

Migration Court of Appeal Judgment
Case Number UM 334-09

1. Refugee status pursuant to Chapter 4 § 1 of the Swedish Aliens Act (2005:716)

According to Chapter 4 § 1 of the Swedish Aliens Act (SAA) a refugee is an alien who is outside his/her country of nationality, because he or she feels a well-founded fear of persecution on grounds of race, nationality, religious or political belief, or on grounds of gender, sexual orientation or other membership of a particular social group and is unable, or because of his or her fear, unwilling, to avail him- or herself of the protection of that country.

This applies irrespective of whether it is the authorities of the country that are responsible for the alien being subjected to persecution or whether the said authorities are unable to provide protection against persecution by private actors.

Pursuant to Article 4, paragraphs 3 and 4 of the Qualification Directive the assessment of an application for international protection should be individual, whereby it must be considered *inter alia* whether the alien has already been exposed to persecution or serious harm or to direct threats of such persecution or such harm.

X submits that due to his membership in a minority group and due to the general situation in Mogadishu, he risks persecution upon return to Somalia.

The first question that arises relates to the impact of X's alleged membership in one of Somalia's minority groups. In light of the Somali social structure, with its division of the population into various clans and other groups, the Migration Court of Appeal considers that membership in one of the country's minority groups is tantamount to membership in a particular social group within the meaning of the SAA. The Migration Court of Appeal considers that the situation of Somalis belonging to a minority group is currently not such as to grant residence permits solely on the ground of membership in that particular social group.

As provided in the Qualification Directive, the assessment of a person's need for protection must take into account the circumstances of each individual case. It is the nature of an individual assessment that it should be based on the protection grounds relied upon by the individual in his/her claim that he/she is in need of international protection (see MIG 2007:9). The Migration Court of Appeal is of the view that the acts that X claims to have been exposed to are not of a nature and intensity so as to amount to persecution. Nor has he, at a prospective assessment, made it probable that he feels a well-founded fear of persecution upon return to Somalia. There is therefore no ground for granting a residence permit on the grounds of refugee status.

2. A person otherwise in need of protection pursuant to Chapter 4 § 2 subparagraph 1 of SAA

According to Chapter 4 § 2 subparagraph 1 of SAA, a 'person otherwise in need of protection' is an alien who, in cases other than those referred to in Section 1, is outside the country of his/her nationality, because he or she feels a well-founded fear of suffering the death penalty or being subjected to corporal punishment, torture or other inhuman or degrading treatment or punishment.

X argues that the circumstances that he relies upon in his claim constitute a personal threat against him. The Migration Court of Appeal finds, like the lower courts and as part of a forward-looking assessment, that X has not made probable that he would be subjected to such treatment as referred to in Chapter 4 § 2, subparagraph 1 of SAA. He can therefore not be regarded as a person otherwise in need of protection under this provision.

3. A person otherwise in need of protection pursuant to Chapter 4 § 2 subparagraph 2 of SAA

Finally, X claims that he is to be regarded as a person otherwise in need of protection pursuant to Chapter 4 § 2 subparagraph 2 of SAA on the grounds that there is an internal armed conflict in the Somali capital of Mogadishu.

a) Applicable national standards

According to Chapter 4 § 2 subparagraph 2 of SAA, a 'person otherwise in need of protection' is an alien who in cases other than those referred to in Section 1, is outside the country of his/her nationality, because he or she needs protection due to external or internal armed conflict or, due to other severe conflicts in the country of origin, feels a well-founded fear of being subjected to serious abuse.

The protection provisions of Chapter 4 § 2 subparagraph 2 of SAA relating to external or internal armed conflicts were introduced in 1997 when the previous rules on so-called *de facto* refugees and deserters had expired. The *travaux préparatoires* reveal *inter alia* the following (Government Bill 1996/97: 25 p. 99). A new protection provision should define some other categories of persons, which are routinely granted permits in accordance with current practice but which are not covered by any protection provision. The greatest category of persons who in recent years have been granted leave to remain in Sweden for some kind of refugee-related reasons, consist of people who fled war and civil war. The need for protection in such cases is often strong, at least temporarily. Thus, for instance, an armed conflict can be of such intensity in the region from which the applicant comes, that it appears unthinkable to return the applicant there, while it is practically impossible to send them to another part of the country. The commentary (*ibid.*, p. 290) further provides that the term "external or internal armed conflict" has been used in order to indicate that - as in the case of protection of deserters - a war between states is not a prerequisite for protection to be granted. Hence, a person fleeing from civil war must have a right to equal protection.

