Asylum and Immigration Tribunal

AM & AM (armed conflict: risk categories) Somalia CG [2008] UKAIT 00091

THE IMMIGRATION ACTS

Heard at Field House	
On 27 – 29 October 2008	

Before

Senior Immigration Judge Storey
Senior Immigration Judge P R Lane
Senior Immigration Judge Perkins

Between

AM
AM

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr R Toal of Counsel and Mr S Sayeed of Counsel instructed by South Manchester Law Centre and Wilson & Co
For the Respondent: Miss E Laing QC and Miss D Rhee instructed by the Treasury Solicitor

1. When considering the question of whether a person is eligible for refugee protection on the basis of exposure to armed conflict, Adan [1998] 2 WLR 703 does not permit decision makers to reject their claims per se.

2. A person may be able to succeed in a claim to protection based on poor socio-economic or dire humanitarian living conditions under the Refugee Convention or Article 15 of the Qualification Directive or Article 3, although to succeed on this basis alone the circumstances would have to be extremely unusual.

3. In the context of Article 15(c) the serious and individual threat involved does not have to be a direct effect of the indiscriminate violence; it is sufficient if the latter is an operative cause.

4. The Opinion of the Advocate General in Elgafaji, 9 September 2008 in Case C-465/07 does not afford an adequately reasoned basis for departing from the guidance given on the law in the reported cases of the Tribunal on Article 15(c), namely HH and others (Mogadishu: armed conflict: risk) Somalia CG [2008] UKAIT 00022 and KH (Article 15(c) Qualification Directive) Iraq CG [2008] UKAIT 00023.

5. Before the Tribunal will take seriously a challenge to the historic validity of a Tribunal country guidance case, it would need submissions which seek to adduce all relevant evidence, for or against, the proposed different view. The historic validity of the guidance given in HH is confirmed.

6. However, as regards the continuing validity of the guidance given in HH, the Tribunal considers that there have been significant changes in the situation in central and southern Somalia, such that the country guidance in that case is superseded to the following extent:

> *(i)There is now an internal armed conflict within the meaning of international humanitarian law (IHL) and Article 15(c) of the Refugee Qualification Directive throughout central and southern Somalia, not just in and around Mogadishu. The armed conflict taking place in Mogadishu currently amounts to indiscriminate violence at such a level of severity as to*

place the great majority of the population at risk of a consistent pattern of indiscriminate violence. On the present evidence Mogadishu is no longer safe as a place to live in for the great majority of returnees whose home area is Mogadishu;

(ii) Assessment of the extent to which internally displaced persons (IDPs) face greater or lesser hardships, at least outside Mogadishu (where security considerations are particularly grave,) will vary significantly depending on a number of factors;

(iii) For those whose home area is not Mogadishu, they will not in general be able to show a real risk of persecution or serious harm or ill treatment simply on the basis that they are a civilian or even a civilian internally displaced person (IDP) and from such and such a home area, albeit much will depend on the precise state of the background evidence relating to their home area at the date of decision or hearing;

(iv) As regards internal relocation, whether those whose home area is Mogadishu (or any other part of central and southern Somalia) will be able to relocate in safety and without undue hardship will depend on the evidence as to the general circumstances in the relevant parts of central and southern Somalia and the personal circumstances of the applicant. Whether or not it is likely that relocation will mean that they have to live for a substantial period in an IDP camp, will be an important but not necessarily a decisive factor;

iv) As a result of the current conflict between the TFG/Ethiopians and the insurgents, the Sheikhal clan (including the Sheikhal Logobe), by virtue of the hostile attitude taken towards them by Al Shabab, is less able to secure protection for its members than previously, although both as regards their risk of persecution and serious harm and their protection much will depend on the particular circumstances of any individual clan member's case.

7. Where a particular route and method of return is implicit in an immigration decision it is within the jurisdiction of the Tribunal to deal with issues of en route safety on return: see AG (Somalia) [2006] EWCA Civ 1342. But in the context of Somali appeals currently, the method of return is far too uncertain and so any opinion the Tribunal expresses on such issues can only be given on an obiter basis.

DETERMINATION AND REASONS

1. Just over ten years ago in one of the first major cases dealing with refugee issues to come before our most senior court, the House of Lords in Adan [1998] 2 WLR 703 was concerned with the case of an applicant who had fled from Somalia in June 1988 owing to a well founded fear of persecution at the hands of the then government. Addressing the applicant's claim to have a current fear of persecution Lord Slynn of Hadley referred at p.705 A-D to the situation being one where "law and order has broken down" and "where...every group seems to be fighting some other group or groups in an endeavour to gain power". Their lordships did not find that the nature of the conflict meant that Mr Adan qualified for refugee protection. Looking at the situation in Somalia today, it would be easy to think not much has changed. Yet whilst violence and conflict have continued to be endemic in that country, owing to the different forms it has taken (and perhaps to developments in the law) in the intervening years real questions have arisen about whether broad categories of Somali applicants face either a real risk of persecution or serious harm or ill treatment. They arose just over a year ago in HH & others (Mogadishu: armed conflict: risk) Somalia CG [2008] UKAIT 00022 (hereafter "HH"). They arise again today.

The Appeals

2. The first appellant, whom we shall call AM1, is a national of Somalia born on 6 January 1977. He arrived in the UK on 4 June 2005 and claimed asylum soon after. His application was refused and on 6 September 2005 Immigration Judge (IJ) Gladstone dismissed his appeal against that refusal. He went to Ireland and claimed asylum there. Having been sent back from Ireland by the Irish authorities on 2 February 2006, he made a further claim for asylum on 3 February 2006. He was again refused and his appeal came before IJ Glossop who dismissed it on 22 December 2006. Quite unusually the respondent then accepted a further claim made by AM1 on 9 May 2007. The decision of the respondent dated 10 November 2007 to refuse that application and to remove AM1 as an illegal entrant led to a further appeal which resulted in a determination by IJ D N Harris sent on 18 February 2008 dismissing his appeal. Reconsideration was ordered on 6 March 2008 and on 4 August 2008 Senior Immigration Judge (SIJ) Storey decided there was a material error of law: the text of that decision is set out at Annex 1.

3. The second appellant, whom we shall call AM2, is a national of Somalia born on 1 January 1986 who claimed to have arrived in the UK on 28 October 2003. His asylum claim made on the same day was refused on 25 November 2003 but thereafter the respondent accepted an application by him for further leave made on 15 June 2005. That was refused on 25 April 2007. His appeal against that refusal was dismissed by IJ Beg on 8 August 2007. Following an order for reconsideration made that same month, SIJ Jordan in a decision dated 23 January 2008 found a material error of law. The text of that decision is contained in Annex 2.

Procedural History

4. At the outset of the hearing Mr Toal asked us to admit further "subjective" evidence in respect of both appellants. In the case of AMI this consisted in a statement from him dated 2 October 2008 (sent to the Tribunal a day later) and, in the case of

AM2, two statements dated 18 September 2008 and 22 October 2008. Although Miss Laing did not oppose their admission we have decided not to take them into account. As was made abundantly clear in the directions the Tribunal sent to the parties following the Case Management Review (CMR) hearing on 29 July 2008, both cases proceeded on the basis of the findings of fact made by the IJ at the appeal hearing. Neither appellant was found credible in relation to their claimed past experiences in Somalia. In the case of AMI the grounds for reconsideration (drafted by Mr Toal) raised no challenge to the IJ's adverse credibility findings and both the order for reconsideration and the decision finding a material error of law (made on 4 August 2008) were confined to general issues. In AM2's case, whilst the grounds for reconsideration did challenge the IJ's adverse credibility findings, that challenge was rejected by SIJ Jordan in his decision finding a material error of law, dated 23 January 2008. It is true that the latter decision did confirm that a certain, very limited, number of facts relating to AM2 had been accepted (we will return to this subject in a moment), but in no manner was anything said to indicate that the Tribunal at second stage reconsideration was to revisit the findings made in relation to the appellant's history.

5. Furthermore, neither at the CMR hearing on 29 July 2008 nor within the time period specified for further evidence to be submitted, did those representing either appellant express any disagreement with the basis on which the second stage reconsideration was ordered to proceed.

6. As the Court of Appeal has made clear, a reconsideration hearing is not intended as an opportunity to revisit findings of fact untainted by legal error save in exceptional circumstances: see Mukarkar [2006] EWCA Civ 10456, DK (Serbia) [2006] EWCA Civ 1747 and HF (Algeria) [2007] EWCA Civ 445. We recognise that Mr Toal saw the further statements as an attempt to bring matters appertaining to each appellant up to date, but in cases such as these two, where strong adverse credibility findings have been made, new subjective evidence is not to be admitted unless it relates to points of evidence that are uncontroversial. The statements produced for both appellants do no fall into that category.

7. In relation to AM2, however, there are a limited number of facts which the IJ did accept, namely that he is Somali, a member of the Sheikhal (sometimes spelt "Shekhal") Logobe clan, someone from the Hammar Jahid area of Mogadishu and someone who at the date of hearing before the IJ (20 July 2007) was still in contact with his mother and brother and indeed with the clan members with whom the latter were staying in Mogadishu and from whom they were receiving protection. These further findings were expressly confirmed by SIJ Jordan as ones the IJ had made. We consider SIJ Jordan also accepted, although less emphatically, that the appellant's brother, J, was killed in 1999 by the USC and that his father was killed in 2001, also by the USC (see the IJ's determination, paras 11 and 12). Miss Laing confirmed that the respondent was content to accept that these were also findings of fact which had been properly made.

