

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 2147/94

A R A D

AT AUCKLAND

Before: S Sage (Chairperson)
L Tremewan (Member)

Counsel for the Appellant: M Riley

Appearing for the NZIS: No appearance

Date of Hearing: 31 January 1996

Date of Decision: 18 July 1996

DECISION DELIVERED BY L TREMEWAN

This is an appeal against the decision of the Refugee Status Branch of the New Zealand Immigration Service (RSB) declining the grant of refugee status to the appellant, a national of Somalia. He is a member of the Mareehan (also referred to as Marehan) sub-clan of the Darood (also referred to as the Darod) clan.

COUNTRY INFORMATION

Periodically this Authority has had Somalian cases before it. However, these have predominantly been brought by appellants of Isaaq origin who have, in the main, come from northern Somalia. Because the appellant is of the Mareehan sub-clan, and is from southern Somalia, this case is somewhat different.

It is appropriate to refer to recent sources of general country information with respect to the present situation in Somalia, before referring to the specific issues relating to persons of Mareehan background from the south. The United States Department of State Country Reports on Human Rights Practices for 1995: Somalia (February 1996) provides a useful starting point.

“Somalia has been without a central government since its last president, dictator Mohamed Siad Barre, fled the country in 1991. Subsequent fighting among rival faction leaders resulted in the killing, dislocation, and starvation of thousands of Somalis and led the United Nations to intervene militarily in 1992.

Widespread inter-clan fighting subsided in 1995, apart from occasional skirmishes in Mogadishu, Baidoa, and the lower Juba, and an ongoing conflict in the north-west. There was no progress, however, in reconciling the rival faction leaders and creating a new national government. In Mogadishu, faction leader Mohamed Farah Aideed was elected by his supporters to head a putative national government, while in the north-west, the breakaway "Republic of Somaliland" continued to proclaim its independence. Neither administration, however, was recognised internationally.

The persistent absence of a central government led most regions to establish rudimentary local administrations, most based on the authority of the predominant clan and faction in the area. Local authority remained contested, however, in the lower Juba, parts of the north-west, and Mogadishu. The United Nations Operation in Somalia (UNOSOM) ended in March.” (ibid., at 236).

Human rights abuses continued throughout the year. Due to the decrease in inter-clan fighting, however, there were fewer incidents of extrajudicial killing, rape, and violations of humanitarian law than there had been in previous years. Other key problem areas [which] remained [included] the lack of political rights in the absence of a central authority [and] the reliance of some communities on harsh Shari'a punishments...(ibid.) Islamic (Shari'a) courts continued to operate in several regions of the country, filling the vacuum created by the absence of normal government authorities. Shari'a courts traditionally ruled in cases of civil and family law, but their jurisdiction was extended to criminal proceedings...these courts meted out severe punishment...(ibid., at 237). The right to representation by an attorney and the right to appeal do not exist in those areas applying traditional and customary judicial practices or Shari'a law.” (ibid., at 238).

Political violence and banditry have been endemic to Somalia since the revolt against Siad Barre, who fled the capital in January 1991. Tens of thousands of Somalis, mostly non-combatants, have died in interfactional and inter-clan fighting.” (ibid., at 236).

In July, six members of the Marehan Somali National Front (SNF), were reportedly murdered in south Mogadishu by members of the Habr Gedr sub-clan linked to General Mohamed Farah Aideed's wing of the Somali National Alliance (SNA).” (ibid., at 237).

Freedom of movement continued to be restricted in most parts of Somalia. Checkpoints manned by militiamen loyal to one clan or faction inhibit passage by other groups. In the absence of a recognised national government, most Somalis do not have documents needed for international travel... (ibid., at 239). There was no national government recognised domestically or internationally. In most regions, however, local clan and faction leaders function as de facto rulers....In Kismayo, the dominant faction leader seized the town militarily in 1993, but is dependent on elders from several sub-clan in order to govern the community. In June allies of General Mohamed Farah Aideed elected him as president of a putative central government, which functions as the de facto authority in parts of south Mogadishu and the lower Shabelle.” (ibid., at 239).

With regard to the more specific situation in southern Somalia (particularly as it might affect Mareehan), the Authority has drawn extensively from an Occasional Paper 'Victims and Vulnerable Groups in Southern Somalia', by Professor Lee

Cassanelli, published by the Documentation, Information and Research Branch (DIRB) of the Immigration and Refugee Board, Ottawa, Canada (May 1995).