The 2005 Aliens Act expanded the provisions relating to protection in armed

conflict. This was done with a view to include in the said Act all the situations that previously fell under the practice of political-humanitarian reasons. This means that the political situation of a country is so difficult that it seems inhumane to force a person to return there. In order to achieve this, the provision was supplemented with a ground for protection which did not only take into account armed conflict, but also other serious conflicts in a country. (See Gerhard Wikrén & Håkan Sandesjö, Aliens Act with comments, eighth edition, 2006, p. 153).

The concept of serious conflicts in the current provision is described further in the *travaux préparatoires* of the 2005 Aliens Act as follows (Government Bill 2004/05: 170 s. 274; see also MIG 2007:9). The concept of serious conflicts includes, among other things, political instability in the country of origin, where power relations are such that the judicial system cannot impartially protect the population's fundamental human rights. It may concern a conflict between different ethnic groups, between an ethnic group in a part of country and the governmental authorities or between the state or an ethnic group in the country on the one hand and another state on the other, albeit not of such an intensity as to be classified as an armed conflict. The provision requires a causal connection between the abuse to which the alien risks subjection and the serious conflicts that exist in his or her country of origin.

b) Relevant European Community legislation

Article 2 (e) of the Qualification Directive defines persons otherwise in need of protection as *inter alia* third-country nationals who do not qualify as refugees, but where there are clear grounds to assume that they, if returned to their country of origin, would face a real risk of being subjected to serious injury under Article 15 and who are unable, or owing to such risk, unwilling to avail themselves of the country's security.

According to Article 15 (c) of the Qualification Directive, serious injury includes a serious and individual threat to a person's life or limb by reason of indiscriminate violence in situations of international or internal armed conflict.

The European Court of Justice, in its ruling of 17 February, 2009 in Case C-465/07 (Elgafaji, p. 43) interpreted Rule 15 (c) as follows, in comparison with Article 2 (e) of the Directive. In order for a serious and individual threat to be considered to be to life or limb of a person applying for subsidiary protection, the person in question is not required to demonstrate that the threat is specifically directed against him or her as a result of circumstances attributable to his personal situation. The existence of such threats may exceptionally be considered proven when the indiscriminate violence that characterises the ongoing armed conflict is so serious that there are reasonable grounds to believe that if a person returned to that country or, where appropriate, to the region, by his or her mere presence there, would run a real risk of such threats.

c) The concept of internal armed conflict in particular

As seen in the preceding paragraphs, it is of crucial importance for the assessment of X's protection needs to determine whether it can presently be said that an armed conflict exists in his country of origin or parts of it. If this was the case, he would in principle be entitled to protection in Sweden on the basis of Chapter 4 § 2, subparagraph 2 of the SAA. The interpretation of the concept of internal armed conflict is therefore material. It can be observed, as a preliminary point, that a completely unambiguous definition of this international law concept does not exist. The statements submitted by the UNHCR and the ICRC have been outlined above. We shall now turn to the practices and doctrines of relevance to the interpretation of the concept.

In 2004, the Government had reason to interpret this concept in a case regarding two married asylum seekers' protection needs in the light of the conflict in Chechnya (the Government's guiding decision of February 19, 2004, reg. 99-04). Temporary residence permits were granted. On the question of whether there was an internal armed conflict in the couple's country of origin, the Government stated as follows. Under public international law, an internal armed conflict is characterised by armed force between a state's armed forces and other organised armed groups. The said armed force must be of such nature that goes beyond what can be classed as civil unrest or merely sporadic or isolated acts of violence. Furthermore, the armed groups must have a degree of territorial control which enables them to carry out military operations. The relevant protection clause in the SAA was introduced against the backdrop of refugee flows from conflict-affected regions during the first half of the 1990s. The application of the rule leaves room both for a narrower and a wider interpretation of the concept of internal armed conflict than the strict definition found in public international law. A crucial factor for the interpretation of the concept in connection with the application of the said provision in the SAA must include the manner in which the civilian population is affected. The conflict may be so intense that a return to the asylum seeker's part of the country seems inconceivable, while it is not possible to send the asylum seeker to another part of the country.

