

Comments on the Operational Guidance Note on Somalia (March 2009), prepared for Still Human Still Here by Ronan Toal (Garden Court Chambers)

1. This document has been prepared by members of the Still Human, Still Here campaign. It is being published, along with the COI referred to within it, to help legal practitioners representing asylum seekers. It is meant to be used as a guide to some of the COI available. It was prepared 23 March 2010. Please note it was prepared before the Court of Appeal judgment in *HH (Somalia) & Ors v Secretary of State for the Home Department [2010] EWCA Civ 426*. It was also prepared before the Somalia OGN was updated in July 2010. There is, however, no guarantee that the COI referred is comprehensive and it should not be a substitute for case specific COI research.
2. **THIS DOCUMENT IS A GUIDE FOR LEGAL PRACTITIONERS OF RELEVANT COI, WITH REFERENCE TO THE OPERATIONAL GUIDANCE NOTE ON SOMALIA ISSUED IN MARCH 2009. THIS DOCUMENT SHOULD NOT BE SUBMITTED TO UKBA, THE TRIBUNAL OR IN PROCEEDINGS. LEGAL PRACTITIONERS ARE WELCOME TO SUBMIT THE COI REFERED TO IN THIS DOCUMENT.**
3. It is assumed that the guidance contained in the OGN is intended to be consistent with current tribunal country guidance (save to the extent that new country evidence or legal authority supports a different view). Were that not the case then reliance by caseworkers on the OGN would result in the making of decisions that could not withstand challenge in the Courts or the tribunal.
4. The central, and in many cases, decisive question that caseworkers must address when deciding asylum claims is ‘is there a reasonable likelihood that the applicant would experience harm if returned’?¹ Answering that question must start with consideration of risk to the applicant upon his or her arrival at Mogadishu International Airport (‘MIA’) (unless the person is found to be admissible to Puntland

¹ Asylum Policy Instructions ‘Assessing the Asylum Claim’, para. 2.2.d

or Somaliland) since MIA is the place in southern Somalia at which Somalis arrive ‘if returned’. The question must be answered on the basis of ‘all relevant facts as they relate to the country of origin or country of return at the time of taking a decision’ on the claim.²

Risk to those returned to Mogadishu

5. In *AM and AM* the tribunal found that the situation in Mogadishu was such that anyone (save exceptional in exceptional circumstances) returning there from the UK would be at real risk of serious harm or persecution (para. 183). The evidence shows the human rights and humanitarian situation in Mogadishu to be at least as bad now as when *AM and AM* was heard. For example, earlier this month the independent expert on the situation of human rights in Somalia, Shamsul Bari reported:

There was a general expectation that the human rights situation in Somalia would improve with the relocation of the new Transitional Federal Government (TFG) to Mogadishu in early 2009. However, president Sheikh Sharif’s government was heavily challenged by hardline Islamist opposition groups, principally Al Shabaab and Hisbul Islam, beginning with a big offensive for control of Mogadishu on 7 May 2009. Repeated, inaccurate and [in]discriminate exchanges of mortar-fire between all parties have resulted in numerous civilian deaths and many injured, with bombs landing on civilian homes, market places and mosques, as well as provoking tens of thousands to flee the capital and other areas of the conflict. The extreme interpretations of Sharia law by armed opposition groups, mainly Al Shabab and Hizbul Islam and local clan militias in control of Kismayo has led to severe corporal punishment like amputations and stoning that illustrates the extent to which violence still substitutes for the rule of law in many areas. Grave violations against women and children have been reported throughout the country, including the recruitment and use of children by all parties to the conflict.

² Immigration Rules, para. 339J(i)

Reports of killing, maiming and sexual and gender based violence as a result of the conflict are also rife.³

6. The situation in Mogadishu has deteriorated further in recent weeks to the extent that the Mayor of Mogadishu is reported to have asked those residents who remain in the city to leave in anticipation of a TFG offensive against the insurgents.⁴ More than one hundred people were killed in five days of fighting in Mogadishu between 10th and 15th March this year.⁵
7. In our submission, the ‘relevant facts’ currently in existence show that a person returned to any part of Mogadishu, including MIA would be reasonably likely to experience harm of a kind against which the person should be protected by refugee status or humanitarian protection.
8. In *AM and AM (Somalia)* [2008] UKAIT 00091 the tribunal said at the end of paragraph 191 ‘it may well be in the light of these recent developments, that for the immediate future at least, there would be difficulties in ensuring safe arrival [at MIA] in any event’.
9. MIA remains open (and remained open notwithstanding the Al Shabab threat to close the airport in September 2008) because it is ‘the lifeline for many of the remaining residents in’ Mogadishu.⁶ Nevertheless, the evidence clearly shows that a person arriving at MIA would be at real risk of serious harm and that the situation identified by the tribunal in *AM and AM* has not subsequently improved. MIA remains a target for insurgent attacks:
 - a. UN Secretary General’s report, 9.3.2009: ‘insurgent attacks against AMISOM intensified following the withdrawal of the Ethiopian forces...the AMISOM