8. The only point taken by Miss Laing concerned whether the accepted findings of fact relating to AM1 should be treated as including that his home area was Jowhar. She pointed out that the appeal before IJ D N Harris was the appellant's third appeal and that it had been directed at a CMR hearing in January 2008 that (on Devaseelan [2003] Imm AR 1 principles) the appellant could not go behind the findings of fact previously made. That was pertinent, she said, because previously IJ Gladstone (on 9 September 2005) had not believed he was from Jowhar. By appearing in paragraph 25 to accept that the appellant was from Jowhar, IJ D N Harris overlooked his own self-direction and SIJ Jordan had simply echoed the original mistake.

9. With the greatest respect to Miss Laing, we do not think it would be right at this stage to depart from what was stipulated as a given fact in relation to AM1 by both SIJ Jordan in January 2008 and SIJ P R Lane at the CMR hearing of 29 July 2008 and which has been accepted without demur by the respondent at least until a few days before this hearing. The materials before us betoken that both parties have taken great care to prepare for this appeal and in our view the time for seeking to modify the factual matrix agreed by both parties has long passed.

10. We should mention here that at the hearing the only evidence we heard was from Professor Chinkin on the relatively discrete issue of whether Tribunal country guidance on returnees being able to make prior arrangements for armed militia escorts placed the United Kingdom in breach of its international obligations. It is convenient if we come to that after having first set out certain other matters.

11. We should not forget to record our gratitude to the parties for the high quality of preparation they and their legal teams put into these appeals and into the production of relevant materials, country background and legal. We should also mention that whilst throughout we refer to "Mr Toal's" and "Miss Laing's" submissions we do so as a shorthand only, since Mr Sayeed on the one side and Miss Rhee on the other were joint authors, to a greater or lesser degree, of many of them. We have not sought to summarise either party's submissions in the one place, but rather to refer, where we deem it necessary, to their respective positions on particular issues as we come to them.

Scope of the Appeals

12. Mr Toal submitted that the Tribunal was obliged to consider the appeals of both appellants on refugee, humanitarian protection and Article 3 grounds. The respondent urged that we take a much more restrictive view. She submitted that the only issue in AM1's case was the Article 15(c) issue and the only two open in the case of AM2 were that issue plus the issue of safety of travel from Mogadishu airport to Mogadishu city. (As in KH (Article 15(c) Qualification Directive) Iraq CG [2008] UKAIT 00023 (hereafter "KH"), we refer to provisions (such as Article 15(c)) of the Qualification Directive itself, rather than the implementing measures under UK law, the Refugee or Person in Need of International Protection Regulations 2006 (SI/2525/2006) (the "2006 Protection Regulations") and the amended Immigration Rules, para 339C(iv) in particular, albeit it is the latter that we apply).

13. We find against the restrictive view. Dealing first with AM1, we have already made clear that the findings of fact made by IJ Harris (who based himself on the earlier findings of fact made by IJ Gladstone and IJ Glossop) are unaffected by legal errors and so are preserved. On the basis of those findings, he is someone who has been found not credible in the account he gave of his past experiences and to be someone who has established nothing beyond the identity of his home area, Jowhar. We accept that the decision that there was a material error of law saw the focus of the grounds for reconsideration as being the Article 15(c) issue. On the other hand nowhere does that decision exclude refugee or Article 3 grounds. What seems crucial to us is that the subject matter seen as requiring a fresh decision is whether for someone such as the appellant there would be a serious and individual threat to the appellant's life or person by reason of indiscriminate violence in a situation of armed conflict. As Miss Laing herself put it during her closing submissions, there are "no hermetic seals" between this issue and the subject-matter covered by the refugee protection and Article 3 grounds. It is apparent from the Tribunal cases of HH and KH that the subject matter of Article 15(c) protection is seen to overlap heavily with the subject matter of refugee protection and Article 3 protection.

14. As with SIJ Storey's decision as to material error of law in respect of AMI, SIJ Jordan's decision as to material error in the case of AM2 nowhere excluded refugee or Article 3 grounds from the scope of reconsideration. Further he identified the reconsideration as being one in which the guidance in NM and Others (Lone women: Ashraf) Somalia CG [2005] UKIAT 00076 (hereafter "NM") needed to be revisited and said in the final paragraph, in what by any reckoning were very general terms, that "i[t] will be open to the appellant to deal with the whether members of the Sheikhal can in general (as well as the appellant in particular) have any specific or different protection needs".

15. Given the heavy overlap in material scope we think it would be artificial to shut out either appellant from receiving a decision on all grounds available to him under s. 84 of the Nationality, Immigration and Asylum Act 2002 (hereafter "the 2002 Act").

16. It may be, depending on our eventual conclusions on the two appeals that dealing with all three grounds entails little more than saying that for the same or similar reasons to those given in respect of refugee protection both appellants win or lose under Article 15(c) as well as under Article 3 of the ECHR. That is a matter of the merits. But the grounds are a different matter. In the original grounds of appeal submitted by both appellants all three grounds were raised and none have been subject to any withdrawal or concession.

17. Having resolved the matter of scope, we can proceed on the footing that, in accordance with the underlying logic of the Qualification Directive, we first consider whether either appellant is a refugee, secondly whether either is eligible for subsidiary (humanitarian) protection; and thirdly whether either is eligible for human rights protection, Article 3 (or 2) ECHR protection in particular. It is for the appellants to prove their entitlement to protection but they only need to do so to the standard of reasonable degree of likelihood or substantial grounds for believing that there is a real risk. Our decisions must be based on the entirety of the evidence.

18. We have already made clear that in view of the unimpugned adverse findings of fact made by the relevant IJ in each appeal, the factual scope of these appeals includes very few individual details. In AM1's case the only accepted facts are that he is a national of Somalia from Jowhar. In AM2's case the accepted facts are slightly more in number: it is accepted he is a national of Somalia, of Sheikhal Loboge clan origin, from the Hammar Jahid area of Mogadishu and having some family connections in that area and elsewhere in southern Somalia. It is by virtue of the limited nature of the positive findings, however, that we are able to address without more ado several generic issues that have arisen in key Tribunal country guidance decisions on Somalia previously. We are concerned to examine the current conflict in central and southern Somalia with a view to establishing which categories of enforced returnees, if any, it places at risk. The fact that in each appeal there is an accepted home area – Jowhar in AM1's case and Hammar Jahid, Mogadishu in AM2's case – also affords a proper basis for some limited generalisations about safety in a person's home area within central and southern Somalia. As an inevitable consequence of recent events in Somalia we are obliged to deal specifically with the position of internally displaced persons (IDPs) and the general humanitarian situation in Somalia presently. We do also give our opinion, which for reasons stated later we give purely on an obiter basis, on various matters relating to safety of en route travel from Mogadishu International airport.

Internal relocation

19. We need to say something about the relevance to both appeals of the issue of internal relocation. Whereas the respondent's stated position in her skeleton argument was that "[n]one of these appeals is an internal relocation case" (para 61), Mr Toal's position was somewhat enigmatic. The respondent is obviously right about this unless either appellant can satisfy us that there is a real risk of persecution or serious harm in his home area. But assuming we were satisfied about this, it seems to us that internal relocation is a real issue. The respondent has never formally conceded the issue in either appeal. Neither of the decisions as to material error of law excluded the issue. Further, it appeared integral to the submissions made on both sides in relation to each appellant that the Tribunal had to make specific findings about their ability, if found necessary, to move around Somalia as an internally displaced person. That is how Mr Toal put matters in para 68 of his skeleton and Miss Laing devoted considerable effort to persuading us to reject Mr Toal's argument that the appellants would be internally displaced persons (IDPs) exposed to ongoing risk wherever they went in Somalia. Thus we do not exclude the relocation issue as one we may have to address.

Safety of en route travel

20. In HH the Tribunal noted that it was "common ground between the parties" that in the light of the Court of Appeal judgment in AG (Somalia) [2006] EWCA Civ 1342 (hereafter "AG") it was not relevant to consider any risk that the appellants "might face in travelling from any particular point of return, such as the international airport near Mogadishu, to their home area". In these appeals, however, both parties take a very different tack. Mr Toal contends that the cases of AM1 and AM2 are factually distinguishable from AG and that both AG and GH [2005] EWCA Civ 1182 recognise that in certain situations the AIT is obliged to consider whether there is a real risk of persecution or Article 3 ill-treatment at the airport or on the way home. Miss Laing for the respondent did not go that far, but was prepared to state in paragraph 61(c) of her skeleton that:

> "In cases where the route of return is known or is implicit in the decision which is subject to appeal, those issues may (probably) be considered by the AIT ..."

21. In our judgment, Mr Toal is right to say that neither GH nor AG says that the Tribunal is never obliged to consider whether there is a real risk of persecution or Article 3 ill-treatment at the airport or on the way home. At paragraph 29 of AG, Hooper LJ expressly repudiated such a view. Hooper LJ's summary of passages from the judgments of Scott Baker LJ and Keene LJ in GH included this formulation from Keene LJ:

> "51. It may be that there will exist cases where the appellant may be able to make good this deficiency even in the absence of removal directions, because the Secretary of State has committed himself through a policy statement or otherwise to a particular method and route of return. In such a case, it may be implicit in the decision to remove from the United Kingdom that a particular method and route would be adopted and, if so the safety of that method and route may be considered by the appellate tribunal as being part of and parcel of the "immigration decision" under section 82(1) [of the 2002 Act]. It would be open to an appellant to rely on ground (g) under section 84(1), just as he could if the Secretary of State had chosen to give removal directions as part of the immigration decision. Like Scott Baker LJ I take the view that the wording of section 84(1)(g) is wide enough to give the appellate tribunal jurisdiction to take into account the "en route" risks in such cases.

22. Whilst Keene, LJ does not identify which passages from Scott Baker LJ's judgment he has in mind in the last sentence above, there is a clear reference by the latter at paragraph 45 to the fact that "there may be circumstances where the Secretary of State adopts a routine procedure for removal and return, so that the method or route of return is implicit within the decision to remove."