The Migration Court of Appeal essentially adopted the Government's approach to the interpretation of the concept of internal armed conflict in its decision MIG 2007:9. In the current context, and in light of information on such issues as the absence of a functioning government structure in parts of Somalia and the severe hardship suffered by civilians there for almost two decades, there is reason to reconsider the Migration Court of Appeal's previous interpretation. It is possible that the concept of internal armed conflict should be given a different and wider meaning.

That branch of public international law that is commonly referred to as international humanitarian law is central to any context where the issue of interpretation of the concept of internal armed conflict arises. A natural starting point is the 1949 Geneva Conventions' Common Article 3. The article provides a level of protection in civil war that is a minimum standard for all armed conflicts (Ove Bring and Said Mahmoudi: Sweden and international law, third edition, 2007, p. 191). A direct definition of internal armed conflict is however lacking in the Geneva Conventions. Nor can Additional Protocol II (1977) to the Geneva Conventions be said to properly contain a

definition of the term. The Protocol does however contain a definition of non-international armed conflicts, to which the Protocol applies. It concerns conflicts which take place in a Contracting Party's territory between its armed forces and rebellious armed forces or other organised groups that under a command structure, exercise such control over part of the State Party's territory that enables them to carry out sustained and coordinated military operations (see Protocol, Article 1 p. 1; see also Ove Bring and Anna Körlof: *International Law for the Armed Forces - a Handbook*, third edition, 2002, p. 71 and 230). In order for the Protocol to apply, both the government forces engaged in conflict and the insurgents must exercise some territorial control.

The ICRC has a special role in the context of the 1949 Geneva Conventions (see, for example, Common Article 3; see also Article 2 of the Statutes of the International Red Cross and Red Crescent). In a document from March 2008 entitled "How do you define 'armed conflict' in international humanitarian law "(International Committee of the Red Cross [ICRC], Opinion Paper: How is the term "Armed Conflict" Defined in International Humanitarian Law?) the organisation presents what is referred to as the current legal position with regard to *inter alia* the definition of non-international armed conflict. After reviewing the main treaties in the field (the 1949 Geneva Conventions and the 1977 Additional Protocol II, see above) and statements by commentators, the ICRC reaches the following conclusion. Non-international armed conflicts are characterised by protracted armed confrontations that occur between armed government forces and one or more armed groups, or between such groups, and which take place on a state's territory. The armed confrontation must attain a minimum level of intensity and the parties involved in the conflict must show a minimum degree of organisation.

Additional guidance can be sought from international criminal courts and the jurisprudence developed by them in recent years. Thus, for instance, the International Criminal Tribunal for the former Yugoslavia has stated that an armed conflict exists whenever armed violence is resorted to between states or when protracted armed violence occurs between government authorities and organised armed groups or between such groups within a state (International Criminal Tribunal for the Former Yugoslavia, Prosecutor v. Dusko Tadic, Case No.. IT-94-1-T, 7 May 1997, p. 561).

As regards the International Criminal Court, its Statute contains an indirect definition of internal armed conflict. Article 8 of the Statute, which entered into force on 1 July, 2002, concerns the Court's jurisdiction over war crimes and the definition thereof. Article 8 (2)(f) contains the conditions that must be met for the Court to have jurisdiction over certain war crimes. The description states that it concerns situations of non-international armed conflicts rather than situations that have arisen as a result of internal disturbances or tensions such as riots, isolated and sporadic acts of violence or other similar acts. In addition, the armed conflict must take place within a state's territory and include a protracted armed conflict between governmental authorities and organised armed groups or between such groups.