³ Human Rights Council Report of the independent expert on the situation of human rights in Somalia, Shamsul Bari, 8th March 2010 (Advanced unedited version)

⁴ UNOCHA Weekly Humanitarian Bulletin 12-19th March 2010

⁵ UNOCHA – IRIN Somalia: without food and unable to bury the dead in Mogadishu 15.3.2010

⁶ COI Report: Somalia, 13.11.2009, para. 26.16.

positions at the seaport and airport remain highly vulnerable to mortar fire from surrounding elevated areas⁷

- b. 14.4.2009 – mortar rounds were fired by Al Shabab at a private aircraft (carrying a US congressman) as it took off from MIA. The aircraft was unharmed but at least 5 civilians on the ground were killed;⁸
- c. 29.6.2009 – at least 3 bombs exploded simultaneously near MIA;⁹
- d. 17.9.2009 – a suicide bomb attack on the AMISOM base at MIA killed at least 21 and wounded at least 40 people;¹⁰
- e. 23.10.2009 – Al Shabab attacked the airport with mortars as the President prepared to board an aircraft to Uganda. Up to 39 civilians were killed by retaliatory artillery fire from AMISOM troops;¹¹
- f. 7.12.2009 – Somali police warned that their intelligence showed Al Shabab to be preparing suicide bombers in high ranking military and police uniforms to attack MIA and the sea port. The warning came after a suicide bombing on 3.12.2009 that killed 24 people;¹²
- g. 26.1.2010 – a suicide bombing or mortar attack on the AMISOM hospital, near MIA, killed at least 5 people;¹³

⁷ UN Security Council: *Report of the Secretary General on the Situation in Somalia*, 9.3.2009, para. 20

⁸ The Washington Post *Plane of US Lawmaker Fired Upon* 14.4.2009

⁹ COI Report: Somalia, 13.11.2009, p. 13 (Latest News)

¹⁰ AFP *Somalia: Mogadishu bombings pile pressure on peacekeepers* 18.9.2009 and UNOCHA, *Weekly Humanitarian Bulletin*, 11-18.9.2009,

¹¹ UNOCHA *Weekly Humanitarian Bulletin*, 16-23.10.2009; The New York Times *Somali Insurgents Attack Airport*

¹² AP *Somali Governemtn warns of suicide attacks at key installations; students protest suicide attack*, 7.12.2009

¹³ VOA *Al-Shabab Attacks Peacekeeping Hospital in Somalia* 26.1.2010

10. More generally, MIA is within the city of Mogadishu. The tribunal found in *AM and AM* that ‘the great majority of persons facing return to Mogadishu would be at real risk of persecution or serious harm there’ (para. 183). On the strength of that finding, absent evidence of any qualitative change for the better in Mogadishu, no one can be returned to Mogadishu without the UK breaching the Refugee Convention or ECHR. The reason that the tribunal itself did not reach that conclusion was that it wrongly believed that a distinction could be drawn between MIA and ‘Mogadishu city zone’ and that the risk referred to in its para. 183 was confined to ‘Mogadishu city zone’.¹⁴
11. Reference to the map of Mogadishu shows that such a distinction cannot readily be drawn. MIA is in the city district of Mogadishu called Waaberi. In para. 174 of its determination in *AM and AM*, the tribunal described ‘the spread of violence in Mogadishu’ and noted the Amnesty International report that ‘fighting was taking place in southern districts of the city such as Hodan, Hodan / Waaberi...’.
12. Moreover, from the airport, it would be necessary for a returnee to travel along the airport access road to the K4 junction in Hodan district.¹⁵ Doing so, the returnee would be at real risk of serious harm because the road, K4 (where there is an AMISOM base) and Hodan district are locations of continuing and intense violence. That is in part because the airport and K4 and the road adjoining them are among the few parts of Mogadishu controlled by the TFG / AMISOM, making them targets for repeated attack by the insurgents. TFG and AMISOM forces consistently respond to being attacked with disproportionate and indiscriminate violence, including artillery, mortar and heavy machine-gun fire:
- a. in para. 193 of *AM and AM* the tribunal referred to evidence that the road from MIA to K4 was controlled by the TFG / Ethiopians but that it ‘does come under attack from insurgents on a daily basis’;

¹⁴ See the grounds of appeal in support of the application to the AIT for permission to appeal to the Court of Appeal in *AM and AM* and the tribunal’s decision refusing permission to appeal, (both attached) which said: ‘ground 1 blurs the important distinction between return to Mogadishu (the city) and return to Mogadishu International Airport...This airport is not inside the city zone’.

