospital in Mayfa'a where she stayed for 20 days. She is six years old.

-Somali refugee describing what happened when smugglers forced his family and other passengers to leave the boats in deep water far from shore.

113. The following report entitled *Despair in Somali refugee camp in Yemen* was published on 9 March 2008 by Hiraan Online, and includes the following, accessed from

[http://www.hiraan.com/news2/2008/mar/despair\\_in\\_somali\\_refugee\\_camp\\_in\\_yemen.aspx](http://www.hiraan.com/news2/2008/mar/despair_in_somali_refugee_camp_in_yemen.aspx)

"Help us, we are hanging in hell," reads the placard held up by Somali refugees when the Dutch development cooperation minister visits their camp in Yemen. Women have taped up their mouths with sticking plasters or plastic, holding their arms crossed above their heads as sign they are being held prisoner in the camp. Minister Bert Koenders is shocked by what he finds.

Heat, dust, sand and wind dominate the lives of around 9,000 Somalis who have sought refuge in Yemen from the civil war in their own country. In Somalia the civilian population has been suffering from the effects of violent conflict for years. A million people are displaced within Somalia itself, while many others have fled to countries like Yemen. Hundreds fail to survive the crossing in ramshackle boats. Those who do make it to Yemen risk being detained in Kharaz, a camp in the middle of the desert 150 kilometres west of Aden.

114. The name of this refugee camp is rendered into English with the spelling Al-Qaras, for example, on the website of the Somalia diaspora broadcasting network Bar-Kulan, which on 22 April 2010 reported at <http://www.bar-kulan.com/2010/04/22/chaos-erupted-in-al-qaras-refugee-camp/> that *[c]haos and violence erupted in Yemen's Al-Qaras refugee camp after arguments about a school in the camp which is mainly inhabited by Somalis started.*

#### Restrictions on the Employment of Foreigners in Bahrain

115. The 2009 human rights report on Bahrain published by the United States Department of State (USSD) and accessed from <http://www.state.gov/g/drl/rls/hrrpt/2009/nea/136066.htm> includes the following:

The government established a 10-person unit within the MOI's Criminal Investigation Directorate focused on trafficking in persons....On July 1, to eliminate some of the practices involved in labor trafficking, the LMRA implemented new visa rules for migrant workers in the public and private sectors to reduce the incidence of employers holding workers' passports or otherwise restricting their movement. The new rules also targeted the illegal practice known as "free visas," whereby an employment sponsor enabled a laborer to enter the country under the cover of working for the sponsor and then allowed the worker to find other work, at an often exorbitant fee payable to the sponsor. On August 1, new rules went into effect that allow foreign workers to change jobs without employers' permission, subject to certain time limits. In practice, however, some employers continued to hold foreign workers' passports and used other such coercive measures to prevent mobility. Moreover, these reforms did not cover the country's approximately 70,000 migrant domestic workers, the group that was most vulnerable to trafficking.

### Somali Clans

116. A document entitled *Genealogical Table of Somali clans* published by UNHCR Somalia and accessed from [http://www.ecoi.net/file\\_upload/bsvec1\\_unhcr2000.pdf](http://www.ecoi.net/file_upload/bsvec1_unhcr2000.pdf) indicates, consistent with the claims made by or on behalf of the applicant and describing her clan origins, that the Rahanweyne clan is also known as the Mirifle, that it is a subgroup of the Digil and Mirifle group, and that one of its subclass is the Disow.

## **FINDINGS AND REASONS**

### **Country of Nationality**

117. The applicant claims to be a citizen of Somalia. She arrived in Australia on a Bahraini passport belonging to another person and has produced no reliable documentary evidence to prove her nationality. However, the applicant has provided an account of her antecedents which, as explained below, the Tribunal considers to be consistent with her claimed nationality. Furthermore, there is no evidence before the Tribunal to indicate that the applicant is a national of any other country. The Tribunal therefore finds that the applicant is a national of Somalia, and has assessed his claims against that country.

