

Heard at Field House

SH (Return - Gedo - Burden of proof) Somalia [2004] UKIAT 00164

**IMMIGRATION APPEAL TRIBUNAL**

Date Determination notified:  
10 June 2004

**Before:**

**Mr Andrew Jordan (Chairman)  
Mr N. Kumar JP**

**Between**

**APPELLANT**

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**RESPONDENT**

Representation

For the appellant: Mr B. Cox, counsel

For the respondent: Mr M. Blundell, Home Office Presenting  
Officer

**DETERMINATION AND REASONS**

1. The appellant is a citizen of Somalia who appeals against the determination of an adjudicator, Mr P.S. Aujla, dismissing her appeal against the decision of the Secretary of State to refuse her asylum claim but allowing her appeal on human rights grounds. Since the claimant had already been given leave to remain, allowing her appeal under the ECHR added nothing to her status.
2. The appellant was born on 5 June 1975 and is 28 years old. She entered the United Kingdom on 7 November 2002 and

claimed asylum on 19 November 2002. She was accompanied by her son, Abdillahi, born 12 September 2000 who was joined as a dependent to her application.

3. The Secretary of State refused her claim for asylum and granted her exceptional leave to remain in the United Kingdom until 17 January 2004. The decision was made on 17 January 2003 and gave rise to a right of appeal under section 69(3) of the Immigration and Asylum Act 1999. This is the so-called "upgrade appeal" envisaged in the case of **Saad, Diriye and Osorio [2001] UWCA Civ 2008, [2002] INLR 34**. The appellant duly appealed.
4. The appellant belongs to the Darod clan, sub-clan Marehan and lived in Mogadishu with her parents, three brothers and three sisters. Her father was a businessman and is now dead. Her mother, three sisters and two of the three brothers have been granted the right to remain in the United Kingdom under the Somali Family Reunion concession.
5. The Marehan is not a minority clan in Somalia. Members of the clan, by reason of clan membership alone, do not face persecution by reason of being an unprotected minority. In paragraph 37 of the determination, the adjudicator decided:

"Mr Cox [counsel for the appellant before the adjudicator and before us] has claimed that the appellant is a member of a particular social group in that she will be returning as a single woman from the Marehan clan. However, there is no evidence before me to indicate that single women from majority clans are at risk of persecution by virtue of being single women or because of being single women they are not able to access protection from their clan. I remind myself of the fact that the appellant does belong to a majority clan. I also remind myself of the House of Lords decision in **Adan** that those status civil war does not itself give rise to well-founded fear of persecution. The fact that the appellant would be returning as a single woman does not, in my view, established the level of risk which is over and above that to which other members of her majority clan, both men and women, would be exposed. I therefore do not accept Mr Cox's suggestion that the appellant, as a single woman, is a member of a particular social group within the context of Somalia who would be at risk of persecution simply because of her membership of that group."

6. In line with that thinking, the adjudicator concluded that the appellant would be able to access protection from members of her own majority clan and that there was no evidence she

would be at risk from members of her own clan just because she is a single woman.

7. The appellant has appealed against that decision. The fact that she has been granted exceptional leave to remain (albeit now expired) does not act as a bar to her pursuing the additional status afforded by the grant of asylum.
8. In support of her claim, the appellant provided the adjudicator with a report from Dr Cedric Barnes. An attempt was made to introduce some form of political stability into Somalia by the creation of a Transitional National Government (TNG). At first, conditions appeared to improve following the results of the peace conference held in Djibouti in August 2000. Unfortunately, the situation deteriorated in 2002. The TNG became little more than a factional regional administration, often unacknowledged in many other parts of Somalia, if not actively opposed by them. The authority of the TNG does not extend further than Mogadishu and, even there, its authority is at best weak. Those identified as being most vulnerable by UNHCR include internally displaced persons and returning refugees. Dr Barnes also added to that category, single or unsupported women. On page 20 of the adjudicator's bundle, it is said that women have suffered disproportionately since the break-up of Somalia and that sexual assault is said to be commonplace. It is suggested that of all women, those internally displaced are likely to be most vulnerable, particularly those without husbands or extended families. The source for Dr Barnes, it is clearly found in paragraph 5.29 of the Country Report for October 2002.
9. In Dr Barnes first report, consideration was given to the appellant as a refugee. It was recorded that the former president of Somalia, Siyad Barre belonged to the Marehan clan and this was sufficient to excite the antipathy of USC/Hawiye militias who were said to be especially brutal towards members of the Marehan clan.
10. In an updated report prepared for the benefit of the Tribunal and dated 8 May 2004, Dr Barnes gave thought to the situation of the Marehan in Mogadishu. The Hawiye clan militia drove out most of the Marehan from Mogadishu. The TNG's grasp on authority is slim and the police forces ineffective. Neither the police nor the courts apparently provide protection against widespread lawlessness. Dr Barnes stated that of the three international fact-finding mission's undertaken since 2000, none has visited Mogadishu, almost certainly because it remains insecure.