¹⁵ See map of Mogadishu, attached

- b. UN Secretary General's report, 20.7.2009 'insurgents have conducted repeated attacks on...strategic positions, such as the K4 junction...' ¹⁶

13. Examples of such attacks include:

- a. 24.1.2009 - a suicide car bomb targeting AMISOM forces at K4 crashed into a passenger bus and exploded. 22 civilians were killed and 23 wounded by the explosion and the ensuing gun-battle between AMISOM and the insurgents; ¹⁷
- b. 24 and 25.2.2009 - insurgents attacked a TFG police checkpoint in Hodan. TFG and AMISOM forces responded with heavy machine guns, artillery, RPGs and mortars in civilian populated areas. Two days of fighting led to at least 40 deaths and 241 injuries; ¹⁸
- c. 30.3.2009 - fighting on the road from K4 to villa Somalia resulted in 8 deaths; ¹⁹
- d. 5-7.6.2009 - over 30,000 people fled from fighting in 3 districts, including Hodan, during one weekend; ²⁰
- e. 20-21.8.2009 - 2 days of fighting in Hodan / K4 (as well as other districts of Mogadishu) resulted in 20 deaths and 45 injured; ²¹
- f. 17.9.2009 - following the suicide bomb attack on the AMISOM base at MIA, AMISOM responded with a 5 hour artillery barrage on residential neighbourhoods in Hodan (and other districts); ²²

¹⁶ UN Security Council *Report of the Secretary General on the Situation in Somalia* 20.7.2009, para. 7

¹⁷ AFP *Suicide Car Bomb, gunfight kill 22 civilians in Somalia* 24.1.2009

¹⁸ Amnesty International Public Statement *Somalia: Civilians pay the price of intense fighting in Mogadishu*, 4.3.2009

¹⁹ Reuters *Fighting kills at least 14 in Somalia* 30th March 2009

²⁰ UNOCHA *Weekly Humanitarian Bulletin*, 5-12 June 2009

²¹ UNOCHA *Somalia: Humanitarian Access Update* 1-31 August 2009

- g. 23.9.2009 – 12 killed and 17 wounded as a result of fighting that followed an insurgent attack on the AMISOM base at K4;²³
- h. 22.10.2009 – at least 30 killed and 70 wounded as a result of heavy shelling by AMISOM of civilian areas, including Hodan district, which followed the mortar attack on MIA;²⁴
- i. 28.10.2009 – at least 4 people killed and 10 wounded as a result of fighting in 2 districts, including Hodan;²⁵
- j. 15.12.2009 – AMISOM shelled Hodan after insurgents attacked one of their bases;²⁶
- k. 24.12.2009 – heavy fighting followed an insurgent attack on AMISOM positions at K4; at least 11 killed and 25 wounded;²⁷
- l. 27.1.2010 – 3 people died in Hodan when the public vehicle in which they were travelling was caught in cross fire;
- m. 29.1.2010 – fighting between insurgents and AMISOM around K4 junction killed at least 9 people, mainly civilians²⁸
- n. 15.2.2010 – civilians killed by a bomb attack on a ministerial convoy at K4²⁹

²² IASC Somalia Protection Cluster Update Weekly Report, 18.9.2009

²³ Reuters *Fighting kills at least 12 in Somali capital*, 23.9.2009

²⁴ UN Somalia Humanitarian Overview, October 2009

²⁵ UNOCHA *Weekly Humanitarian Bulletin* 23-30 October 2009

²⁶ Garowe Online 15.12.2009

²⁷ AFP *Somalia – security; 11 killed in heavy fighting in Somali capital* 24.12.2009

²⁸ France 24 *International News Insurgents leave nine dead in Mogadishu* 29.1.2010

²⁹ Reuters, *Somli Defence minister survives suicide attack* 15.2.2010

- o. 3.3.2010 – fighting in Hodan, Waaberi and other districts followed an insurgent attack on K4 AMISOM base; at least 35 killed, 60 wounded.³⁰

Internal relocation

14. Given the situation in Mogadishu as described above we say that returning anyone to MIA would expose the person to real risk of serious harm. Whether or not there is another part of the country in which there is no such risk and in which it would not be unreasonable to expect the person to stay is therefore immaterial because prior to arriving in such a place, the person would be exposed to real risk in breach of the Refugee Convention and ECHR.³¹ However, even if a person can be removed to southern Somalia without exposure to the risks arising on account of the current situation in Mogadishu it is unlikely nevertheless that such a person would have an internal relocation.
15. In our submission, the tribunal in *AM and AM* adopted a legally erroneous approach to internal relocation when it said in para. 183 that for a person returning to Mogadishu, in order to succeed in an appeal ‘they need only show that they have no viable internal relocation alternative’ (repeated in para. 188).³² This error has apparently been adopted by the OGN.³³ It is not necessary for a person who

³⁰ UNOCHA *Weekly Humanitarian Bulletin* 26.2.- 5.3.2010

³¹ See UNHCR *Guidelines on International Protection: “Internal Flight or Relocation Alternative” within the Context of Article 1A(2) of the 1951 Convention and / or 1967 Protocol relating to the Status of Refugees* 23.7.2003, para. 11 ‘If the refugee claimant would have to pass through the original area of persecution in order to access the proposed area, that area cannot be considered an internal flight or relocation alternative’. If the person’s home area is safe but the place to which he or she is to be returned is one in which the person would be at risk of being persecuted then the person is entitled to protection. Thus in *Gardi v Secretary of State for the Home Department* [2002] 1 WLR 2755 the Court of Appeal accepted that the appellant who would be safe in his home area, the Kurdish Autonomous Region, would nevertheless be entitled to protection if in fact he was to be returned to Baghdad. The existence of a safe home area is grounds to withhold protection only ‘if it is plain that the claimant can safely be returned to his own home area’ (Simon Brown LJ in *Canaj v Secretary of State for the Home Department* [2001] INLR 342).