“Southern Somalia (roughly the area between the middle Shabelle River valley and the Kenya border, including the coastal region from Mogadishu to Kismayu) was the part of Somalia which experienced the most sustained inter-clan fighting following the collapse of the Siad Barre regime in early 1991. It is this area where most of the 28,000 United States and United Nations peacekeepers were deployed in December, 1992. It is also that area where a number of communities are still vulnerable as armed militias continue to compete for access to water, land and strategic port facilities.” (‘Victims and Vulnerable Groups in Southern Somalia’ Occasional Paper, DIRB Immigration and Refugee Board, Ottawa (May 1995) at 1).

“Much of the current sense of collective insecurity in Somalia dates from the final years of the Siad Barre regime, 1988 – 1991, when the government sought to combat a series of clan-based opposition movements by sending its troops against the civilian populations of the clans involved. In addition to the well-documented war against the Isaaq populations in the north in 1989, government forces launched punitive actions against Hawiyya civilians in 1989 – 1990, against Ogaden clansmen in 1990 and against protesting civilians in Mogadishu in 1989 – 1990. In addition to killing hundreds of civilians, these attacks destroyed livestock and productive assets upon which the communities depended for survival. This pattern of collective punishment against the civilian settlements of clan rivals continued into the post-Barre phase of the civil war. Because Somali clans have historically regarded security or retribution as a collective responsibility, individuals can feel threatened by virtue of their membership in the group, even if they have not personally engaged in overt violence against members of other clans.

The period from the ouster of Siad Barre in January 1991 to the launching of Operation Restore Hope in December 1992 witnessed the forcible and systematic displacement by Hawiyya clan militias of tens of thousands of Darods (Mareehan, Dolbohante and Majerteen) from the capital city and the lower Shabelle valley. This series of Hawiyya offensives and Darod counter-offensives involved numerous incidents of torture, mutilation, rape and execution without burial on both sides. Hawiyya control (shared by various clans) of Mogadishu and virtually the entire Shabelle valley was the outcome. Darod civilians and soldiers fled south to Kismayu, Bardera and Kenya, or to their clan homelands in the north and north-east.” (ibid., at 3-4).

“The arrival and deployment of United Task Force (UNITAF) and United Nations Operations in Somalia (UNOSOM) forces in December 1992 helped reduce the incidence of overt clan warfare and the outflow of refugees from southern Somalia. (ibid., at 6). Operation Restore Hope had helped suppress the level of overt warfare and stabilise the informal boundaries between rival factions, but it did not end more subtle forms of violence - such as expropriation, intimidation and extortion - practised within each region. The "war" is now concentrated in key resource areas of the south, which are also largely, although not exclusively, inhabited by minorities.” (ibid., at 8).

“It is too early to say what effect the withdrawal of international peacekeepers at the end of February 1995 will have on the overall situation in southern Somalia.” (ibid., at 9).

“The rifts among the Majerteen, Mareehan and Ogaden factions in the lower Juba are also likely to produce intermittent fighting, although major shifts in the territorial balance of power do not seem imminent.” (ibid., at 10).

“Clan retributions for abuses supposedly carried out under the Siad Barre regime appear to be diminishing, but civilians continue to be killed in factional retaliation of more recent vintage. Extra-judicial executions, torture, home searches, evictions and looting are all cited in *Country Reports 1994*, but few specifics are provided. (ibid., at 11). While it seems that most Darod, Isaaq and Hawiyya clansmen could today repatriate safely to their home regions of Somalia, there are several reasons why they might not be inclined to do so ... particularly (those) who do not have close relatives to accompany them through border regions, where bandits and armed militiamen abound. Some potential repatriates may feel there are political risks in returning to Somalia. Association with the Barre regime appears to be less stigmatising now than it was in the months immediately after the regime collapsed. The most prominent agents of repression under the old regime have either been killed or long since fled the country, and atrocities committed by contending militias in more recent years are far fresher causes for retribution than the deeds of a now deceased dictator.” (ibid., at 12).

Further useful references with regard to the position of the Mareehan are the UNHCR RefWorld Responses to Information Requests, 'Information on Clans in Somalia' 20 October 1993, 24 May 1996. The following extracts have been taken from these sources.