### **Well-founded Fear of Persecution for a Convention Reason**

#### Assessment of Protection Claims

118. Not unreasonably given the circumstances of her arrival, the applicant's identity was in issue for the delegate. The Tribunal notes that the applicant clearly misled the Department about her identity upon her arrival in Australia, and yet if she initially attempted to maintain the charade that she was in fact the owner of the passport with which she travelled to and attempted to enter Australia this is unsurprising, as she faced the prospect of being detained or returned to the place from whence she came.
119. The applicant has also submitted not one but two demonstrably bogus Somali birth certificates, as is clear from the document examination reports on the departmental file, details of which were provided to the applicant. However, as the country information indicates, it is unlikely that there was any such thing as a genuine Somali birth certificate available at the time the certificates upon which she seeks to rely are said to have been issued, as a consequence of which citizens of Somalia wanting documentary evidence of their identity had no choice but to obtain unofficial (ie; bogus) documents. The applicant herself claims no detailed knowledge of the documents' provenance, only that her father obtained them at the time they are said to have been issued. The documents' inauthenticity means that they have little value in proving the applicant's identity, but in light of the situation prevailing



in Somalia, the Tribunal is of the view that they also have little value in *disproving* that identity.

120. The applicant has given a plausible explanation as to how she came to have some facility in the English language, but more importantly, it is apparent that she speaks fluent Somali, and there is no evidence to suggest that she speaks any other language.
121. Furthermore, despite extensive inquiries carried out by the Department, there is no persuasive evidence which indicates that the applicant has any identity other than the one she claims, or that she has the right to enter or reside and reside in any country other than Somalia. This is not to rule out the possibility that the applicant has such a right, but the Tribunal is nevertheless of the view that there is no logically probative evidence before it which supports that conclusion.
122. The applicant's identity, both personally and as a member of the Rahanweyn clan and the inter-riverine community in Baidoa, Somalia, has now been attested to by a numerous witnesses from both Australia and overseas, a number of whom gave oral evidence at the Tribunal hearing. Although the references did not all appear consistent at face value, their descriptions of the applicant's place in the Somali clan structures nevertheless accord with the UNHCR document referred to at [116]. The evidence was, in the view of the Tribunal, highly consistent with the applicant's own evidence, in more significant material matters and also in peripheral respects which are nevertheless consistent with those claims. One of the witnesses, for example, referred to the applicant's back injury, said to have occurred when she leapt from a window to escape militiamen. Another spontaneously referred to the applicant by name when recounting events which involved her. Much of this supporting evidence was not before the delegate.
123. Having carefully considered the evidence before it the Tribunal has concluded that the weight of that evidence suggests that the applicant is in fact [Ms D] as claimed.
124. The applicant's account appears to the Tribunal to be reasonably consistent with the available country information. She has described in detail her background in Baidoa, her departure from Somalia, and her experiences in the Arabian Peninsula. Not all of the evidence accords precisely with the available country information, but in the view of the Tribunal a great deal of it does so, and to a significant degree.
125. With respect to the situation in Baidoa, for example, the applicant's evidence is consistent with reports about the bomb attack on the TNG leader in September 2006 and presence of Ethiopian troops from around that time. Inaccuracies in some of the other incidents she described may readily be attributed, in the view of the Tribunal, to the confused situation at that time, not to mention the applicant's youth and the traumatic nature of the events she claims to have experienced. Thus the applicant claimed to have been caught up in an incident when Al-Shabaab militias are said to have gone from house to house in Baidoa confiscating weapons in August 2006, in respect of which the delegate noted that the TNG was still in control of Baidoa at that time. However, the country information at [111]-[112] does make it clear that *government* troops went from house to house confiscating weapons at that time, and that the situation in Baidoa at that time was nevertheless somewhat fluid, with Islamic militiamen infiltrating the city and holding Baidoa airport at one point, and government troops changing sides to join the Islamists. As the applicant conceded at the hearing, she did not actually know who these militiamen were, but assumed they were Al-Shabaab.
126. The applicant's account of her trip from Somalia to Yemen is consistent with country information at [112] describing this smuggling route, including the barbarous manner in

which the passengers were simply forced overboard when land approached with scant regard for their safety, as well as the physical impact of a near drowning on another Somali refugee who arrived in Yemen in similar circumstances as the applicant.

127. An explanation was also offered with respect to the apparent confusion over the destination in Yemen to which the applicant was heading. The applicant's reference to a refugee camp near Aden called Al Qaras Al Jahim is supported by country information at [113]-[114] above referring to the Kharaz (or Al-Qaras) refugee camp near Aden, and the inhabitants' description of it as hell (Al Jahim translates into English as hell (see, for example, <http://www.al-islam.org/enlightening/42.htm>, which states, inter alia, that:

[t]he term / jahim / is derived from the term / jahm / which means '*to light a fire*', and then / jahim / is '*a burning-fire*' which, in the Qur'an, generally means '*Hell*'.