³² However, the misdirection was not material to the determination of either of the appeals heard by the tribunal in *AM and AM* and so was not challenged in the recent appeal to the Court of Appeal brought by the unsuccessful appellant

³³ Para. 3.6.19; para. 3.7.12

establishes that he or she would be at risk in one part of the country to show that there is no internal relocation alternative. The position is correctly stated by the Immigration Rules which say that the Secretary of State will not grant asylum or humanitarian protection 'if in part of the country of origin a person would not have a well-founded fear / would not face a real risk of suffering serious harm and the person can reasonably be expected to stay in that part of the country'.³⁴ In other words, the decision maker would have to be satisfied by evidence that there is an internal relocation alternative before a claim for international protection can be refused.³⁵

16. Current circumstances in Somalia make it most unlikely that a decision maker could reasonably be satisfied that there is a part of Somalia to which it would be reasonable to expect a person to go from Mogadishu. The assumption that if the person is from a majority clan, he or she can relocate to an area where his or her clan is present³⁶ is not a sufficient basis to be satisfied that there is an internal relocation alternative in the absence of evidence that that would mean that the particular individual would be provided at least with physical protection and adequate means of subsistence.

17. First of all, the OGN very significantly understates the extent of internal displacement from Mogadishu.³⁷ We think the reference in the OGN to the UNHCR estimate of 250,000 displaced from Mogadishu up to the end of November 2008³⁸ must be mistaken. On 29th January 2009, the UNHCR estimate was that one million people had been displaced from Mogadishu since February 2007.³⁹ In the first 4 months of

³⁴ Para. 3390

³⁵ See *Jasim v Secretary of State for the Home Department* [2006] EWCA Civ 342 where Sedley LJ said: 'Once the judge of fact is satisfied that the applicant has a justified fear of persecution or harm if returned to his home area, the claim will ordinarily be made out unless the judge is satisfied that he can nevertheless be safely returned to another part of his country of origin'. Thus, in *AA (Uganda) v Secretary of State for the Home Department* [2008] EWCA Civ 579 the Court of Appeal held that the tribunal had erred in law by dismissing an appeal on the ground that the appellant had failed to show that her church would not support her in Kampala and thus had failed to show that Kampala was not an internal relocation alternative for her. Lawfully to have dismissed her appeal on internal relocation grounds by reference to support that the church would provide in Kampala the tribunal would have to have been satisfied that her church would provide her with accommodation, employment and protection from sexual exploitation.

³⁶ OGN, para. 3.7.7

³⁷ Para. 3.6.7

³⁸ OGN, para. 3.6.7

³⁹ COI Report: Somalia, 13.11.2009, para. 27.03

2009, following the Ethiopian withdrawal from Somalia, nearly 70,000 IDPs returned to Mogadishu.⁴⁰ However, in May 2009 renewed conflict broke out between the TFG and the insurgents causing further massive displacement from Mogadishu. By October 2009, more than 255,000 had been displaced from the city as a result of fighting there since May 2009.⁴¹ From the beginning of this year up to 16.3.2010 nearly 44,000 more people fled from Mogadishu.⁴²

18. In *AM and AM* the tribunal said that there was not even a reasonable likelihood that a person relocating from Mogadishu (or other home area) would become an IDP.⁴³ However, in reaching that conclusion, the tribunal did not give any indication of what definition of IDP it was using. The generally accepted definition is that contained in paragraph 1(2) of the *Guiding Principles on Internal Displacement* which says:

For the purposes of these Principles, internally displaced persons are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.

In para. 178 the tribunal in *AM and AM* said of persons returned to Mogadishu that they would face a real risk of serious harm or being persecuted and so ‘if they tried staying there, that they would soon be forced to leave’.⁴⁴ Manifestly, a person leaving Mogadishu to avoid the real risk of serious harm or being persecuted there falls within that definition of an IDP.

15. The tribunal in *AM and AM* identified a number of reasons why, notwithstanding the dire humanitarian situation, it could not be said that civilians or IDPs per se faced a

⁴⁰ See the document ‘Country Evidence’ para. 34

⁴¹ UN Secretary General’s Report on Somalia, 2.10.2009, para. 19

⁴² IASC Somalia Population Movement Tracking System maps 29.1.2010 and 16.3.2010

⁴³ Para. 188, cited in the OGN para. 3.6.13, 3.7.11, 3.8.9, 3.9.9, 3.10.10, 3.11.12

⁴⁴ *AM and AM* para. 178

real risk of serious harm in southern Somalia.⁴⁵ The evidence shows that the humanitarian situation has deteriorated significantly and materially since the tribunal reached that assessment to the extent that such a positive assessment cannot properly be made now.