23. Hooper LJ's subsequent analysis at paragraphs 119-125 clearly adapts and builds very much on the above approach. We must confess that neither this judgment nor any subsequent Court of Appeal judgment contains a definitive statement of principle about this matter: presumably that is why Miss Laing adopts such tentative language. But it seems to us clear enough that where the route and method of return are implicit in the immigration decision, the Tribunal is obliged as part of the hypothetical exercise to consider "en route" risk. The real question then is whether what is known about route and method of return is sufficiently precise and foreseeable so as to be properly understood as being "implicit" in the decision to remove.

24. Before we turn to what is known about the route and method of return in the two appeals before us, we need to say something more about the circumstances in which, when the route and method *are* implicit in the decision, en route risk can become a relevant dimension for assessing whether a person has a well-founded fear of persecution under the circumstances. More than one approach might be thought possible. On one approach consideration of en route risk is only valid in a case in which a person has established a well-founded fear of persecution in his home area. If a person has not established a well-founded fear of persecution in his own area, he is not a refugee. He is able (notionally) to live in his own area, even if he cannot get there. At least under the Refugee Convention, he is not entitled to the surrogate protection of the international community because at home he would be safe. On this approach it is to be presumed that the sending state can ensure a person gains access by some route to the safe home area, if there is found to be one.

25. The other approach is to consider that even in the case of a person who fails to establish risk of persecution on return to his home area, it can still , albeit in circumstances which will of their nature be highly unusual, be necessary sometimes to consider risk at the airport on arrival or en route risk homewards.

26. In our judgment, whilst the first approach will often serve to determine an appeal one way or the other, it cannot be assumed that en route risk is not capable in itself of giving rise to a well-founded fear of persecution. Consider the following sequence: (1) it has been decided that a person can live safely in his home area; (2) the immigration decision against him clearly identifies (or has implicit in it) the route and method of return to his home area; (3) but there is strong evidence that return via this route and by this method would expose him to a real risk of persecution. It seems to us that this sequence meets the requirement of Article 1A(2) (at least as regards persecution), since although the risk to him only arises in part of the country of nationality, it will necessarily (by virtue of the known en route and method of return) be *to* that part of the country to which he is returned (or has to travel through) and, *in* that part of the country that risk will arise. Such risk can be at the airport itself or en route from the airport. Such an approach can be seen in many decisions of the Tribunal dealing with risk on return to the airport: e.g. AA (Involuntary returnees to Zimbabwe) Zimbabwe CG [2005] UKIAT 000144, AA (Risk for involuntary returnees) Zimbabwe CG [2006] UKAIT 00061, HS (returned asylum seekers) Zimbabwe CG [2007] UKAIT 00094.

27. We also consider that the latter approach is consonant with GH and AG. GH was specifically concerned with the legal issue of the jurisdiction of the Tribunal under s.82(1) in the context of someone who had failed to establish risk in his home area (Suleymaniya in Iraq). In AG it was accepted that AG was unable to show a real risk of ill-treatment on return to his home

area (Mogadishu). If the former approach was correct, GH and AG would have held that assessment of en route risk had no basis in law whatsoever.

28. Turning then to route and method of return, the meaning of the former is plain: one looks at the point of arrival (airport or port) and then at any onward route proposed, "Method of return" is less straightforward a term, but must include, we think, matters such as the time of the return and any arrangements made relating to it, e.g. travel documents, escorts on the plane or on arrival or later on, and arrangements with the authorities in the receiving state or others (e.g. International Organisation for Migration (IOM)) regarding reception, processing on arrival and any considerations relating to safety of onward internal travel.

29. Having clarified the legal issues, we turn to consider Mr Toal's submission that so far as route and method of return are concerned, the two appeals before us are factually distinguishable from GH and AG.

30. We can readily accept that at least one of these two cases is factually distinguishable in respect of *route* of return. The respondent has confirmed that the point of return will be Mogadishu International airport and has been making returns there until very recently. In the case of AM2 the onward route would be the main road from the airport into Mogadishu city. In the case of AM1 it would be to Jowhar either by going into Mogadishu or skirting Mogadishu. By contrast, there was no such clarity about route in AG. We cannot accept, however, that in the case of either AM1 or AM2 the *method* of return is sufficiently known. In AG Hooper LJ concluded that:

> "... it is impossible for immigration judges in cases of this kind (involving the safety of arrival at an airport and of journey into Mogadishu) to deal with all the eventualities at the time of the hearing ..."

31. The insuperable difficulty that besets Mr Toal's submission is that in the context of Somali cases there are more uncertainties surrounding method than are normally to be found in the context of removals to other countries. Even if he is right and there are nevertheless fewer "eventualities" uncertain now than was the case in the second half of 2006 when AG was decided, they are still very significant ones. There are uncertainties (at least currently) about what travel documents will be required and/or accepted; the timing of the return flights (so as to ensure parties to the conflict do not seek to fire at civilian aircraft) and, crucially, about what arrangements need to be in place to ensure safe en route travel. At the time of AG, as now, it cannot be ruled out that ensuring such safety may depend on returnees at least having had the opportunity to arrange an armed escort beforehand. All will depend on the situation at the actual time of any enforced removal.

32. We shall have cause later on to touch further on the extent of the uncertainties surrounding the method of return when we consider (in the context of giving our obiter opinion, the evidence about what is happening in the area of Mogadishu International airport and along the main roads leading from it into Mogadishu and to other points in central and southern Somalia, principally Jowhar.

The Background evidence

33. We do not propose to set out in any detail the background evidence placed before us in this case, which was voluminous. A list of items is contained in the Appendix. Quite often in the remainder of this determination we shall refer to the COIS report of October 2008. We do so because it is very recent and also refers to a wide number of major sources, quite a few themselves very recent. In places we shall also refer to "the Nairobi evidence", by which we mean the body of evidence assembled by the appellant's representatives during early September 2008 (with some additions in mid-October) for the purposes of this appeal and consisting in witness statements from persons in Nairobi with particular knowledge of the situation in Somalia, including Alex Tyler, the UNHCR Protection Officer for Somalia, Matt Bryden, a Somali analyst, Tony Burns of SAACID-Australia and Catherine-Lune Grayson and Maja Munk of the Danish Refugee Council. Some of the witness statements from journalists, aid workers and others are anonymous, at their request because of fears for their own safety and that of their families in Somalia. There are also a number of interview records based on replies to a standard questionnaire from persons with relatively recent first-hand experience of the conflict in Somalia. Otherwise all we need to add here is a brief summary of some of the most pertinent features of the current situation.

34. In a country whose population is around 10.4 million, there are currently around 3 and a half million dependent on food aid. The number of internally displaced persons (IDPs) is variously estimated as being between 1 -1.9 million (COIS, 7.09). The humanitarian crisis is widely said to be the worst in 17 years (COIS, D.1). Exacerbating it have been rising food prices, Somalia having been worse hit than most other countries in the world by the global recession (COIS D.2). At the same time Somalia is currently ranked as the "least clean" i.e. most corrupt country world-wide (COIS, B.19). The security situation is widely described as having deteriorated considerably in 2008 (COIS, 28.18). From the position in 2006 when the Union of Islamic Courts (UIC) were in the ascendancy and that in 2007 when the Transitional Federal Government (TFG)/Ethiopians had largely displaced the UIC, a realigned insurgency, in which remnants of the UIC, Al Shabab (which is variously spelt in the background sources and apparently means "The Boys" in English) and the two factions of the ARS (Alliance for the Re-liberation of Somalia),one Djibouti-based, the other Eritrea-based, has succeeded (at least for the moment) in driving the TFG/Ethiopian forces out of much of southern and central Somalia, although the latter remain entrenched in and around Mogadishu and very recently appear to have recaptured three towns near Baidoa. The African Union (AU) forces, called AMISON, primarily perform peace keeping functions in the areas in and around Mogadishu and operate to protect key elements of the TFG. Intended to be 8,000 strong it is still only 2,500 or so strong. In recent months it has become a target for insurgent armed attacks. Since the beginning of 2007 figures provided by the Elman Peace and Human Rights organisation estimate 9,474 killed, including 2,716 killed during the first half of 2008, although SAACID considers Elman's figures to be an

underestimate by perhaps 50% (Nairobi evidence, p.37). In late October 2008 the TFG (headed by President Abdullahi Yusuf) signed a ceasefire agreement in Djibouti with the ARS's Djibouti faction as a follow up to the 19 August 2008 "Djibouti Agreement". That agreement envisages an increase in AU peacekeeping forces and a commensurate withdrawal of Ethiopian troops from Somalia. However, it was immediately rejected by other insurgent groupings and appears yet another in a long line of deals which are in reality no more than tactical moves in the ongoing fighting. One point noted by UN Humanitarian Co-ordinator for Somalia, Sir John Holmes, and by the author of a 17 October 2008 letter from the Foreign and Commonwealth Office Africa Department, is that, due to the withdrawal in recent months of all UN personnel from Mogadishu and the biased and inconsistent nature of much of the local reporting, hard facts and figures about incidents of violence are very hard to come by.

The UN arms embargo against Somalia

35. In the light of our finding above that we are not obliged to consider the route or method of return in the case of Somali appeals currently, it is not strictly necessary for us to address the evidence and detailed submissions we received concerning whether country guidance relating to prior arrangement by a returnee for a paid militia escort would, if followed, place the United Kingdom in breach of its international obligations. However, we bear in mind Hooper LJ's words in AG about the desirability of the Tribunal seeking to give its obiter opinion on such matters: see AG, para 123. With that in mind we first of all set out the evidence of Professor Chinkin and then our assessment of it. Since it is a relatively discrete issue it is convenient to do this before examining the appeals proper.