11. The Marehan are associated with the Gedo region. The Marehan clan control the Gedo region and many Marehan who fled Mogadishu after the collapse of Siyad Barre's regime fled there. Unfortunately, there appears to have been inter-clan fighting in this part of the country between rival factions of the Marehan clan. Although there was a ceasefire negotiate in 2002, in a single factional controls the region and there is a suggestion at least that the security situation deteriorated during 2003.
12. We were also referred to the Country report prepared by CIPU in April 2004.

### **Return to Mogadishu**

**5.10** *The TNG have control over some areas of Mogadishu where its official ministries are located and also has some authority outside the capital including the coastal area to the south of the capital. Other areas of the capital continue to be controlled by leaders of factions opposed to the TNG. As noted in the JFFMR July 2002, the TNG leaders are all highly dependent on the pro-TNG business cartel in Mogadishu comprising Habr Gedir and Abgal businessmen. The TNG have reportedly paid some warlords to ensure the continued support of their militias. On 2 October 2003, HornAfrik reported that the TNG opened an office to deal with land disputes in Mogadishu. Muhammad Siyad Barqadle, the deputy mayor of Mogadishu said that the office would work with the courts in the Benadir region*

**5.11** *... The JFFMR March 2004 noted that the threat to security in Mogadishu remained constant and that it was not possible to identify stable areas in the city. It was emphasised that no improvement of the situation took place during 2003. UN sources stated that the Mogadishu area is split between the SRRC and Muse Sude, there is no single authority and the TNG hardly controls any part of the city. In spite of this Mogadishu is an expanding town.*

### **Current security situation**

**6.151** *As reflected in the JFFMR March 2004, "...UN sources suggested that the fluid security situation and general trend in extra-judicial killings in the southern and central regions remained unchanged during 2003, a trend that has been constant since 1999. It was indicated that the security situation in Somalia generally had deteriorated during 2003. The source explained that this situation was caused by the time that had elapsed and because the culture of violence and*

*weapons, and disrespect for life have become more prevalent in Somalia. It was added that the security situation in Somalia is being continuously monitored and that the overall level of violence in 2003 was high. Incidents of kidnappings and looting had increased, as many people looked to increase their resource base. The weaker clans and the minority groups were now worse off. This increase in violence and the deterioration of security in Somalia has affected not only Somali civilians, but also local UN staff. "*

**6.85** *As reflected in the JFFMR March 2004, "...the delegation met with Abdiaziz Omar Daad, formerly minister of reconciliation under President Siad Barre from 1986 to 1990. He is a Marehan himself and explained that it is too difficult for Marehan to live in Mogadishu as they are conceived to be wealthy because many of them used to work for the Siad Barre regime. He stated that all Marehan clan members would be blamed for the suffering caused by the Siad Barre regime and they risk being killed. Omar Daad estimated that approximately 200 persons of the Marehan clan live in Mogadishu today who are able to stay only there because they have intermarried with strong clans. An independent Marehan could not live in Mogadishu safely and run a business. Omar Daad stated that a Marehan who had worked for the Siad Barre regime could not return to Mogadishu. Any other clan (e.g. Hawiye or Habr Gedir) who had worked in the administration (including the police) of Siad Barre would not have any problems returning to Mogadishu today. Even family members of a Marehan who had worked for Siad Barre would have problems today."*

Pausing there, Mr Blundell properly stated that he did not feel able to speak against the clear words of the CIPU report to the effect that the appellant could not return to Mogadishu. Having considered the entirety of the evidence on this issue, we are satisfied that the concession is correct. It follows that the adjudicator's global finding that the appellant is not at risk does not properly address the specific protection needs of this appellant. The general security situation is described in paragraph 6.13:

**6.13** *As noted in AI 2003 and UNSCRs October 2002 and February 2003, fighting between rival clans and factions continued in many parts of the country. As reflected in USSDR 2003 and AI reports from 2003, there are continued reports of killings and reprisal killings of clan opponents, expulsions of members of other clans, cases of kidnapping as well as detention, and torture or ill treatment of prisoners. Women and minorities are particularly vulnerable to abuses. As noted*

by IRIN, the DIJHRC chief investigator stated in July 2003 that civilians are often killed during factional fighting due to the indiscriminate shelling of residential areas, he asserted that the combatants did not care what happened to civilians. As noted by AI in reports from 2002 and 2003, none of the factions responsible respect the principles of international humanitarian law regulating the conduct of armed conflict and protection of civilians and members of faction militias generally act with impunity. According to AI report of February 2003, faction leaders have done little or nothing to suppress the arbitrary abuses of gunmen in the areas they claim to control. According to UN sources, there are about 10,000 militiamen in Mogadishu alone. However, as noted by IRIN, in a positive development the JVA were, as of September 2003, in the process of disarming militias in Kismayo and surrounding areas that it controls.