128. On the basis of the evidence before it, the Tribunal therefore accepts that the applicant is a Somali national from Baidoa as claimed, that her father was a member of the RRA and experienced persecution during a power struggle within that group, and that the applicant and her family are philosophically opposed to the Islamists including Al-Shabaab. The Tribunal accepts that the applicant's father was an active member of the RRA, that he was disfigured by injuries inflicted on him during a power struggle within that organisation, and that he is still living in hiding in the Baidoa region. The Tribunal also accepts that one of the applicant's sisters is in gaol in Somalia and that the rest of her immediate family is scattered, with some of them missing and believed dead and the whereabouts of the others unknown.
129. The Tribunal also accepts that the applicant fled Somalia in 2007 in the manner claimed, experiencing serious abuse *en route* to the northern coast of Somalia, and that she was smuggled almost to the shore of Yemen by boat before being forced overboard where she nearly drowned before being rescued by her fellow passengers and conveyed in a semi-conscious state to Sana'a.
130. The Tribunal also accepts that the applicant passed illegally through Saudi Arabia, given that that country has no record of her lawful entry, and into Yemen, remaining there for some two years before coming to Australia.
131. The Tribunal has serious reservations about the applicant's account of what happened to her in Yemen. The circumstances under which she met her employer in that country appear to have been incredibly fortuitous, as does her utilisation of her claimed employer's passport in the manner claimed and the fact that her alleged theft of the passport was never reported to the Yemeni authorities. Similarly, the departmental file indicates that the passport was returned directly to the 'employer' along with the visa grant notification, which is at odds with the applicant's claim to have collected the passport from the shop of the friend who assisted her to obtain the visa. Rather than the applicant's 'employer' being a stranger, the Tribunal considers that it is more likely that she is in fact a relative of the applicant, and probably her aunt, given that when she first arrived in Australia she claimed to have been residing with her aunt in Yemen, and it would follow from this that by subsequently denying any blood relationship with this person, or that she had any knowledge of or involvement in the applicant's travel to Australia the applicant is seeking to shield her from the possible consequences of such involvement, or protect any others who may have been involved. The Tribunal notes that the country information at [115] tends to confirm that the Yemeni laws with respect to foreign nationals working in that country did tighten up in mid-2009, as claimed by the applicant at hearing, which could have led to the scenario claimed by the applicant, namely that her employer began to treat her less favourably from that time, but it could equally have given rise to another scenario altogether, namely that a the presence of a

niece working illegally for her aunt in Yemen had become less viable because of the risks which might have accrued to the aunt when the laws tightened, necessitating the finding of a other solution.

132. However, this speculation does not, in the view of the Tribunal, overcome the fact referred to above that there is no logically probative evidence which tends to show that the applicant has the right to enter or reside in any country other than Somalia. As such, it is perhaps a distraction from the question of whether the applicant faces a real chance of persecution in Somalia.
133. Having carefully considered the evidence, the Tribunal is satisfied that the fears expressed by the applicant are genuinely held.

#### Risk of Serious Harm Capable of Amounting to Persecution

134. The country information extracted above suggests that Somalia continues to be a virtual war zone, and that political allegiance and to some extent clan membership can and does give rise to a real chance of being persecuted, particularly for those perceived to be opposed to Al-Shabaab.
135. The country information also indicates that gender-based persecution of women is rampant in Somalia.
136. The Tribunal therefore finds that there is more than a remote chance that the applicant will encounter serious harm capable of amounting to persecution for the purposes of s.91R of the Act in the reasonably foreseeable future, should he return to Somalia.