Evidence of Professor Chinkin

36. At the hearing we heard evidence from Professor Christine Chinkin who had earlier produced an expert opinion dated 3 September 2008. Professor of International Law at the London School of Economics, her suitability to give an expert opinion on the specialised area of international law involving the United Nations is beyond question. Her report states at paragraph 1 that:

> "The question I have been asked to address is whether requiring returnees to Somalia to pre-arrange a paid militia to escort them from their place of arrival to an area of Somalia where they would likely to be safe because of their clan membership would incur violation of the arms embargo imposed by the UN Security Council (SC) against Somalia."

37. She was asked to produce this report against the background that in AG the Court of Appeal had given consideration to the view expressed in NM that involuntary returnees not from minority clans could obviate any possible risk of being attacked en route from the airport to which they were flown by prearranging for a clan militia escort.

38. Her report goes on to explain that the SC first imposed an arms embargo against Somalia on 23 January 1992 in Resolution 733 and has reaffirmed and expanded it in a number of resolutions since, including: 751, 24 April 1992; 767, 27 July 1992; 775, 28 August 1992; 794, 3 December 1992; 814, 26 March 1993; 837, 6 June 1993; 897, 4 February 1994; 1425, 22 July 2002; 1474, 8 April 2003; 1519, 16 December 2003; 1558, 17 August 2004; 1587, 15 March 2004; 1630, 14 October 2005; 1744, 20 February 2007; 1772, 20 August 2007; 1801, 20 February 2008; 1811, 29 April 2008; 1814, 15 May 2008; and 1831, 19 August 2008. All are aimed at tackling the continued flow of arms and ammunition into Somalia that undermines peace and security and political efforts at reconciliation. They had been made under chapter VII of the UN Charter. Article 41 read together with Articles 48, 25 and 103 of the latter establish that these resolutions impose an obligation on Member States breach of which can constitute an internationally wrongful act. "Successive resolutions", she writes, "have expanded the scope of the arms embargo, clarified its terms and improved and strengthened mechanisms for monitoring compliance and implementation". As developed over time, the arms embargo (the longest-standing in UN history) is comprehensive in scope and permits only limited exemptions which are specified. The monitoring mechanisms set up under various SC resolutions include a Sanctions Committee, a team of experts, a Panel of Experts, and a Monitoring Group. She highlights the significance of two resolutions in particular. One is Resolution 1425, 22 July 2002. She states that it:

> "both clarifies the definition of the arms embargo ('financing of all acquisitions and deliveries of weapons and military equipment') and extends its scope, spelling out that it covers indirect as well as direct action, and services as well as weapons and equipment, including financial assistance and training."

39. Another is Resolution, 1744, 20 February 2007. It was adopted, she notes, in the aftermath of Ethiopian military intervention and authorises member states of the (AU) to establish a mission (AMISON) whose functions include providing assistance "with the free movement, safe passage and protection" of those involved in the political process and to contribute "to the creation of the necessary security conditions for the provision of humanitarian assistance". This, states Professor Chinkin, "undermines any assumption of the legality of unauthorised armed militia carrying out security tasks, or of any support for them to do so". She goes on to emphasise that by making further specific exemptions for AMISON-related activities, this resolution confirms that such exemptions "do not extend to the equipment of and supplies to unauthorised militia, or to the indirect financing of such militia".

40. In the course of explaining why she adjudges the prohibition on direct or indirect financial assistance related to military activities to apply to payments for armed clan escorts Professor Chinkin observes that:

> "In April 2008 the Monitoring Group noted that 'financing for arms purchases in violation of the embargo is facilitated by sanctionable activities'. It lists various funding sources including the payments that are demanded at roadblocks (UN Document. S/2008/274 para 187) ... In these circumstances it seems reasonable to assume that payments at roadblocks constitute 'indirect financial assistance' that facilitate purchase of arms and contributes to the supply chain. Further paying militia for escort services constitutes business and commercial activities and generates revenues and thus also constitutes indirect financial assistance for the making of such purchases ..."

41. Professor Chinkin's report also analyses the way in which these SC resolutions have come to operate in UK law. Section 1(1) of the United Nations Act 1946 provides that if the Security Council calls upon His Majesty's Government to apply any measures to give effect to a resolution His Majesty may by Order in Council make such provisions as appears to Him to be necessary or expedient for enabling those measures to be effectively applied. Two such Orders have been made: the United Nations Arms Embargoes (Liberia, Somalia and the Former Yugoslavia) Order 1993 and the Somalia (United Nations Sanctions) Order 2002 (SI/2002/2518). (There are also, we note, two EU Regulations implementing the UN arms Embargo against Somalia in Community law - Council Regulation (EC) No 147/2003 concerning certain restrictive measures in respect of Somalia and Council Regulation (EC) No 631/2007 amending Regulation EC No 147/2003 concerning certain restrictive measures in respect of Somalia - but they do not affect the analysis made by Professor Chinkin).

42. She cites Article 5 of the 2002 Order which states:

> "Any person who except under the authority of a licence granted by the Secretary of State under this article, directly or indirectly provides to any person in Somalia any -
> (a) technical advice;
> (b) financial or other assistance; or
> (c) training,
> related to military activities shall be guilty of an offence under the Order, unless he proves that he did not know and had no reason to suppose that the technical advice, financial or other assistance or training in question was to be provided to a person in Somalia."

43. She then comments on Hooper LJ's treatment of the issue of the legality of militia to protect them on return to Somalia in AG [2006] EWCA Civ 1342. At para 35 Hooper LJ had noted the power granted by Article 5 for the Secretary of State to grant a licence for what would otherwise be a breach of this Order. Reliance on such a step would, she stated, be "no answer to a breach of an international obligation, since at international law a responsible state cannot rely on the provisions of its internal law as justification for failure to comply with its international obligations."

44. Since most of Professor Chinkin's oral evidence traversed ground already covered in her report, we need only note here that she re-emphasised that SC resolutions on the arms embargo against Somalia had to be construed purposively so as to ensure its provisions pursued the goal of disarmament. The embargo's provisions clearly covered even transactions including relatively small amounts of money: such was evident from the fact that some of the resolutions, for example Resolution 1474, 8 April 2003 para 3(e), made reference to violations, including transfers of ammunition, small arms and single use weapons. Whether a state was responsible for an internationally wrongful act in the form of a direct or indirect breach of the arms embargo depended very much on the level of its knowledge as to the likelihood of a resultant breach. There was a spectrum. At one end of it there would be case of direct financial assistance activity in clear cut breach of the embargo. At the other end there would be cases of acquiescence in indirect financing where there would only be a possibility that it would lead to a breach. The focus of the embargo was on prohibiting state involvement in the supply of arms into Somalia from outside. Arrangements made by a person in the United Kingdom with someone in Somalia (by phone or other means) to supply an armed escort could constitute a breach of the embargo.

45. Miss Laing took Professor Chinkin to various passages in NM and HH. Professor Chinkin accepted that these did not amount to the Tribunal "requiring" returnees to make prior arrangements for an armed escort, only to them pointing out various possibilities.

46. Professor Chinkin accepted that the two Orders in Council giving domestic effect to the arms embargo against Somalia did not apply to actions which happened in Somalia with no UK involvement. An individual Somali within Somalia who pays money for an armed escort would not normally breach the embargo unless the payment arose in circumstances which encouraged business activities in breach.

47. Miss Laing asked whether a person wishing to provide himself with personal security or protection could be said to be engaged in actions related to military activities. It very much depended, the Professor replied, on who that person got security from. Armed militias were non-exempt non-state actors and were also outside the AMISON arrangement. Their activities could be said to relate to military activities because there was a heavy blurring in Somalia between security and military acts and between criminal and military activities.

48. In re-examination Professor Chinkin said that if as a matter of fact a Somali in the UK needed to pre-arrange an armed escort that could amount to a breach of the embargo if the UK state knew it was (highly) likely that would happen. In reply to questions from the panel, she said that depending on the circumstances such an act would be analogous to an order to carry out a specific operation. But if a state has neither endorsed nor denounced such an action that would be somewhere in the middle of the spectrum. She accepted that for a person to pay for an armed escort could be seen in one sense as a protective action but

the terms of the embargo clearly saw the arming of militias as working to undermine peace and security. The exemptions were exhaustive. Asked if she herself were to travel to Mogadishu International airport and there pay for an armed escort in order to secure her personal protection for onward travel, she said that would certainly violate the spirit of the embargo and her tentative opinion was that it would also violate its letter.

49. We also received a supplementary written opinion from Professor Chinkin in response to several questions on which the panel sought clarification. She reiterated her view that the acts of individuals as well as entities inside and outside Somalia are within the ambit of the arms embargo: she cited SC Resolution 1425, 22 July 2002, para 8. In support of her view that the arms embargo resolutions applied against armed military activities generally, she highlighted the express concerns noted in Resolution 747, 24 July 1992 about the availability of arms and ammunition in the hands of militia and the prevalence of armed banditry throughout Somalia:

> "This indicates that attention is directed towards the form of conflict in Somalia, including the holding of weapons by militia and supplements the argument relating to the specific mention of small arms in Resolution 1474..."

50. So far as concerns the attributability of acts of individuals to the United Kingdom under the arms embargo resolution Professor Chinkin cited the Tehran Hostages Case, (US v Iran) 198-0 ICT Reports paragraphs 63, 73-4 as authority for the proposition that returning a person to Somalia knowing that for them to be safe they must have an armed escort, might be seen as wrongful conduct in the form of failure to take all reasonable steps to prevent such wrongful conduct.

Our decision on the UN arms embargo issue

51. We have no difficulty in accepting that the existence of and operation of the UN arms embargo against Somalia is a significant feature of the background evidence relating to country conditions which we must take into account.