### **Internal Flight**

It is apparent from an examination of the background material that internal flight, seen in the context of the position in Somalia, has to be viewed with particular care. The stance adopted by UNHCR in its January 2004 position paper on return is that there can be no internal relocation except in very specific circumstances:

**6.70** According to UNHCR's position paper on return, January 2004 "...The general pattern of human settlements prevailing in many parts of Africa, including Somalia, is often characterised by common ethnic, tribal religious and/or cultural factors, which enable access to land, resources and protection from members of the community. Consequently, this commonality appears to be the necessary condition to live in safety. In such situations it would not be reasonable to expect someone to take up residence in an area or community where persons with a different ethnic, tribal, religious and/or cultural background are settled, or where they would otherwise be considered aliens. ...Therefore, it would be unreasonable to expect a person to move to an area in his or her own country other than one where he or she has ethnic, tribal, religious and or/cultural ties. ...This is true in Somaliland and Puntland. ...Specifically in Somaliland...those not originating from this area (non-Somalilanders) would be considered as foreigners, and face significant acceptance and integration problems, particularly taking into account the extremely difficult socio-economic situation of those native to the territory...In this regard it should be noted that 'place of origin' should not necessarily be equated with 'place of birth'...Therefore, the determining factor in defining where a

*person originates from is where the person has effective clan and family ties, and where clan protection is thus available. In light of the above, especially given the prevailing clan system, UNHCR is of the view that the internal flight alternative is not applicable in the context of Somalia”.*

Our understanding of this passage is that it is not ‘place’ that defines whether relocation is possible but the presence of effective clan and family ties. Whilst there remained a significant Marehan community in Mogadishu, it would have been possible for the appellant to return there. That community no longer exists there as an effective network of support. Many fled to Gedo where the Marehan clans now dominate. Were it safe for the appellant to relocate there, this would conventionally be seen as internal flight. In the context of Somalia, however, it might more easily be seen as re-joining her community.

### **Return to Gedo**

Having excluded Mogadishu as a place of safety, the Tribunal’s attention was inevitably drawn to a consideration of whether other parts of Somalia, controlled by Marehan, provide an alternative viable option to which the appellant might return. First of these was Gedo.

#### **Gedo**

**5.21** *As reflected in the JFFMR July 2002, the Marehan clans dominate Gedo region. The SNF, led by Colonel Abdirazzaq Isaq Bihi, has been the main Marehan faction operating in the region, which has also been strongly influenced in the past by the Islamist Al-Itihaad movement. As stated in the US State Department’s International Religious Freedom Report 2003 (IRFR 2003), the El Wak district of Gedo reportedly remained under the control of radical Islamists as of mid 2002. As reflected in the JFFMR July 2002, during heavy fighting in mid 2002 Bihi reportedly switched his allegiance from the SRRC to the JVA but was subsequently captured by Ethiopian forces that frequently operate in Gedo. He was however released in June 2002 and subsequently participated in peace talks in Kenya as a representative of the SNF. The JFFMR March 2004 notes Gedo remains a very difficult region since no single group or clan is in charge and the region is very poor. Furthermore it receives hardly any support from the outside. It was stated that the region is still split between rival factions. It was suggested that the situation was more or less quiet although the emphasis was that fighting could resume any time.*

**6.169** *There were reports of intra-Marehan clan fighting in Luuq, in the northern Gedo region. The UNSCR February 2003 stated that 40 people were killed as on 29 October 2002 as a result of this. In June 2003 the UN reported that fighting between the Marehan was making access to Gedo difficult for humanitarian staff.*

Pausing there, the situation in Gedo is not so serious that a member of the Marehan clan, even an unaccompanied woman, could not find adequate safety there. The Tribunal next considered whether the appellant might return to Mogadishu in order to travel to Gedo. Mr Cox submitted that, having found that Mogadishu was not safe, the Tribunal could not safely return the appellant there even for the purpose of transit. We do not agree. There is no credible evidence that the appellant would be at risk for the few hours during which she would be in Mogadishu. No material has been provided to us that airport checks would reveal her clan identity or otherwise place her at risk. Nevertheless, arrival at Mogadishu airport is only the first stage. The Tribunal must be satisfied that the appellant can make the journey from Mogadishu to Gedo. In approaching this part of the claim, Mr Cox reminded us that it was in an attempt to reach Gedo that the appellant was last assaulted. Internal travel is referred to in the CIPU report. Furthermore, specific attention has to be given to the position of IDP's and women:

**6.170** *As noted in the UNSCR October 2003, "...the almost complete absence of any established authority resulted in armed groups setting up checkpoints at will to extort money from travellers. The lack of local authority has significantly reduced the frequency of visits by aid workers to places such as Belet Hawa, Luuq and Bardera." According to the UNSCR February 2004, "...although the region was generally quiet during the reporting period, no clear authority has emerged and many of the clans are embroiled in disputes, resulting in occasional killings. El-Wak has been under the joint administration of the Garre and Marehan clans. In December 2003, Garre militia wrested control of El-Wak from the Marehan."*

**6.79** *As noted in CAP 2004, "...in both the CAP Workshop for 2003 (August 2002) and 2004 (August 2003), as well as in numerous other UNDP/OCHA reports, aid actors in Somalia have re-affirmed the three most vulnerable groups in Somalia to be IDPs, returnees and minorities. While many other categories of vulnerability have been identified, these groups, which include women and children, qualify as the "most vulnerable of the vulnerable," primarily due to having suffered from: 1) the loss of assets through exposure to a major shock, whether it be economic, climatic or conflict-related; 2) having*

*little to no access to protection from clan affiliations, and 3) being exposed to multiple vulnerabilities or risks."*

### **Women**

**6.110** *According in to the USSD 2004, "...women and children suffered disproportionately heavily in the fighting following the fall of Barre's administration." According to the JFFMR December 2000, "...there were large numbers of rapes, abductions and forced marriages of women by the warring militia, especially in 1991-92, which has stigmatised the victims."*

### **Violence against women**

**6.117** *Violence against women in Somalia is widespread; robbery and rape are particularly common. The UNDP Human Development Report of 2001 noted that sexual violence against women during the civil war did not end with the war. According to the report there is some evidence that sexual violence is a persistent crime even in areas of stability. The USSDR 2003 indicated "...that rape is common in inter-clan disputes...there were also reports of numerous rapes of Somali women and girls in refugee camps in Kenya during 2003. Although laws do exist prohibiting rape they are not enforced". As stated in the JFFMR July 2002, "...many women consider the traditional punishment of forcing the offender to marry their victim and to pay compensation to the family of the victim for 'their' loss to represent a further degradation for the victim herself".*

13. During the course of the hearing, Mr Blundell volunteered to seek information from the country expert within the Home Office as to the viability of travel from Mogadishu to Gedo. Having made such enquiries as he could, he informed us that there have been returns to Mogadishu. The journey from Mogadishu to Gedo is approximately 150 miles but there is no public transport system and, as the CIPU notes, the journey is likely to be interrupted by militia checkpoints at which extortion demands will be made. Realistically, the appellant will have to be provided with money in order to enable her to complete the journey and is likely to be subjected, at least, to extortion demands by militiamen. As Mr Cox pointed out, the very fact that the appellant will have money will render her liable to extortion. Whilst we accept that this may not be in quite the same category as a person being required to flee across battle-lines in order to seek the safety of his or her own community, it appears to us that the journey is likely to be perilous. She will be accompanied by a young child. Mr Blundell accepted that it would not be particularly easy.

14. The conclusion that we have reached is that, whilst the background material establishes that the area around Gedo will provide adequate safety for this appellant, even as a single woman, there is at present no practical means enabling her to complete her journey there in adequate safety. In our judgment, under both Conventions, the provision of adequate security is essentially a practical affair. In reaching this conclusion we have avoided deciding the issue on the basis of who has the burden of establishing it. It is, of course, for the appellant to establish her claim. If the evidence suggests there are areas within the country where a particular appellant is able to find adequate protection, the assumption will be that there are means of travel to enable her to reach that destination. If, as in the case of Somalia, there is evidence that there are significant difficulties in completing the journey, that information may be sufficient to enable the appellant to discharge the burden placed upon her. Nevertheless, it will sometimes be the case that the Secretary of State has access to information that is not available to an appellant and, in such cases, it may be reasonable for the Secretary of State to provide it. In so doing, we are not suggesting that the burden shifts to the Secretary of State although this issue was not explored before us.
15. The consequences of this decision are that the appellant has succeeded in establishing that there is an insufficiency of protection for her were she to return to Somalia and that her claim under the Refugee Convention is made out. Her upgrade appeal is allowed.

Decision: The appellant's asylum appeal is allowed.

Andrew Jordan  
Vice President  
1 June 2004