16. The tribunal found that ‘many appear not to need humanitarian assistance and many who do need it, get help of some kind’.⁴⁶ The number of people in need of humanitarian assistance has increased from 3.2 million when *AM and AM* considered the evidence⁴⁷ to more than 3.6 million.⁴⁸ Few if any IDPs fall within that part of the population not needing humanitarian assistance: they are consistently identified as the most vulnerable group and the group most in need of assistance.⁴⁹

17. The tribunal acknowledged the difficulties of providing humanitarian assistance to those in need but found ‘even though aid agencies can meet with obstruction and dangers in delivering aid to IDPs in need...a significant percentage of those in need are reached.’⁵⁰ Since then the availability of humanitarian assistance to IDPs has significantly diminished. There are a number of aspects to this. First, ‘the sharp decline in donor contributions [to the UN Consolidated Appeal Process, the means by which international assistance to Somalia is funded] has led to a situation where the core needs of the displaced cannot be adequately covered’.⁵¹ Second, ‘humanitarian space’ has shrunk and deteriorated further, principally on account of violence and threatened violence from insurgents to those providing assistance.⁵² This has resulted in the humanitarian community increasingly having to ‘provide assistance where it can rather than where needs are highest’.⁵³ In January 2010 the World Food

⁴⁵ *AM and AM* para. 156 - 158

⁴⁶ *AM and AM* para. 157

⁴⁷ *AM and AM* para. 157

⁴⁸ UN Secretary General’s Report on the situation in Somalia, 31.12.2009, para. 24

⁴⁹ See for example, UNOCHA *Consolidated Appeal Process, 2009* (12.11.2008)

⁵⁰ *AM and AM* para. 157

⁵¹ Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kalin: Addendum: Mission to Somalia, 21.1.2010, para. 31

⁵² Amnesty International *Fatal Insecurity: Attacks on aid workers and rights defenders in Somalia* (October 2008)

⁵³ UNOCHA *Humanitarian Access Analysis, January to June 2009*

Programme, the largest single provider of food aid, accounting for nearly 60% of the total UN assistance budget for Somalia⁵⁴ announced that it was suspending its operations in southern Somalia following a ban imposed against it by Al Shabab.⁵⁵ It has been estimated that prior to the suspension of WFP activities as much as 50% of the assistance that it provided was diverted from the intended recipients.⁵⁶ Third, the tribunal attached significant weight to the flow of remittances from the Somali diaspora. The world economic crisis (that post-dates the tribunal's decision) has resulted in a substantial decline in remittances to Somalia.⁵⁷

18. It cannot simply be assumed that if a person belongs to a majority clan he or she will be protected and provided with adequate means of subsistence by the clan. As the tribunal acknowledged in *AM and AM* 'displacement means that a person cannot automatically be protected by his or her clan. In the process of moving, it appears that IDPs can face violence and intimidation even from fellow clan members'.⁵⁸ The Secretary of State has regularly relied before the tribunal on a report by Joakim Gundel which says: 'It is a traditional code in Somali culture that when a person comes to your house and seeks protection, one is obliged to protect this person. Thus failing to protect a person is considered dishonourable, signifying that one did not live up to his obligations. However, in the light of the massive displacements of recent times, the numbers of people have become too large for the local host clans to service this traditional obligation – which has increased their vulnerability.'⁵⁹

19. The UN Secretary General's Representative on the human rights of internally displaced persons, Walter Kalin, in his report on Somalia of 21 January 2010 said:

⁵⁴ *Report of the Monitoring Group on Somalia pursuant to Security Council Resolution 1853 (2008)* 10.3.2010

⁵⁵ 'Displaced Somalis slam Islamist militia ban on WFP', AFP, 2.3.2010

⁵⁶ *Report of the Monitoring Group on Somalia pursuant to Security Council Resolution 1853 (2008)* 10.3.2010, para. 235

⁵⁷ UNOCHA *Somalia Humanitarian Overview* March 2009

⁵⁸ Para. 155

⁵⁹ ACCORD *Clans in Somalia: Report on a lecture by Joakim Gundel: COI Workshop, 15 May 2009 (Revised Edition) December 2009* p. 23

Displacement by its very nature strips people of their protective environment, lowers their resilience and heightens their vulnerability. In the context of Somalia, IDPs often lose their clan protection if they are forced to move to other, safer areas and are therefore even more exposed to protection risks. Women and children constitute the majority of the displaced, who often flee and settle in safer areas without male family members accompanying them, which increases their vulnerability in the local context...⁶⁰

During flight, the displaced reportedly encounter serious protection risks. Testimonies indicate that these include the rape of women and girls, looting of transport vehicles, physical assaults and murder inflicted by militia groups and gangs...armed elements who have set up illegal checkpoints, interfere with the right of all Somalis to seek safety in another part of the country by, inter alia, asking for payment to pass, stripping the displaced of their last possessions or committing even worse crimes...⁶¹

Information made available to the Representative, as well as testimonies by IDPs coming from these areas reveal grave levels of violence and appalling conditions, in particular in the Afgooye corridor, including severe overcrowding, a destitute shelter and sanitary situation, critical food situation, rapes and even mass rapes of women, recruitment of children into armed groups and killings. This situation is further exacerbated by severe restrictions or even lack of access for humanitarian organizations, looting of compounds and other difficulties organizations face in delivering humanitarian aid to beneficiaries. This has resulted in