52. We also have no difficulty in agreeing with a number of interpretive observations made by Professor Chinkin in her evidence regarding both the UN and UK provisions in place to enforce the embargo (and we should say in advance that nothing said below is intended to criticise her efforts, in the context of a very speculative brief, to assist the Tribunal reach a correct answer). We accept, for example, that in certain circumstances actions undertaken by private individuals can incur state responsibility for wrongful acts; that the relevant SC resolutions identify that the acts of individuals, as well as entities, can constitute a violation of the arms embargo; that money paid to a clan militia to obtain an armed escort could possibly amount to "financial assistance"; that "military activities" could include activities undertaken by militia to provide an armed escort; and that payment made by A knowing that B would or might use the funds to obtain arms from C could come within the meaning of "indirect financial assistance". More generally, we accept that both the UN SC resolutions and the EU and domestic legislation implementing them impose certain mandatory requirements and stand to be construed purposively. We also think Professor Chinkin is right to regard as inconceivable the possible exercise by the Secretary of State under Article 5 to the 2002 Order in Council of the power to issue a licence authorising financial assistance related to military activities in the context of payments for armed escorts. To that extent it may be that the obiter comment by Hooper LJ in AG at paragraph 35 needs to be treated with caution.

53. However, neither those nor any other points of agreement we can find with Professor Chinkin's opinion help us overcome several basic difficulties we have with her principal conclusions.

54. It is worth first of all reminding ourselves of the root reason given by Hooper LJ for rejecting very similar argument raised by Miss Webber for the appellants in AG. At paragraph 35, having set out her arguments and Mr Jay's counter-arguments, Hooper LJ said:

> "In any view this ground is unsustainable but for another reason. Until such time as arrangements are made for the return of the appellant, it cannot be known whether there is even the possibility of a breach ..."

55. It seems to us that, notwithstanding the submissions from both parties on the internal travel issue, the above point remains valid. It cannot be anticipated in the course of a hypothetical consideration of the consequences of removal that the Secretary of State would act so as to (indirectly) require a returnee to pre-arrange an armed escort. Even accepting that certain key matters relating to method can and may be known (e.g. that removal is by air, that the passenger will have emergency travel documents), we do not see that arrangements of this kind can. The need for them and the circumstances in which they would be needed will necessarily be highly contingent on the situation at the time.

56. But even assuming we could treat such arrangements as implicit in the decision to remove, there are several other difficulties. To begin with, it is necessary to bear in mind what has to be considered in a case alleging state responsibility for violation of an arms embargo. According to Professor Chinkin, citing from J Crawford, The International Law Commission's Article on State Responsibility: Introduction, Text and Commentaries, CUP, 125:

> "In every case it is by comparing the conduct in fact engaged in by the state with the conduct legally proscribed by the international obligation that one can determine whether there has been a breach of that obligation. (Ibid, 125-6)."

57. Against that backdrop, let us consider the number of links in the alleged chain of responsibility arising here. In that context several things are immediately apparent. First, it is not suggested that the UK government or any authorised agent of the

government would seek to make any payment; at best the contention is that the actions of the UK government would be likely to cause a private individual to act in breach. Second, the UK state (even accepting that for such purposes the judicial organs can form part of the state) is not requiring - at least in the sense of ordering or instructing - returnees as such to arrange to pay for an escort; at most the decision to remove might be said to make it likely a returnee would need to make such an arrangement. Third, whereas the main aim of the embargo is described as to prevent the flow of arms into Somalia from outside, what is in contemplation here is arranging for a particular use of arms already in Somalia. That already takes the case well outside paradigm cases, e.g. agents of a state other than Somalia paying for arms to be smuggled into Somalia. Fourth, the payment involved is not to purchase or obtain arms, but to use arms already in the possession of militia escorts. Fifth, the allegation also depends on it being likely that the militia enlisted is involved in military activities or that acting as an escort could constitute a military activity (supposing for example it is just two or three family friends with rifles). Sixth, it also depends on it being likely that the payment received will in turn be used to purchase arms in violation of the embargo (rather than, for example, to feed the militiamen's families). So what is being alleged is indirect responsibility for an indirect act on the basis of indirect use made of the assistance provided. Analysing Professor Chinkin's argument, it can be seen that not only does the allegation depend on every link in a multi-linked chain holding; but in respect of every link there is reliance on assumptions about what might or will happen: for example, at paragraph 51 she writes that "it is reasonable to assume [...payments for militia escorts] will or might be used in such purchases". In our view such links are far too uncertain.

58. Let us turn from the alleged chain of responsibility to the question of the purpose behind the making of such arrangements. In this regard it is important to consider the nature of the activity for which payment would be made. As already noted, it is for a particular use of arms already in Somalia and it is in order to secure personal protection. Of course, in some cases in order to secure a traveller's protection an armed militia may be compelled to use its arms and may sometimes even kill others (or be killed) in the process. But the raison d'etre of such an escort will be to achieve protection by ensuring as trouble-free a passage as possible.

59. Professor Chinkin does not dispute that this would be its purpose. Her point is that it is a purpose which, by virtue of the means it uses for its realisation, is in conflict with the objects and purposes of the arms embargo and that it is only the latter which matter when determining state responsibility. However, it is far from clear that what is in contemplation here consists in conduct contrary to those purposes. Certainly the principal purpose of the arms embargo is unambiguous: it is (as stated in the founding resolution, SC 733), "to contribute to peace and stability in Somalia" in the context of a situation deemed by the SC to constitute "a threat to international peace and security" within the meaning of chapter V11 of the Charter. But in doing so the SC appears to recognise that security includes personal security: for example, in Resolution 767, 1992 (para 7) it called upon all "parties, movements and factions in Somalia ... to take measures to ensure their security". Furthermore the UN Charter, of course, is based expressly on the principle of respect for, and observance of, human rights: see Article 55(c). Whether it can be an international wrong to act to respect a person's nonderogable human rights (in this case, the right to life) is heavily to be doubted: see Yassin Abdullah Kadi, Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities, joined cases C-402/05 C-402/05 P and C-415/05 P judgment 3 September 2008.

60. It is Professor Chinkin's opinion that payment for a military escort would work against the aims of re-establishment of peace and security, and disarmament. "Having recourse to paid armed militia", she states at paragraph 51 of her report, "might contribute to increasing tension, the militarisation of society and insecurity in Somalia". That is a credible opinion and one to which we attach significant weight. However, an equally credible argument could be put forward for saying that such recourse would accord with the basic objects and purposes of the embargo. Take for example a Somali national lawfully settled in the UK who upon learning that her mother is critically ill and likely to die soon decides that in order to protect her own life on the journey home to see her mother, she should arrange for a paid armed escort. Let us suppose that before making this arrangement she contacts the Foreign and Commonwealth Office to check whether it is lawful. As already noted, the right to life and to take steps to protect one's own life is both a peremptory norm of international law and a fundamental human right guaranteed by the Charter (Art 55). Is it seriously to be suggested that the only lawful advice to give her would be that such an act would be in breach of the UN arms embargo? It would be an act intended to afford her personal security.

61. We accept, of course, that all that is taken issue with in this case is the prospect of *paid* protection. However it cannot be said that payment to non-state actors for protection is intrinsically contrary to any rule of law, national or international. Many states, including the UK, allow for protection by private security services.

62. Indeed, it could well be argued that refusal to permit a civilian to ensure protection though payment in a situation of armed conflict could itself constitute a violation of international law. SC 1814, 15 May 2008, states that the Security Council:

> "*Reaffirms* its previous resolution 1325 (2000) on women, peace and, security, and 1674 (2006) on the protection of civilians in armed conflict, and stresses the responsibility of all parties and armed groups in Somalia to take appropriate steps to protect the civilian population in the country, consistent with international humanitarian law, human rights and refugee law, in particular the avoiding of any indiscriminate attacks on populated areas." (see also Resolution 1801, 20 February 2008)

63. Professor Chinkin averred in her report that the SC resolutions only contemplate protective functions being carried out by governmental forces (the TFG) or ANISOM and that this is borne out by the fact that there are specific exemptions to cover such functions. Thus she writes at paragraph 54 of her report that:

> "While the functions of armed escort groups could come within 'protective use' (Resolution 1356, para 3) there is no suggestion that their weapons are intended to be 'non-lethal' ...The exemption from the embargo on 'supplies and the technical assistance by States intended solely for the purpose of helping develop security sector institutions' emphasises the importance the SC places on the process of national security sector reform, not the continuation of multiple armed groups. Payment to armed militia does not come within the exemption and there has been no decision from the Sanctions Committee suggesting that it does."

64. We have some doubts that the arms embargo resolutions intend to define exemptions exhaustively. For example, one of the most recent SC resolutions on Somalia emphasises the duty on all states to "protect merchant shipping" against piracy (1772, 20 August 2007, para 18), but there is no exemption for financial assistance given to provide such protection. But even assuming she is right that there is nothing exempting payment to militia escorts, neither is there anything in any of the resolutions that proscribes the carrying of arms for protective purposes. Indeed the resolutions could be said to be premised on the recognition that the normal protective functions of the government authorities have largely broken down. The resolutions cannot be taken to mean that the population of Somalia must either rely on protection from the TFG or ANISOM or accept that they are wholly unprotected. 'Scrupulous' observation of the arms embargo cannot be understood to require individuals to needlessly expose themselves to danger.

65. Lest it not be forgotten as well that what is contemplated here is a number of small individual transactions amounting, at least on costing set out by Professor Chinkin at her para 5 on the basis of the UK Home Office, BIA, Report of Information Gathering Mission, 27-30 April 200, to be between $100 - $1,000 dollars for a 50-100km journey. Regardless of what we say above, such amounts may well fall foul of the de minimis rule in international law (de minimis non curat lex). We recognise that Professor Chinkin took the view that the SC resolutions intended to cover even small financial transactions. This could be inferred, she said, from the coverage given to transactions involving ammunition, small arms and single use weapons. But in our view such references are neutral as to the question of the volume of arms involved in any one transaction. It may well be that the Sanctions Committee (see para 36 above) has never identified any concern with very small-scale individual transactions because such would have no discernible bearing on the state of peace and security in the country.