#### Convention Nexus

137. Four overlapping Convention grounds have been raised by the applicant, namely her membership of a gender-based particular social group, her ethnicity as a member of the Rahanweyn clan, her actual and/or imputed political opinion as a perceived opponent of Al-Shabaab and also of a Rahanweyn person in favour of the TNG, and her membership of a family-based particular social group with the Convention nexus for the purposes of s.91S deriving from her father's political profile.
138. With respect to the first ground, it is clear from the country information on Somalia cited by the applicant and reproduced above that women are second class citizens in Somalia, and are subjected to widespread abuses because of their gender. To the extent that there is any operable law in that country, it offers women little or no protection, and it is also apparent that much of the country operates under the ad hoc Sharia law of the Islamists. Both culturally, and to a large extent legally, women are simultaneously excluded and subordinated in Somali society, and the breakdown of law and virtual civil war situation which has gripped Somalia on and off for decades now appears to have exacerbated their marginalisation.
139. To use the language of *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387, women in Somalia are identifiable by their gender, this attribute is distinct from their shared fear of persecution, and they are also distinguished from Somali society at large, which consigns them to a vastly inferior status in life.
140. Although serious harm inflicted upon women in Somalia may not always be inflicted *for reason of* their membership of a group comprising women in Somalia or some subset thereof but as individuals, it nevertheless seems clear to the Tribunal that the violence against women

in that country flourishes in part because of the lack of status women have in that society, and the consequent fact that they can be persecuted with impunity *because they are women*.

141. Consequently, the Tribunal is satisfied that the gender-based harm the applicant would face in Somalia come within the scope of the Convention for reason of her membership of the particular social group comprising women in Somalia.
142. With respect to the other Convention grounds raised, the Tribunal observes that it is clear that political opinion comes within the scope of the Convention, and is prepared to accept that clan membership also does, either on the basis that it constitutes a discrete ethnicity or perhaps more properly because clans in the Somali context constitute a particular social groups. The Tribunal notes in this respect that the country information set out in the applicant's submissions supports the proposition that some divisions in the conflict between the TNG and the Islamists are along clan lines, giving rise to a risk of clan-based persecution, but it is not clear to the tribunal that this would be one of the essential and significant reasons for the persecution faced by the persecution, given that her father, for example, came under attack because of an intra-clan dispute which seems to have occurred along political lines.

#### State Protection

143. The High Court of Australia considered the questions of women as a particular social group and also the nexus between the harm feared and the Convention ground in *Minister for Immigration v Khawar* (2002) 201 CLR 1. Gleeson CJ observed, at [32], that *it would be open to the Tribunal, on the material before it, to conclude that women in Pakistan are a particular social group*. Gleeson CJ explained, at [31], that:

Where persecution consists of two elements, the criminal conduct of private citizens, and the toleration or condonation of such conduct by the state or agents of the state, resulting in the withholding of protection which the victims are entitled to expect, then the requirement that the persecution be by reason of one of the Convention grounds may be satisfied by the motivation of either the criminals or the state.

144. The country information reproduced above suggests that on one view Somalia is a failed state, and that what passes for a government there is incapable of protecting its citizens, but also indicates that to the extent that there is any state-like mechanisms operating in Somalia, they fail abjectly to protect women from abuse because of the prevailing attitudes towards women in that country. Consequently, the Tribunal finds with respect to the applicant's gender-based claims that there to the extent that there can be said to be a functioning state, there would also be persecutory withholding of state protection for reason of the applicant's gender.
145. With respect to the applicant's claims, generally, the Tribunal finds on the basis of the evidence before it, including that cited in the applicant's submissions and also that set out at [110] that the Somali state, such as it is, is unable to provide protection to the applicant.
146. In each case, the Tribunal concludes that the applicant's unwillingness to seek protection from the Somali authorities is justified for the purposes of Article 1A(2).

#### Internal Relocation

147. The Tribunal is satisfied that in the present case the risk of Convention persecution exists in the country as a whole, and that safe relocation within Somalia is therefore not reasonably open to the applicant.

### **Conclusion on Persecution**

148. The Tribunal is satisfied that the applicant has a well-founded fear of persecution in Somalia in the reasonably foreseeable future, for the overlapping Convention reasons of her actual and/or imputed political opinion, and her membership of a particular social groups comprising her family and also women in Somalia, which for the purposes of s.91R(1)(a) are the essential and significant reasons for the harm feared.

### **Safe Third Country**

149. As indicated above, there is no evidence before the Tribunal to suggest that the applicant has the right to enter and reside in any safe third country for the purposes of s.36(3) of the Act or of Article 1E of the Convention, and the Tribunal finds accordingly that she does not have any such right.

### **CONCLUSIONS**

150. 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**

151. 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.