⁶⁰ Para. 42

⁶¹ Para. 43

pitifully insufficient quantities of humanitarian aid being distributed, given the overwhelming needs of the population.⁶²

20. The 'Afgooye corridor' is 'a makeshift settlement with the highest density of internally displaced persons in the world – over half a million IDPs along a stretch of 15 kilometres of road' between Afgooye and Mogadishu.⁶³

21. The Representative identified the following as 'major protection concerns encountered in IDP settlements':⁶⁴

- a. Overcrowding, with the overwhelming majority of residents being women and children, who often live without adequate shelter and access to basic services, including health care, education, potable water and sanitation...
- b. Severe levels of malnourishment, which in Somalia have been found to be highest in IDP settlements and drought-affected areas;
- c. Lack or inaccessibility of education programmes for internally displaced children and youth...
- d. Economic exploitation of children and, in particular in southern and central Somalia, also their recruitment into armed groups;
- e. Lack of physical security, rapes, gang rapes and other instances of sexual and gender-based violence in and around the settlements...the subordinate socio-economic position of Somali women is one of the root causes of the sexual violence faced by internally displaced women and girls;

⁶² Para. 44

⁶³ Para. 17

⁶⁴ Para. 49

- f. Lack of public land where IDPs can settle with a certain security of tenure and without the risk of becoming forcibly evicted or having to pay exorbitant rents to private landlords.

22. In the light of the foregoing it could only be in exceptional cases that the decision maker could be satisfied that it would be reasonable to expect a person from Mogadishu to live elsewhere in Somalia as, by definition, an internally displaced person. To be so satisfied there would have to be cogent evidence of exactly where the person could be expected to relocate; how he or she could get there safely; how the person's needs for shelter, food, water, sanitation and so on would be met and showing how the protection concerns identified above would be satisfactorily addressed for the individual. A finding such as that made by the tribunal in *AM and AM* referring to humanitarian assistance that 'many who do need it, get help of some kind'⁶⁵ would not be good enough for a decision maker to be satisfied that there is an internal relocation alternative available to a particular individual.

Female Genital Mutilation

23. The Court of Appeal shortly summarized the law in relation to the burden and standard of proof in asylum and human rights claims in *MH (Iraq) v Secretary of State for the Home Department* [2007] EWCA Civ 852 where it said:

The authorities disclose two principles. One, the burden is on the asylum seeker to make his case: see for example *Aziz v Secretary of State* [2003] EWCA Civ 118. Two, the burden is discharged, however, certainly in relation to future events, by showing that there is a real as opposed to a fanciful risk that they will happen.

⁶⁵ *AM and AM* para. 157

24. The OGN acknowledges that 98% of Somali women have undergone FGM.⁶⁶ In the light of that, there is plainly a ‘real as opposed to fanciful risk’ that an uncut woman or child sent back to Somalia will be subjected to FGM. Nothing said or referred to in the rest of the OGN shows that that risk can be sufficiently avoided so that removal to Somalia would not breach the Conventions.

25. It is said in the OGN that ‘the avoidance of FGM is dependent on whether a girl is from the town or the countryside. If a family lives in a major city it is possible to avoid FGM so long as the parents agree (even if the rest of the family and / or clan do not support the idea)’.⁶⁷ The source for that is a paragraph in the 2004 report ‘Human Rights and Security in central and southern Somalia’ where the observations of Jesper Morch, Representative, UNICEF, Nairobi are set out. In our submission, that is insufficient for a decision maker properly to be satisfied that there is no real risk of FGM in the circumstances to which he refers because: (a) taking his assertion at its highest ‘it is possible to avoid FGM’ is not an assertion that there is no ‘real as opposed to fanciful risk’; (b) in any event, there is no explanation given as to why Jesper Morch thinks it is possible to avoid FGM. Absent such an explanation, his opinion is not an adequate basis for concluding that a particular returnee will not be at risk.

26. It is also said that ‘it should be possible for mothers to oppose FGM’.⁶⁸ It is submitted that that is the language of speculation and does not come near to conveying the degree of confidence that would be required properly to conclude that mothers can in fact successfully oppose FGM so that there is no real risk.

27. There is a striking absence of published material about FGM in Somalia. Given that absence but given that it is accepted that the practice is nearly universal, the Secretary of State should be extremely cautious before finding that an individual can avoid being subject to it. The evidence gathered by Wilson and Co. on this issue goes some

⁶⁶ Para. 3.11.2

⁶⁷ Para. 3.11.4

⁶⁸ Para. 3.11.4

way to filling the lacuna in the otherwise available evidence. The provenance of the statements comprising that evidence is further explained in the accompanying statement of Michael Hanley. The statements should be given substantial weight. First, they have already been considered by the Secretary of State in the context of the country guidance appeal referred to in Michael Hanley's statement. The filing of the appellant's material that included those statements led to the Secretary of State's decision to withdraw his case rather than contest a country guidance appeal and instead to grant refugee status to the appellant. Second, in making country guidance decisions, the tribunal has shown that it may be prepared to attach very substantial weight to statements about country conditions, notwithstanding that the statements have been obtained by one of the parties to the appeal and even if the statements are anonymised. Thus, in *HH (Somalia) CG* [2008] UKAIT 00022 the tribunal gave such weight to the anonymous statements contained in the UKBA's reports of its fact finding missions to Nairobi; similarly, in *AM and AM* it placed considerable reliance on the evidence gathered by Wilson and Co during its visit to Nairobi in September 2008.