“Any explanation for the current level of hostilities between Somalia's clans and sub-clans must take into account former ruler Siad Barre's deliberate divisive tactics for maintaining power. Barre's government was dominated by members of his own Mareehan clan, a sub-clan of the Darood clan. Human Rights Watch and the Lawyers Committee for Human Rights state that, "The monopoly that the relatives and clan members of the President had over education, health, employment and business opportunities has bred deep-rooted grievances and has had an important political effect on alienating other clans (1988, 156). Freedom in the World 1991 - 1992 described the "progress" of the Siad Barre regime over the years as a devolution into a repressive and dynastic form of crypto-Marxism which strongly favoured his own minority sub-clan alienating majority clans and fuelling several clan-based insurgencies" (1992, 35). As the INS Resource Information Centre writes, "the groups which had organised some of the most effective opposition to the Siad Barre government, Majarteen sub-clan of the Darood clan, Hawiye and Isaaks.....were among the principal targets of government repression. However, other groups which opposed the Siad Barre regime also suffered. Because Siad Barre retaliated against political dissent by punishing whole clans or sub-clans – with aerial bombings of cities, for instance – ethnic divisions were sharply exacerbated." (January 1993; also - Africa Watch, 13 February 1992, 5).

“The chance of normalising the situation in the country after the fall of Siad Barre's regime in 1991 was destroyed by lingering bitter rivalries between more than a dozen militias based on clan...As Amnesty International wrote in its assessment of the state of affairs in Somalia, "[t]he end of Siad Barre's rule...should have provided the opportunity to establish the protection of basic human rights in Somalia. Instead, new conflicts and a new pattern of human rights abuses arose. Reprisals by the victorious Hawiye fighters in the capital were targeted against civilians of the ex-President's Darod clan family - including both his Mareehan supporters and his Majarteen opponents without distinction...In the first three months after Siad Barre's overthrow, hundreds of Darood clan members were killed and Darood women raped in Mogadishu and their property looted mainly by troops loyal to General Aideed." (Amnesty International August 1992, 5).

“Another factor to take into account in the appraisal of the fragility of the Somali context is "that in modern Somalia the clans are no longer localised or attached to specific territories, but are more and more taking the shape of socio-economic and

political organisations based on kinship" Bongartz, 1991,10. This, in turn, leads to the proliferation of clan-based militias and to a situation where "there is no region of the country (except, perhaps, the heartland of Somali National Movement controlled territory) where military forces have gained sufficient control (of territory) to ensure protection of residents from attacks of armies of other political/military groupings" (Resource Information Centre, 1993, 22). In a mixed note of optimism and pessimism about future prospects, the same source states that "while the relative ease with which coalitions of ethnic forces are formed and broken, and the relative lack of loyalty between sub-clans of the same clan may in the long run commit reconciliation between fighting factions, in the short run, it affords civilians almost no protection against endemic ethnically and politically motivated violence."(ibid.,23).

"Clan rivalries have long been a factor in Somali history and continued after the country's creation in 1960, even though almost all of the population are members of one ethnic family with a homogeneous culture. Following the fall of Siad Barre, clan allegiances and conflicts have dominated the country...In the southern and central regions, which include Mogadishu, the United Somali Congress(USC) dominates. The USC is split into two warring Hawiye factions, one led by Ali Mahdi Mohammed and the other by General Mohamed Farah Aideed."

THE APPELLANT'S CASE

The appellant is a 31 year old man who was born and raised in K in southern Somalia. He is one of nine children. One of his brothers now lives in what was formerly USSR, and a sister lives in the Netherlands. The appellant understands that both fled Somalia as he has. His remaining siblings are in Somalia (as far as the appellant was last aware), except for one sister who, with her family, managed to escape to Ethiopia in late 1994. At that same time, the appellant's parents and his own wife and three children also fled to Ethiopia.

The appellant, after completing his schooling, assisted his father in the small family importing/exporting business. The family achieved a reasonable standard of living. They lived alongside their extended family members in K where the appellant spent his formative and adult years.

The appellant stated in his evidence that the civil war in Somalia, following the deposition of Siad Barre in 1991, had a significant impact upon him and his family. The appellant indicated that because they were of the Mareehan sub-clan (as Siad Barre had also been), they suffered enormously due to the retaliation of other clans who had been repressed by the Barre regime. In particular, it was when General Mohamed Farah Aideed and his troops attacked K that the appellant's family suffered directly. (It is noted that it was General Aideed who played a prominent role in driving Siad Barre from the country. The General claims to have 70 percent of Somalis supporting him; see RefWorld Information Request, ibid.)

The appellant's father's business (which had already suffered as a result of the crisis in Somalia) was looted and burnt. Within a short space of time, during 1991, the appellant lost three of his uncles (all of whom were shot) and a cousin (who was raped, had her breasts cut off, and died within a week). All of the extended families' houses were burnt. The appellant stated that he knew that the motive behind these attacks related to the fact that his family were all of the Mareehan sub-clan. He himself had escaped attention from the families' aggressors by hiding in a bushy cave-like area.