66. All in all we find the contention that taking account of the ability of returnees to pre-arrange armed militia escorts would be contrary to the Orders in Council and UN law to be untenable. In any event, as explained at the outset, because it goes to method of return, we do not consider that it is an issue which comes within our jurisdiction in the context of immigration decisions made against nationals of Somalia in the current period.

67. Before turning to our assessment of the evidence relating to conditions in Somalia, we need to address certain other legal issues.

Protection Issues and Armed Conflict

68. Central to these appeals is whether it is possible for a national of Somalia being returned to his or her home area to establish a need for international protection or Article 3 protection. As already indicated, as a result of the implementation of the Qualification Directive in the 2006 Protection Regulations and Immigration Rules, we are obliged to consider such a person's eligibility for refugee protection, eligibility for humanitarian protection and eligibility for Article 3 ECHR protection - and in that order.

Refugee Protection

69. As regards refugee protection in situations of armed conflict, the leading authority is Adan [1998] 2 WLR 703, which, of course, concerned a claim made by a national of Somalia in the 1990s. The Tribunal has continued to place strong reliance on this authority: see e.g. HH para 125. And indeed the respondent at para 23 of her skeleton relied on it for the bald proposition that "[t]he killing and torture incidental to a clan and sub-clan based civil war do not give rise to a well-founded fear of persecution when the asylum seeker is at no greater risk of such ill-treatment by reason of her clan or sub-clan membership than others at risk in the war." In view of what we go on to say about the current situation in Somalia, it is important, however, to clarify the ambit of this decision. First, although their lordships formulated their legal guidance in terms of "civil war", the very fact that what they contemplated was a situation of "fighting between clans…" (p.711A) where "law and order has broken down" and "every group seems to be fighting some other group or groups in an endeavour to gain power" (705B) demonstrates that they did not intend to use "civil war" as a term of art and that the fighting they described amounted to (what some 10 years later, is now widely accepted as better and more precisely described as) a situation of (internal) armed conflict. Second, their legal guidance was not confined to a situation of civil war/armed conflict in which there is no government. Their lordships very consciously sought to address, in the light of academic authorities and leading overseas cases, how decision-makers should approach refugee claims brought by persons fearing return to situations of war or armed conflict in general (704-705; see also the Court of Appeal's application of Adan's guidance in Romain Kibiti v Secretary of State for the Home Department [2000] Imm AR 594, in which Buxton LJ on p.599 stated: "In our judgment the current situation in the Democratic Republic of Congo is properly to be described as 'civil war', and within the ambit of that description in Adan" (see also pp.600-601)). Third (and contrary to one of Mr Toal's submissions) their lordships in Adan were not simply concerned to find that a situation of civil war/armed conflict did not give rise to a Refugee Convention ground; they were clearly concerned also with whether such situations gave rise to persecution: as Buxton LJ put it in Kibiti, summarising Adan:

> "…

(3) In a civil war situation, a person can only claim the protection of the Convention if he has a fear of persecution over and above that attaching to his involvement in, or with, the civil war *and, further*, that that persecution is for a Convention reason" (ibid, p. 598) (emphasis added).

70. The other point is this. The opinions of their lordships in Adan were based on a distinction between two types of harm: harm inherent in the ordinary incidents of civil war/armed conflict and harm involving risks over and above such incidents. At p.705 Lord Slynn of Hadley stated that in a situation where law and order had broken down and every group was fighting some other group or groups in an endeavour to gain power:

"…what the members of each group may have is a well-founded fear not so much of persecution by other groups as of death or injury or loss of freedom due to the fighting between the groups. In such a situation the individual or group has to show a well-founded fear of persecution over and above the risk to life and liberty inherent in civil war."

(At p.713B Lord Lloyd of Berwick used the words "over and above the ordinary risks of clan warfare".)

71. At p.713B-C Lord Lloyd of Berwick noted Mr Adan's claim that males of his own sub-clan were particularly at risk because they had attacked a militia stronghold of the main opposing clan, adding:

"But I do not consider that this throws doubt on the Tribunal's conclusion that all sections of society in northern Somalia are equally at risk so long as the civil war continues. There is no ground for differentiating between Mr Adan and the males of his own or any other clan."

72. Two observations are pertinent here. We do not take their lordships to have been intending to say that in a situation of armed conflict there could not be persecution solely because those affected were equally at risk. That they cannot have intended such a reading is clear from their express recognition elsewhere in this decision that (citing Hathaway) "[i]t is not necessary for a claimant to show that he is more at risk than anyone else in *his* group, if the group as a whole is subject to oppression": see also p.710 G-H, 711 D-G, 713 A. We accept that Lord Lloyd in one place (at p.712 A-C) appeared to suggest that group persecution can only arise in a country not in a state of civil war, but such a suggestion is not supported by any reason and runs counter to his own underlying logic. If we are correct that disposes, it seems to us, of one of the main criticisms levelled at Adan in some overseas cases (e.g. the two cited by Mr Toal, Refugee Appeal No.71462/99 (RSAA, NZ) and Minister for Information v Haji Ibrahim [2000] HCA 55), since that criticism depends on the view that where there is group persecution, it is erroneous to require a person to show harm "over and above" that which each member of the group faces collectively. Adan acknowledges this.

73. The other observation is this. Their lordships appear to have given little thought to the relevance of an international law approach to assessing refugee eligibility in a country of return afflicted by armed conflict. In seeking to brush aside attempts by Nicholas Blake QC to establish the relevance of such a framework, Lord Lloyd stated at p.711B:

"What then is the critical factor which distinguishes persecution from the ordinary incidents of civil war? Mr Blake sought to draw a distinction between the armed forces of either side, who would, he said, be governed by the rules of war, and the targeting of individual civilians or groups of civilians. I doubt, however, whether in the context of clan warfare in Somalia, it is realistic to think in terms of rules of war, or the conventional distinction between civilians and members of the armed forces. Mr Adan's own evidence was that most of the population is armed."

74. This passage reminds us of the need for caution in seeking to apply the guidance in Adan over 10 years later. Since Adan, the House of Lords has adopted a different approach to the concept of persecution (defining it in Horvath [2000] Imm AR 552 (HL) in terms of severe violations of basic human rights) and since October 2006 we must now apply the (highly similar) international human rights-based definition set out in Article 9 of the Qualification Directive as implemented in Reg 3 of the Protection Regulations. Further, the notion that "ill-treatment" (to use the wording of Adan) or "…torture" (to use the word given in the respondent's skeleton at para 23) cannot be persecutory simply because the situation is one of wartime, not peacetime, is contrary not only to international human rights law but also to domestic law, the Human Rights Act 1998 in particular. According to the latter the only human rights guarantees that can cease to apply in time or war are *derogable* rights: see Article 15 of the ECHR. Whether one treats international humanitarian law or international human rights law as lex specialis in relation to situations of armed conflict, under neither legal framework can violations of nonderogable human rights be permitted in wartime: see NA v UK Application no. 25904/07 17 July 2008, BE (Iran) [2008] EWCA Civ 540 and KA para 48.

75. In addition we must apply Adan knowing that the House of Lords and the Court of Appeal have since applied the laws of war quite readily in refugee claims in the context of armed conflict (see Sepet and Bulbul [2003] UKHL 8 and Krotov [2004] EWCA Civ 69) as well as in non-refugee contexts: see R (On the application of Al-Jedda) v Secretary of State for Defence [2007] UKHL 58. We have to apply Adan in the context that since then, as the above cases reflect, there have been important developments in customary international law and in international human rights law, with the accretion of considerable case law dealing with armed conflict by the ECtHR in cases where breaches of Articles 2 and 3 are at issue (e.g. Isayeva v Russia App.nos 57947/00, 57948/00 paras 168-200, building, inter alia, on Ergi v Turkey (66/1997/850/1057), 28 July 1998) and by international tribunals dealing, inter alia, with the Former Yugoslavia and Rwanda and Sierra Leone, and now the International Criminal Court, where breaches of international humanitarian law and international criminal law are at issue. It is inconceivable, in the light of these developments, that any court or tribunal would seriously suggest today in situations of armed conflict such as have characterised Somali affairs that the absence of "the correct distinctions between civilians and members

of the armed forces" precluded application of peremptory norms of international law. Nor would it be seriously suggested that the mere carrying of a weapon meant that a person was a combatant and not a civilian (a suggestion carrying the alarming implication that Somalia would be seen to have relatively few civilians!). In any event, even as early as 1992, SC resolutions on Somalia, establishing binding obligations on states, have all been predicated on Somalia being a situation in which there are large numbers of civilians (or "non-combatants") in need of protection against armed violence: see e.g. Resolution 733, 23 January 1992 paras 8 and 11, Resolution 794, 3 December 1992, preamble. In more recent years the resolutions have made abundantly clear the SC view that the rules of war do apply to the situation in Somalia. For example, Resolution 1772, 20 August 2007 stresses:

> "the responsibility of all parties and all armed groups in Somalia to take appropriate steps to protect the civilian population in the country, consistent with international humanitarian law, human rights and refugee law, in particular by avoiding any indiscriminate attacks on populated areas."

76. The above developments also call in our view for a careful analysis of what their Lordships in Adan should be taken to mean by referring to the *"ordinary risks* of clan warfare". Whilst it is clear that they did not have in mind specifically any distinction based on the laws or rules of war, we cannot avoid seeking to give ongoing content to the distinction. Bearing in mind the aforesaid developments in international law (and in the Somali context, the clarification by the Security Council of the relevance to Somalia of the rules of war), we consider that, compatibly with the ratio in Adan, the most sensible content to be given to this distinction is between acts of armed conflict which accord with the laws of war and acts which do not. Civilians caught in the crossfire between armed groups will not normally face anything other than the ordinary incidents of civil war. But if, for example, one of the parties has deliberately stationed themselves next to a crowded marketplace and the other side knows – or ought to know - that, yet launches an attack, then there is a risk to civilians in that marketplace over and above the ordinary incidents of civil war. In the latter type of situation, there is a real risk of serious violations of peremptory norms of international humanitarian law and human rights law.