28. The statements were sent to the UKBA on 2.2.2010 in what is referred to as 'Appellant's second bundle'. They are anonymised for the reasons explained in Michael Hanley's statement but as explained in his statement, the identities of the makers of the statements can be disclosed to the UKBA. Important features of that evidence include:

- a. girls are subject to considerable pressure to be cut, 'including by other girls who have been cut and who are proud of the event and who then taunt younger girls as being unclean and they refuse to play with them. It is common to prevent girls who have not been cut from praying'. Familial pressure on the parents of an uncut girl to have her cut would be considerable and irresistible, other than by a woman with a very strong personality;⁶⁹

⁶⁹ Appellant's 2nd Bundle, p. 19, para. 20ff

- b. an employee of a well known NGO, who is regularly used by the Secretary of State as an informant about the situation in Somalia⁷⁰ who said ‘if a woman opposes circumcision it will still almost certainly happen at the hands of female family members who would put pressure on the mother and even resort to having the girl circumcised when the mother is temporarily absent. Even the daughters of some of the nurses working in our clinic who oppose FGM have been taken and circumcised by female relatives whilst their mothers were at work’;⁷¹
- c. a female Somali doctor who has worked in the area of FGM describes the familial and wider societal pressure that would be exerted on a child (and the child’s parents) to undergo FGM. An uncut girl would be ‘labelled by the community as a ‘bad girl’ ...and it would be a subject of gossip that would generate enormous psychological pressure on her and her female relatives’. She gave an example of a friend who was ‘very against her daughters being circumcised’ but who eventually succumbed to the pressure from her family to have them cut⁷²
- d. the statement of a woman⁷³ who is a long time campaigner against FGM describing, inter alia, the deep rooted adherence to the practice; the pariah status that would attach to an uncut woman or girl (so that, e.g. an uncut woman would probably not be able to marry and would be regarded in the community as a whore; an uncut child would be ostracized by children at school). A woman who does not want her child cut will inevitably come into conflict with her own and her husband’s family:

⁷⁰ E.g. para. 3.7.6 of the OGN and COI Report, Somalia, 13.11.2009, para. 18.05;

⁷¹ Appellant’s 2nd Bundle, p. 49, para. 41

⁷² Appellant’s 2nd Bundle, p. 60ff

⁷³ Appellant’s 2nd Bundle, p. 66ff

Relatives, neighbours and clan will become involved in the conflict in favour of having the child cut. A woman who resists having her daughter cut will be seen as rejecting Somali tradition; as importing 'gaallo' (non-believer) ideas into Somalia; as having abandoned her religion and as preventing her daughter from following her religion; as bringing terrible shame on her family and her clan. If the woman continues trying to prevent her daughter from being cut, and in doing so continues to defy her mother or father, she may be cursed by her parents. Such a curse is a terrible thing in the Somali context; it is believed that a person cursed by her parents will be doomed to failure for the rest of her life. A person known to have been cursed by her parents will be treated by the community as bad and someone who cannot be relied on and someone to be dealt with very carefully if at all.

The woman may end up as 'deyro', i.e. a disowned child. Somalia is not an individualistic society like the west. A woman depends upon her family; her being depends on her position in her family. If she is deyro and she loses that position, she would be like a tortoise without a shell. She would lose the support of her family. She would have nothing.

However, before reaching that stage, it is more likely that female relatives would take the initiative and have the child cut, regardless of the mother's wishes. She described the cutting of five of her nieces, arranged by one of her sisters and a grandmother of the girls being done in the presence of the girls' mother and in spite of their mother's opposition to them being cut. She described another instance of a child being cut notwithstanding that her father's opposition. The child's mother arranged for it to be done whilst she was visiting a friend.

- e. the Statement of a woman,⁷⁴ employed by Save the Children and working on FGM related issues in Somalia. She highlighted the societal pressure that would be exerted on the child to submit to FGM; the stigmatization of an uncut child and of a parent who would permit the child to be uncut; the practice of female relatives disregarding the parent's wishes and cutting the child irrespective of them; her own daughter was cut whilst staying with her paternal grandmother;

29. The statements are compelling evidence showing that (a) even if a parent is opposed to FGM, so powerful are the cultural and familial pressures in favour of cutting that there is a strong chance of eventual acquiescence by the parent; (b) powerful pressure will be exerted on the child herself such that she will be forced to choose between FGM and ostracism so that there is a real chance that she will choose to be cut, even if her parents are opposed to the practice; (c) even if the parents oppose FGM, there is a real risk that their wishes will be disregarded and the child will be cut in any event (as happened to children of some of those who gave statements to Wilson and Co.).