Although the appellant did not see the families' houses being burnt, he was later able to briefly return to the area and saw for himself that the houses had indeed been razed to the ground. He had been able to return because, at that particular time, Mohamed Said Hersi Morgan (described in the RefWorld extract, *ibid.*, as "the maverick military leader of Majeerteen Ogaden and Mareehan clan forces based in K", Siad Barre's son-in-law and a former defence minister) was in the area with his troops. Although the appellant stated that he was not involved with Morgan's troops, when they had been in the area, this had afforded a degree of protection to Mareehan. The appellant stated that neither he nor any of his family had been involved in any of the fighting. However, when General Morgan and his SNF troops were fighting in the area, the appellant did assist, on occasion, by caring for the injured and carrying water.

From mid-1991, the appellant and his family led a transient life-style moving constantly to avoid threat. They left K and took a lorry with other refugees to Q, some 300 kilometres from K. Space was at a premium on board the lorry since there were refugees everywhere trying to flee. The lorry was full of people sitting on top of each other. The family stayed at Q for about three days, but then had to move on again because General Aideed's troops were in the area and, as Mareehan, the appellant and his family knew that they were accordingly in extreme danger.

The family moved south to LS and then to LK. The appellant explained that these areas are small areas of territory within the borders of each of these respective countries. He and his associates would leave LS due to the intense troubles in that country, especially for Mareehan, and enter Kenya. However, once in Kenya the appellant and his colleagues would be made most unwelcome and suffer many problems such as beatings, a lack of access to water and being pressured by the

Kenyan police guards for money. The appellant recalled that they went backwards and forwards over the border approximately three times during a six-month period from 1991 - 1992. He could not remember much of the exact detail relating to the family's precise movements during this time, but recalled generally that they were running for their lives and were always being chased by General Aideed's troops because they were Mareehan.

The appellant advised that it had not been possible during this period for him and his family to enter Ethiopia because General Aideed's troops killed those who tried to do this.

The appellant did not need a passport to leave Somalia. In fact, the appellant had had a Somalian passport issued in 1989 for a three-year period, but would not have been able to renew the passport anyway, as there was no appropriate government agency to do so. Eventually, in early December 1992, the appellant managed to make an arrangement where he was driven into Kenya. Once in M, he was able to purchase a Namibian passport through an associate of his. Using funds given to the appellant by his brother-in-law (who lived in Kenya), the appellant was able to obtain flight tickets for Malaysia. Accordingly, he departed Kenya for Malaysia, and disposed of his Namibian passport there.

The appellant arrived in New Zealand 14 December 1992. He made an application for refugee status on 14 January 1994. That application was formally declined by letter dated 8 March 1994. It is from that decision that the appellant has now appealed to this Authority.

The appellant has had contact with his family in Ethiopia since his arrival here, though there has been no means of communicating with his siblings in Somalia. He has had no news from Somalia.

The appellant believes that he had nothing to return to in Somalia. His immediate family is in Ethiopia. The family homes have been destroyed, as well as the family business. There is no effective government in Somalia at the moment and it would be doubtful whether the appellant had any livelihood to which he could return. He believes that, because of the breakdown of law and order, he would have a real chance of being killed by other clan members who would know him to be a Mareehan. As indicated earlier, it is the appellant's case that his clan background exposes him to a differential risk (as compared to others of different

clan backgrounds), because of the particular incidents of retribution targeted at Mareehan following the deposition of Siad Barre's repressive regime. In any event, with the conditions which prevail in Somalia, the appellant believes he is at a greater risk of being killed by anyone. Given that his home region is now the stronghold of General Aideed, the appellant maintains that this would be the most dangerous area for him to return to and that, in any event, he would also be at serious risk in any part of Somalia.

THE ISSUES

The Inclusion Clause in Article 1A(2) of the 1951 Refugee Convention and the 1967 Protocol Relating to the Status of Refugees relevantly provides that a refugee is a person who:

"... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it."

In the context of this case, the five principal issues are:

1. Is the appellant genuinely in fear?
2. Is it a fear of persecution?
3. Is the persecution feared persecution for a Convention reason?
4. Is the fear well-founded?

If so:

- (a) as to the whole of the country of origin?
- (b) as to only part of the country of origin, in which case, can the appellant genuinely access domestic protection which is meaningful in all circumstances to expect the appellant to relocate elsewhere in the country of origin?