Public international law literature discusses in detail the difference in scope between the 1949 Geneva Conventions' Common Article 3 and the 1977 Additional Protocol, which

is applicable to situations of internal armed conflict in a country, Additional Protocol II (see, e.g., Hans-Peter Gasser: *Humanity for All - The International Red Cross and Red Crescent Movement*, Henry Dunant Institute, 1993, p. 558f).

As mentioned above, it is natural to seek guidance in international humanitarian law and its doctrine in the context of interpretation of the concept of internal armed conflict. However, it is the Migration Court of Appeal's view that it is not possible to conclude that an internal armed conflict does not exist in a country solely on the basis that the requirement of territorial control in Additional Protocol II to the 1949 Geneva Conventions was not met and that therefore the Protocol does not apply. The above assessment leads the Migration Court of Appeal to the conclusion that it is not necessary for government forces to be involved in the conflict for it to be classified as an internal armed conflict. If the opposite had been the case, it would mean that people from a country where the government had collapsed enjoyed fewer rights to seek international protection from domestic armed force than others.

In light of the above the Migration Court of Appeal considers that there is a state of internal armed conflict under the SAA if the following conditions are met. The severe tensions between the groups include protracted and ongoing fighting between armed government forces and one or more of the organised armed groups or between two or more of such groups fighting with each other. The armed force is such as to go beyond what can be classified as civil strife or merely sporadic or isolated acts of violence. As regards the civilian population, the violence brought about by the conflict is indiscriminate and of such a serious nature that there are reasonable grounds to believe that a civilian by his or her mere presence would run a real risk of a serious and personal threat to life or limb.

d) The situation in the country

The next question to be answered is whether the above criteria are met in the present case. In order to answer this question, the Migration Court of Appeal must first consider whether the assessment should be made in relation to the entire territory of Somalia, or if a demarcation of the geographical area can and should be made.

The Government's guiding decision from 2004 on a Chechen couple's protection needs have been outlined above (Reg. 99-04). In this case, it was held that there was an internal armed conflict in Chechnya, i.e. in part of the Russian Federation. Even in countries other than Sweden, decision-makers have found reason to limit their assessment of internal armed conflicts to only a portion of a country. Thus, for instance, Germany's highest administrative court, the Bundesverwaltungsgericht, in a ruling in June 2008, concluded that an internal armed conflict could be deemed to exist in a certain part of a country where the criteria for such a conflict was met only with regard to that part of its territory (BVerwG 10 C 43.07; see also above Elgafaji case where the ECJ uses the term "the region").

Similarly, the Migration Court of Appeal considers that it is possible to limit the

assessment of whether there is an armed conflict in a country to a certain part of the country. If this was not possible, there would not be any room for the application of Article 8 of the Qualification Directive. Under this provision, Member States, as a step in assessing an application for international protection, may decide that an applicant is not in need of such protection if in a part of the applicant's country of nationality (country of origin, in the Directive's terminology) there is no real risk that the person will suffer serious harm and if he or she could reasonably be expected to reside in that part of the country. (See also MIG 2009:4).

It is common ground that X's place of origin in Somalia is the country's capital, Mogadishu. He claims, as a basis for his protection grounds, *inter alia* that X is unable to return there due to the fact that there is an internal armed conflict there. The Swedish Migration Board for its part, denies that there is an internal armed conflict in Somalia as a whole or any part of its territory. In its submissions in this appeal, the Board has argued *inter alia* that it is not possible to select a very limited area, such as a city or a few districts, and argue that there is an armed conflict there.

The Migration Court of Appeal has, as previously mentioned, concluded that it is possible to limit the assessment to cover a certain geographical area in a country; in this case, Somalia. This begs the question of whether it is also possible, and appropriate, to restrict the assessment to a place which can hardly be referred to as either a region or an area.