30. In our submission, it cannot seriously be suggested that a child or a child and her parents can reasonably be expected to relocate to avoid FGM. To the extent that relocation is said to be possible in Somalia, its feasibility is predicated upon the person having effective support from his or her clan in the place of relocation.⁷⁵ Such support would be unavailable to a person fleeing from FGM; he or she would be estranged from and in fear of the clan (or at least, closer relatives). Moreover, the person (whether the uncut child or the parent) would be to a significant degree stigmatized as a result of rejecting a fundamentally important cultural practice. Such a person would not be in a position to expect support from his or her clan. To some extent this is accepted in para. 3.11.11 of the OGN – the person 'may encounter lack of acceptance by others in a new environment as well as a lack of accommodation etc which may make internal relocation unduly harsh'.

⁷⁴ Appellant's 2nd Bundle, p. 90ff

⁷⁵ OGN para. 3.6.9 for example, and 3.7.6

31. We would say that any woman who has not been subject to FGM is at real risk of being cut, and thus persecuted, if returned to Somalia. The parent (or other close family) of such a person would be similarly at risk by reason of the risk to the daughter / sister. They should be entitled to protection in the UK.

List of Sources

Asylum Policy Instructions 'Assessing the Asylum Claim'.

Human Rights Council *Report of the independent expert on the situation of human rights in Somalia, Shamsul Bari*, 8th March 2010 (Advanced unedited version).

UNOCHA *Weekly Humanitarian Bulletin* 12-19th March 2010.

UNOCHA – IRIN *Somalia: without food and unable to bury the dead in Mogadishu* 15.3.2010.

COI Report: Somalia, 13.11.2009.

UN Security Council: *Report of the Secretary General on the Situation in Somalia*, 9.3.2009.

The Washington Post *Plane of US Lawmaker Fired Upon* 14.4.2009.

AFP *Somalia: Mogadishu bombings pile pressure on peacekeepers* 18.9.2009.

UNOCHA, *Weekly Humanitarian Bulletin*, 11-18.9.2009.

UNOCHA *Weekly Humanitarian Bulletin*, 16-23.10.2009.

The New York Times *Somali Insurgents Attack Airport*.

AP *Somali Government warns of suicide attacks at key installations; students protest suicide attack*, 7.12.2009.

VOA *Al-Shabab Attacks Peacekeeping Hospital in Somalia* 26.1.2010.

UN Security Council *Report of the Secretary General on the Situation in Somalia* 20.7.2009.

AFP *Suicide Car Bomb, gunfight kill 22 civilians in Somalia* 24.1.2009.

Amnesty International *Public Statement Somalia: Civilians pay the price of intense fighting in Mogadishu*, 4.3.2009.

Reuters *Fighting kills at least 14 in Somalia* 30th March 2009.

UNOCHA *Weekly Humanitarian Bulletin*, 5-12 June 2009.

UNOCHA *Somalia: Humanitarian Access Update* 1-31 August 2009.

IASC *Somalia Protection Cluster Update Weekly Report*, 18.9.2009.

Reuters *Fighting kills at least 12 in Somali capital*, 23.9.2009.

UN *Somalia Humanitarian Overview*, October 2009.

UNOCHA *Weekly Humanitarian Bulletin* 23-30 October 2009.

Garowe Online 15.12.2009.

AFP *Somalia – security; 11 killed in heavy fighting in Somali capital* 24.12.2009.

France 24 International News *Insurgents leave nine dead in Mogadishu* 29.1.2010.

Reuters, *Somli Defence minister survives suicide attack* 15.2.2010.

UNOCHA *Weekly Humanitarian Bulletin* 26.2.- 5.3.2010.

UNHCR *Guidelines on International Protection: “Internal Flight or Relocation Alternative” within the Context of Article 1A(2) of the 1951 Convention and / or 1967 Protocol relating to the Status of Refugees* 23.7.2003.

UN Secretary General’s Report on Somalia, 2.10.2009.

IASC *Somalia Population Movement Tracking System maps* 29.1.2010 and 16.3.2010.

UN Secretary General’s Report on the situation in Somalia, 31.12.2009.

UNOCHA *Consolidated Appeal Process, 2009* (12.11.2008).

Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kalin: *Addendum: Mission to Somalia*, 21.1.2010.

Amnesty International *Fatal Insecurity: Attacks on aid workers and rights defenders in Somalia* (October 2008).

UNOCHA *Humanitarian Access Analysis, January to June 2009*.

Report of the Monitoring Group on Somalia pursuant to Security Council Resolution 1853 (2008) 10.3.2010.

‘Displaced Somalis slam Islamist militia ban on WFP’, AFP, 2.3.2010.

Report of the Monitoring Group on Somalia pursuant to Security Council Resolution 1853 (2008) 10.3.2010.

UNOCHA *Somalia Humanitarian Overview* March 2009.

ACCORD *Clans in Somalia: Report on a lecture by Joakim Gundel: COI Workshop, 15 May 2009 (Revised Edition) December 2009*.