In our decision in Refugee Appeal No. 1/91 re TLY and Refugee Appeal No. 2/91 re LAB (11 July 1991), this Authority held that in relation to issue (4) the proper test is whether there is a real chance of persecution. In relation to the issue of relocation, the relevant principles are explained and discussed in Refugee Appeal No. 11/91 re S (5 September 1991), Refugee Appeal No. 18/92 re JS (5 August 1992), Refugee Appeal No. 135/92 re RS (18 June 1993) and Refugee Appeal No. 523/92 re RS (17 March 1995).

ASSESSMENT OF THE APPELLANT'S CASE

1. Is the appellant genuinely in fear?

The Authority found that the appellant gave his evidence in a clear manner. The evidence given by him during the hearing was consistent in most material respects to that given by him previously in statements and to the RSB at his interview. Further, the evidence given was consistent with country information held by this Authority. We accept that the appellant is genuinely in fear.

2. Is the appellant's fear a fear of persecution?

We accept that the appellant holds a fear of persecution. He believes that if he returned to Somalia, there is a real chance that he will be killed as a number of his family members already have been. He has no home nor business to return to since everything owned by his family has already been completely destroyed and that he has no "life" left there to return to anyway. We accept that this amounts to persecution.

3. Is the harm feared persecution for a Convention reason?

Again we find in the affirmative. In our view there is a real chance that the appellant would be persecuted on the grounds of his clan membership, thus falling within the Convention ground of persecution for either race, or membership of a particular social group. In reaching such a finding, we refer to our earlier decision of Refugee Appeal No. 500/92 re MASN (2 July 1993), and, with respect to the view that clan membership is membership of a particular social group, Refugee Appeal No. 1932/93 re AQF (19 September 1995).

We stress that it is our view that despite the fact that any person in Somalia faces significant risks, we accept that the appellant would be subject to *differential* victimisation because of his being Mareehan.

4. Is the fear well-founded?

We find that the appellant's fear of persecution is well-founded for the following reasons:

- (a) Several members of the appellant's family have already been killed during the post Said Barre period. Mareehan were at particular risk from General Aideed's troops who have continued to maintain a significant power base in Somalia - most particularly in the south where the appellant is from.
- (b) The appellant's families' homes and his own particular family's business have been destroyed. The appellant's immediate family have fled to Ethiopia. Further, two of his siblings have successfully obtained refugee status outside of Africa; one other has also fled Somalia for Ethiopia. He has no information about his other siblings.
- (c) Country information makes it clear that although there have been some minor improvements over the last year or two, still there is a total lack of control by any central authority, and violence and human rights abuses are wide-spread. Persecution from lawless Somali clans remains unchecked. Mareehan are at particular risk and adequate protection is unavailable. Southern Somalia is still a comparative "hot spot".
- (d) Even where members of a particular clan are able to experience a greater degree of safety (for example, within an area which is controlled by their own clan), nevertheless it can be impossible for them to get access to such an area, as they would need to travel through other areas controlled by opposing factions. Although there is, according to available country information, at least one small area where Mareehan are in control, (in Geedo) we consider that the

appellant would suffer a real chance of persecution in attempting to reach such an area.

We now go on to consider whether the appellant's fear is well-founded as to the whole of the country of origin, or only as to part. We find that there may well be a small pocket or pockets of Somalia where, if the appellant was able to reach such a place, there might not be a real chance of persecution. Frankly, on the country information available, even this is a matter of some uncertainty and accordingly the benefit of the doubt would have to be accorded to the appellant in this regard. However, in the final analysis, the situation does not change because even if it had been held that the risk only pertained to some of the country of origin, the appellant could not be expected to relocate. This is because if he tried to access any safe areas which might exist, he would have to travel through areas where there clearly is a real chance of persecution.

In any event, the appellant is not able to access domestic protection which is meaningful as there is no effective government or authority in Somalia at the moment capable of protecting any Somalis, let alone the appellant.

CONCLUSION

In summary, our conclusions are as follows:

1. It is accepted that the appellant holds a bona fide subjective fear of returning to Somalia.
2. The harm feared by him is of sufficient gravity to constitute persecution.
3. The persecution feared is accepted as being related to a Convention ground, namely his membership of a particular social group, the Mareehan sub-clan of the Darood clan, and, in the alternative, his race.
4. The appellant's fear is well-founded as the Authority considers that there is a real chance that the harm feared by him will occur if he was to return to Somalia.

- (a) However, in any event we find that the appellant's fear is well-founded in the whole of Somalia (applying the benefit of the doubt principle).
- (b) The appellant would be unable to genuinely access meaningful domestic protection and therefore it would be unreasonable to expect the appellant to relocate elsewhere in Somalia.

For these reasons, we find that the appellant is a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is granted. The appeal is allowed.

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Member