77. It follows from the above analysis that when considering the question of whether either appellant is eligible for refugee protection on the basis of exposure to the armed conflict, Adan does not permit decision makers to reject their claim per se.

Poor socio-economic conditions and refugee protection

78. In her skeleton argument at para 25 the respondent advanced the contention that it would be wrong "as a matter of principle" to consider that a claim, based on a person's fear of being compelled on return to subsist in an IDP camp, fell within the Refugee Convention. In the same paragraph she added:

> "[T]he prevailing economic conditions in a society which are experienced either by all its members or a section of its members cannot amount to persecution for the purposes of the Refugee Convention. It is clear from a number of authorities that the purpose of the Refugee Convention is not to enable people to escape dire economic conditions, but to protect them from deliberate ill-treatment on Convention grounds."

79. We disagree, at least insofar as this argument is directed at the meaning of persecution, rather than the requirement under the 1951 Convention to show a Convention ground or reason. The meaning of persecution is set out at Reg 5 of the 2006 Protection Regulations and (we repeat) in terms which in our view can be taken broadly to mirror that which has been accorded by the UK courts and this Tribunal (and its predecessor) since Horvath [2000] Imm AR 552 (HL). Given that persecution must be seen, therefore, as harm in the form of severe violations of basic human rights, it could only be right "as a matter of principle" to exclude claims based on forced subsistence in an IDP camp if human rights law precludes it. But, as we shall go on to explain, human rights law does not preclude it. Albeit holding that claims for protection against refoulement based on dire socio-economic circumstances are normally not decisive when considering Article 3 ill-treatment, the Strasbourg Court has not excluded that in certain extreme circumstances, such circumstances could give rise to a violation of a nonderogable right: see below paras 86-88. Further, as has been made clear by the Court on many occasions (e.g. in Kalashnikov v Russia [2002] ECHR 596) and by UK courts and the Tribunal, for ill-treatment to arise under Article 3, it does not necessarily have to be intentional or deliberate: see R (On the appellant of Adam v Secretary of State for the Home Department [2005] UKHL 66; [2006] 1 AC at [55]. Hence, whilst there will always be heavy factual obstacles in the way of a finding that socio-economic circumstances can constitute persecution, there is no reason of principle why a claim of this kind cannot succeed.

Refugee Convention reason

80. Mr Toal's submission was that if we found the appellants faced a real risk of persecution, we should find no difficulty in concluding that they would face such persecution for a Refugee Convention reason. Miss Laing disputed all his proposed reasons. We shall come back to that issue later on, since, quite properly, Mr Toal's proposed reasons were tied very much to the factual situation in Somalia.

Article 15(b) protection and Article 3 protection

81. In our view, rather similar observations to those just made in relation to persecution apply in relation to Article 15(b) of the Qualification Directive and Article 3 of the ECHR, which both provide a guarantee against torture or inhuman or degrading treatment or punishment. Unlike Article 15(c), neither of these provisions imposes, as a requirement for eligibility for protection, that there be a situation of armed conflict. They apply in any situation, whether one of war or peace. That they can

apply in situations of armed conflict is clarified by Strasbourg jurisprudence. Although the latter deals with Articles 2 and 3 of the ECHR, it is clearly a relevant source for interpreting the very same words used in 15(b). It will suffice for present purposes to make the points we need, therefore, under the sub-heading below dealing with Article 3 of the ECHR.

82. Nothing arises in these appeals under Article 15(a). We shall deal with humanitarian protection under Article 15(c) separately below.

Article 3 of the ECHR

83. One reason why we deal separately with the law on Article 3 of the ECHR is in order to address Mr Toal's submission that the Tribunal was wrong in HH and KH to say that in an armed conflict situation a "differential impact" had to be shown in order for a claimant to show not only a real risk of persecution (Adan) but also a real risk of Article 3 ill-treatment. In his skeleton argument, Mr Toal contended that none of the leading Strasbourg cases on Article 3 imposed a requirement to show a differential risk (paras 41 – 57). We disagree. All of the leading Strasbourg cases rely in part on a principle of comparison or differentiation. In Vilvirajah v UK (1991) 14 EHRR 248 for example, the Court at paragraph 111 stated:

> "The evidence before the court concerning the background of the applicants, as well as the general situation, *does not establish that their personal position was any worse than the generality of other members of the Tamil community or other young male Tamils who were returning to their country*" (Emphasis added).

84. The only proviso the Court attaches to reliance on such a differential analysis is that, when a population or group faces such a degree of risk that all members of the group are exposed to it individually, then there is no need to show by comparison any other personal distinguishing characteristics. That is the proviso or exception which is cited most clearly in NA v UK, paras 115-118. In our view what the Tribunal said in HH and KH as regards differential impact is entirely consistent with the jurisprudence of the Court in such cases (see e.g. para 306 of HH). We should add that we found Mr Toal's further submission, that a differential risk analysis was inconsistent with the principle of non discrimination, entirely fanciful. Not only does the Court itself rely in part on such a principle (see above), but Mr Toal's argument confuses the difference between levels of risk with the existence of illegitimate grounds for risk.

The ECHR and situations of armed conflict

85. Mr Toal sought to argue that both appellants were entitled to succeed, not just on refugee grounds, but also on humanitarian protection and human rights grounds by virtue of principles established by Strasbourg in cases raising Articles 2 and 3 issues dealing with situations of armed conflict. These principles established, he said, that in the absence of evidence that military operations were planned and conducted so as to minimise to the greatest possible extent possible recourse to lethal force and to minimise risk to the lives of civilians when using such force, the inference should be drawn that any civilian deaths were unlawful within the meaning of Articles 2 and 3 ECHR (and under Article 15(b) of the Qualification Directive). He prayed in aid, among others, the case of Ergi v Turkey [1998] ECHR 59 and Isayeva v Russia [2005] ECHR 128. We think he is perfectly entitled to seek to rely on the potential relevance of such cases and we note that the respondent in KH took the view that such cases should also form the main interpretive source for Article 15(c). However, we cannot read them without taking into account that the Court was not concerned in them with refoulement issues (nor was it applying the lower standard of proof apt for dealing with such issues ("substantial grounds for believing…")). Moreover, whether such issues arise under Article 2 or 3 of the ECHR (for a case dealing with them under Article 3, see Muslim v Turkey [2006] ECHR 16), the same important consideration arises when seeking, as in these appeals, to consider whether broad categories of persons having no distinguishing characteristics other than being civilians or some sub-category of civilians, can be said to face a real risk of treatment contrary to nonderogable human rights. In this regard, we see no significant difference between UK case law on "real risk" as set out in Harari [2003] EWCA Civ 807 Batayav [2003] EWCA Civ 1489 and AA v Secretary of State for the Home Department [2007] EWCA Civ 149 (which identify the need for there to be a "consistent pattern") on the one hand and ECtHR jurisprudence on the other, and in particular what was said by the ECtHR recently in NA v UK at paras 116:

> "116. Exceptionally, however, in cases where an applicant alleges that he or she is a *member of a group systematically exposed to a practice of ill-treatment*, the Court has considered that the protection of Article 3 of the Convention enters into play when the applicant establishes that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned (see Saadi v. Italy, cited above, para 132). In those circumstances, the Court will not then insist that the applicant show the existence of further special distinguishing features if to do so would render illusory the protection offered by Article 3. This will be determined in light of the applicant's account and the information on the situation in the country of destination in respect of the group in question (see Salah Sheekh, cited above, para 148)." (Emphasis added)

Article 3 and poor socio-economic and humanitarian conditions

86. It is also necessary for us to address one particular submission raised by the respondent concerning Article 3 and poor economic and humanitarian conditions experienced by IDPs. Much of what is said about this in the skeleton in uncontroversial. At paragraphs 35 – 51 she correctly notes, for example, that the Court observed in NA v UK that, whilst not wishing to detract from the:

> "acute pertinence of socio-economic and humanitarian considerations to the issue of forced returns of failed asylum seekers, such considerations do not necessarily have a bearing, and certainly not a decisive one, on the question of whether the persons concerned would face a real risk of ill-treatment contrary to Article 3" (paragraph 141).

Earlier in the same judgment, the skeleton also reminds us, the Court had said that "a general situation of violence will not normally in itself entail a violation of Article 3 in the event of expulsion" (paragraph 114).

87. However, the way in which the respondent seeks to apply such general principles to IDPs is much less free from controversy. In paragraph 53 of her skeleton, Miss Laing submits that "of and by itself, poor humanitarian conditions in Somalia, even if in an IDP camp, would not establish an Article 3 breach". In our view this resembles her earlier submission regarding such claims brought under the Refugee Convention and we reject it for similar reasons. Whilst the Strasbourg Court has made clear that such claims could only succeed in extreme circumstances, it has expressly not excluded them entirely (see Pancenko v Austria App.no. 40772/98 and HS (returning asylum seekers) Zimbabwe CG [2007] UKAIT 00044, para 59). Indeed, the approach taken by the Court in NA v UK, para 116, when dealing with "situations of general violence" is one which would be equally applicable if one substitutes the words "poor humanitarian conditions":

> "The Court has never excluded the possibility that a general situation of violence in a country … will be of a sufficient level of intensity to breach Article 3. Nevertheless the court would only adopt such an approach in the most extreme case of general violence, where there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return."