In January 2008, Britain's Asylum and Immigration Tribunal ruled in a case which concerned three female asylum seekers from Somalia (HH & others [Mogadishu: Armed Conflict: Risk] Somalia CG [2008] UKAIT 00022). All three applicants came from Mogadishu or its surroundings. In its conclusions of a more general scope (p. 370) the Tribunal found, *inter alia*, that the issue of whether an internal armed conflict existed was mainly concerned with the factual aspects. The Tribunal also drew a distinction between the issue of where an internal armed conflict existed (namely in Mogadishu) and the issue of where international humanitarian law was applicable, i.e. the area that was controlled by combatants (i.e. the city, its immediate surroundings and the base in Baidoa that TFG and Ethiopian forces controlled at the time of the Tribunal's decision).

The Migration Court of Appeal is of the view that the issues of territorial control and the factual application of international humanitarian law are of secondary interest in determining whether there is an internal armed conflict within the meaning of SAA. The British decision is interesting because it shows that a court in another country, where the state is bound by the same international and European Community commitments as Sweden, has ruled that it is possible and appropriate, in legal terms, to limit the geographical area for an internal armed conflict to a city like Mogadishu.

The Migration Court of Appeal agrees with the Migration Board's view that it would be inappropriate to apply the above criteria for internal armed conflicts to a very limited area, such as parts of a city. In the case of Somalia, there are reasons to consider that the claim ought to be assessed against the capital, Mogadishu.

An important factor in this context is the population of Mogadishu. However, it is inherently difficult to find any reliable figures. Available country of origin information stipulates that Mogadishu's population included approximately 250 000 IDPs when hostilities broke out in January 2007 (Utlendingsforvaltningens Fagen for landinformasjon, Norway: Temanotat Sør-Somalia: Sikkerhetssituasjonen, June 2009). Many of these individuals had been displaced from their homes during the Civil War of 1991-1992. According to the same source, 750 000 persons, or about half of Mogadishu's population left Mogadishu in 2007-2008 due to the precarious security situation there. According to information from another source (UNHCR letter from April 2009, see above) approximately one million persons have been displaced from Mogadishu since January 2007, as a result of violence and armed confrontations in the city. The careful conclusion to be drawn from these figures is that Mogadishu is a city with a vast population.

Another factor that is of significance in defining the boundaries of a geographical area when considering whether an internal armed conflict exists should be made against the fairly clear picture that emerges from country of origin information, with Mogadishu as the place where the violence and armed confrontations have been concentrated in the last two, three years. Since UIC lost its position of power in Somalia in 2006 and the organisation's forces have with some success been defeated by the TFG and its Ethiopian allies, one can conclude, adopting the Migration Board's own words in the letter of March 30, 2009, that there has been "a conflict between different armed groups for power in the state." It is the view of the Migration Court of Appeal, based on country of origin information in the case, that the confrontations that occur concern not only power in Somalia, but also control of Mogadishu and the confrontations have also mainly taken place - and continue to take place - in Mogadishu.

In light of the above, the Migration Court of Appeal considers that in making the assessment, it is relevant to consider whether there is an internal armed conflict in Mogadishu, the Somali capital.

The assessment in a case such as the present will be dependent upon the circumstances at the time of assessment. The situation in Mogadishu is changing. Information about the current situation is difficult to come by. In the following paragraphs, the Migration Court of Appeal will therefore make its assessment on whether the above conditions for the existence of an internal armed conflict are met, by reference to the most recent country of origin information that has been presented in this case. The following information regarding Mogadishu is available.

Since the Ethiopian forces withdrew in January 2009 and a unity government was set up in January, which includes parts of the political opposition, the situation in Mogadishu has entered a more peaceful phase. Roadblocks have removed and the population was granted a relatively great freedom of movement. The end of April 2009 saw over 60 000 internally displaced persons return to the capital. There was a variety of reasons for their return. The positive political process and the Ethiopian withdrawal contributed to a

certain stabilisation and instilled hope in many people. Some returned due to the fact that the dwelling conditions where they lived were troublesome, while others saw business opportunities.

The authorities, however, did not have control over the entire capital. (Utlendingsforvaltningens Fagen for landinformasjon, Norway: Temanotat Sør-Somalia: Sikkerhetssituasjonen, 16 June 2009, p. 12)

In the beginning of May 2009 heavy fighting broke out between government forces and rebel group al-Shabaab and the Hizb-ul-Islam (or Hazbal Islam, see above). The fighting was the heaviest in several months, and over 100 civilians lost their lives. Approximately 96 000 people were again forced to leave their homes, many of whom had recently returned to Mogadishu. Local hospitals reported that they had to treat many hundreds of wounded civilians, including women and children. During the course of only a few days, the opposition took control of several areas in Mogadishu. TFG had however regained its positions in certain districts and ousted the al-Shabaab to other districts. (Ibid., p. 12-13)

The fighting in Mogadishu has not only taken place between government forces on the one hand and Islamist groups on the other, but also between the Hizbul-Islam and al-Shabaab. Some government soldiers with a background in UIC are said to have deserted and joined the opposition. It is difficult to get an overview of the conflict in Mogadishu. Part of the explanation is that several government soldiers do not wear regular uniforms, making it difficult to know who is who. It is also said that many foreign jihadists, from places such as Afghanistan, Pakistan and Chechnya, are involved in the fighting in Mogadishu. According to some reports, these account for approximately 300-400 people. Many observers believe that individual al-Shabaab groups are controlled by these foreign jihadists, who apparently want neither dialogue with the authorities or peace (Ibid. p. 13).

A report by the UN Secretary-General indicates that the humanitarian situation in Somalia has seriously deteriorated as a result of intensified fighting in Mogadishu since 7 May 2009, worsening drought throughout the country and the increasing lack of security in most parts of southern and central Somalia. The fighting has resulted in destruction, civilian casualties and massive displacement. More than 250 civilians were killed and some 900 others were injured. UNHCR reported that an estimated 204 000 people, who recently returned to their homes in Mogadishu, have once again had to flee to safer neighborhoods or to the outskirts of the town. (United Nations Security Council: Report of the Secretary-General on the situation in Somalia [S/2009/373], 20 July 2009, p. 10).

There has also been a notable deterioration of the situation regarding human rights in Mogadishu as a result of the flare up in hostilities there. Reported violations of international humanitarian law can in many cases be so severe that they constitute war crimes. Witness statements from refugees and internally displaced persons suggest that insurgent groups may have used civilians as human shields by moving the conflict to areas where civilians live or reside. Repeated, misdirected and indiscriminate grenade fire

has resulted in a large number of civilian deaths and injuries. Tens of thousands of people have been forced to flee Mogadishu. (Ibid., p. 11).

In the light of the description of the situation in the Somali capital, which is clear from the reports, the Migration Court of Appeal determines that Mogadishu currently meets the conditions for internal armed conflict. There is therefore currently, a state of internal armed conflict there as provided in the SAA.

e) Migration Court of Appeal on the issue of residence permits etc.

The Migration Court of Appeal has concluded that there is at present a state of internal armed conflict in Mogadishu, where X comes from. It is however also of importance for assessing his protection needs under Chapter 4 § 2 subparagraph 2 of the SAA, to consider whether there are opportunities for him to seek shelter elsewhere in his country of origin (see MIG 2007:9). It primarily the responsibility of the Swedish Migration Board to make probable that there is an internal flight alternative which means that an alien cannot be considered in need of international protection (MIG 2009:4). In X's case the Migration Board has not alleged that there would be such an option. In the view of the Migration Court of Appeal, there is no internal flight alternative for him.

The Migration Court of Appeal makes the assessment that X must be regarded as being in need of subsidiary protection in accordance with Chapter 4. 2 § first paragraph 2 SAA. It follows from Chapter 5. 1 § of SAA that he is entitled to a residence permit in Sweden.

The premise is that the permanent residence is granted when there is a need for protection under the SAA. Depending on the circumstances, including the character and scope of the conflict, there may be grounds to grant a temporary residence permit. However, such a permit requires the alien to hold a passport (see MIG 2007:30). Since X lacks a passport, and since the Migration Court of Appeal is legally unable to order a passport for the alien, there is no need to consider a temporary residence permit in this case.

Article 18 of the Qualification Directive dictates that the status of subsidiary protection shall be granted because he has met the requirements to qualify as such a person.