88. We also think Mr Toal is on stronger ground when he points out, in his closing written submission, that the ECtHR has not treated the categories of "treatment" which can give rise to breaches of Article 3 as closed or subject to exhaustive definition and, through a number of cases, has made clear that it applies it to a diverse and disparate range of acts and omissions: see e.g. Moldova v Romania (No.2) (2007) 44 EHRR 302, Cyprus v Turkey (2002) 35 EHRR 30, Kurt v Turkey (19987) 27 EHRR 373, Z v United Kingdom (2002) 34 EHRR 3.

89. We shall have cause, later on, to examine how the Tribunal has sought, and should now seek, to apply such principles to persons basing their claims on being compelled to subsist in an IDP camp.

Article 15(c)

90. Not surprisingly, in view of the terms of the two decisions as to material error of law, both parties made detailed submissions on Article 15(c). We do not mean any disrespect by not summarising them in full; indeed we found both very helpful. But the Tribunal gave a very detailed analysis of Article 15(c) in KH, which in turn built on HH. The parties' submissions fell into two parts: points agreeing and points disagreeing with KH. (The former included references to relevant cases before international criminal tribunals.) In our view only the latter requires further treatment by us.

91. Dealing first with Mr Toal's points of disagreement, we were not persuaded by them to depart from the reading given in KH to the term "life or person". The underlying logic applied in KH was that one has to look to the meaning given by customary international law of a very similar provision in common Article 3(1)(a) of the 1949 Geneva Convention. In that context, Mr Toal's appeal to what the phrase "life or person" meant in Article 3(1)(c) or in other treaty provision could not be determinative. The Tribunal in KH, by accepting at para 104 that the term "must encompass the means for a person's survival" ensured the phrase "life or person" was afforded a purposive meaning. But giving such a broad reading did not entail that it should be taken out of its 3(1)(a) context and elided with wider notions of physical and moral integrity, humane treatment or "full respect for human dignity" found in common Article 3(1)(c) or in other treaty law. We did not find helpful Mr Toal's proposal that we interpret the word "threat" in Article 15(c) as meaning a "likelihood of harm", since the latter notion appears to denote a standard of proof, which is the function of Article 2(c) of the Qualification Directive, not 15(c).

92. Mr Toal's submission on the meaning of the word "serious" largely repeated those made by Mr Raza Hussain in KH and we reject them for the same reasons. Indeed, Mr Toal's additional suggestion at para 36 of his skeleton argument, that "serious" had a meaning similar to "flagrant breach" within human rights case law (he cited Ullah [2004] UKHL 26) would have the effect, if accepted, of erecting a threshold of gravity much higher than that set by KH. With great respect, Mr Toal's submissions on the word "individual" betray a misconceived understanding of the term "differential impact" as used by the House of Lords in Adan and the Tribunal in HH (para 308) and KH (para 123). Their Lordships in Adan clearly applied this text in the context of deciding whether there was a real risk of persecution, not whether that risk was for a Convention reason. As Adan and KH make clear, if all members of a group are at risk of persecution or serious harm, they are able to show they face a risk over and above those of a group of individuals that does not face such a risk. Contrary to what Mr Toal's skeleton asserts, the ECtHR in NA v UK did not reject a comparative test: rather they simply pointed out one exception to it: that when everyone in a group faces a real risk of ill-treatment, then there is no need for any further personalisation of the risk. In any event Mr Toal's own suggested formulation at para 56 of his skeleton comes markedly close to the reasoning given to "differential impact" by the Tribunal in HH and KH (Mr Toal's says there that the test should be "to require the individual to demonstrate by means of individualised assessment of his claim for protection (see Art 4(3)) that he personally faces the real risk of serious harm").

93. There is one point made by Mr Toal in relation to Article 15(c) that we wish, gratefully, to adopt. It was not so much made as a correction to KH, but rather as an addition. It concerns his proposed reading of the causal requirement within Article 15(c), for a person to show a serious and individual threat "*by reason of* indiscriminate violence". KH had highlighted the importance of this requirement (see para 61) but had not offered any amplification: Mr Toal noted that in a different statutory context Lightman J construed the same phrase ("by reason of") as meaning an effective cause (Prestige Properties v Scottish Provident Institution [2002] EWHC 330 (HC 395) 2 All ER 1145) and that in the field of refugee law itself the UK courts had

taken the same view in respect of the very similar phrase "for reason of", stating that the causal requirement (to show that persecution is on account of a Refugee Convention ground) is satisfied if the ground is one, albeit not necessarily the only, operative reason for the feared persecution. He cited R (Sivakumar) v SSHD [2003] 1 WLR 840 (the same point was made in Shah and Islam [1999] 2 AC 629 (HL)).

94. We find this is a helpful elaboration. Within the context of Article 15(c) Mr Toal submitted that this meant that the serious harm involved did not have to be a direct effect of the indiscriminate violence; it was sufficient that there was a causal nexus of some kind.

95. At para 13 of his skeleton he wrote:

> "This represents a significant distinction between Geneva Convention common Article 3(1)(a) which talks of 'violence to life and person' and [Article 15(c)] which talks of 'threat to…life or person by reason of…violence'. By way of example, indiscriminate shelling of a civilian neighbourhood may cause death and wounding to civilians. Those deaths and woundings would plainly be 'by reason of' the indiscriminate violence. Equally, it is submitted, if in consequence of that violence, the surviving civilian population was displaced to a region in which it was likely to die of starvation and disease, those consequences would also be 'by reason of' the indiscriminate violence…"

96. Earlier Mr Toal, when dealing with the term "indiscriminate violence" referred to the approach taken by the ICTY in the case of Kupreskic (2000) IT-95-16-T to attacks on civilians which are cumulative. It was stated that single attacks on civilians, which if taken individually do not fall foul of the laws of war, may, if repeated, give rise to a "pattern of military conduct" excessively jeopardising the lives and assets of civilians, contrary to the demands of humanity.

97. The only caveat we would make to Mr Toal's elaboration of "by reason of" is that in order for the indiscriminate violence to be an "effective cause", it clearly cannot extend to include consequences that are connected only remotely.

98. We should add, however, that we do not think Mr Toal was right to contend (in para 16 of his skeleton) that HH adopted an approach inconsistent with the use he advocated. What was said at para 345 of HH was intended as a convenient summary of the Article 15(c) test; elsewhere HH clearly recognised the importance of the causal requirement: see e.g. para 347.

99. Miss Laing's submissions on Article 15(c) were largely a summary of the Tribunal's case law in HH and KH, although she did indicate that the Secretary of State reserved her position on the issue of whether key terms in Article 15(c) were to be given an IHL reading. On what KH saw as the only point of difference between it and HH, relating to the relevance of criminal violence, she urged us to follow KH.

100. A good deal of the submissions were comprised of arguments concerning whether the conflict in Somalia was an "internal armed conflict" in the requisite international humanitarian law (IHL) sense. Since this was almost entirely an argument not about the legal criteria but about their application, it is convenient if we deal with it later on.

Advocate General's Opinion in Elgafaji

101. Albeit Miss Laing in broad terms asked us to follow the guidance on the reasoning of Article 15(c) given in KH, she did, in response to a direction from the Tribunal, outline the analysis of this provision as given by the Advocate General (hereafter "AG") in Elgafaji, 9 Sept 2008 in Case C-465/07 a case referred to the European Court of Justice (ECJ) by the Dutch Council of State. We are disappointed that despite our clear direction seeking both sides' views on whether as a result of this Opinion the Tribunal should revise its own analysis, neither party raised their head above the parapet. Miss Laing would not be drawn and Mr Toal was content to submit that we should regard the Opinion as "confused".

102. It would be wholly remiss of us to ignore the AG's Opinion simply because the parties chose (largely) not to engage with it. The opinion of an AG is not binding on the Court, but he is a full time member of the Court and his (or her) opinion " is very influential, and in fact followed by the Court in the great majority of cases." (P Craig and G de Burca, EU Law, 3rd Ed p.94). At the same time, if in fact that Opinion is consistent with our national case law, there is little more that needs saying.

103. However, whilst most of the points made by the particular opinion with which we are concerned chime with our own case law, some are seemingly at odds.

Points of accord

104. Looking first at points of accord, the AG's Opinion reaffirms the principle that the terms of Community legislation are to be given an autonomous definition. At para 19 he states that:

> "Community provisions, irrespective of which provisions are concerned, are given an independent interpretation which cannot therefore vary according to and/or be dependent on developments in the case law of the ECtHR".

105. Although perhaps obvious enough, this comment provides a timely warning against any attempts by national decision-makers to define key terms of the Directive by renvoi to national law or to treat Strasbourg jurisprudence as definitive of their meaning.

106. The Opinion acknowledges the need to draw on the case-law of the ECHR which should be taken into account in the interpretation of Article 15(c), thereby indicating that the recommended approach is to build on existing extra-Refugee Convention protection principles based squarely on international norms. Again, if obvious enough, this clarification does act to warn Member States against approaches to interpretation based primarily on domestic standards (e.g. as to the meaning of serious harm). By endorsing the validity of decision-makers continuing to draw on ECHR norms as a source, the AG helps ensure they base themselves on objective criteria established in European and international law: to similar effect, see KH, para 39.

107. The AG also promotes a human rights approach to interpretation. In the same way as refugee jurisprudence has increasingly come to give key terms under the Refugee Convention a human rights reading (in order to provide an objective basis for making decisions), defining persecution for example in terms of severe violations of basic human rights, so his recommended approach to the concept of "serious harm" is to give it a human rights reading. Once again, this promotes a more objective basis for decision-making and makes clear that the concept of international protection (consisting in refugee and subsidiary – or in the UK context, humanitarian - protection) is given a unitary interpretation. But we have a caveat to this point, which arises shortly.

108. Like HH and KH, the AG has chosen not to disregard the recital which complements Article 15(c), recital 26 (this states that "[r]isks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm"). Several commentators, including UNHCR, in its November 2007 study, Asylum in the European Union and in a January 2008 statement, "Subsidiary Protection under the EC Qualification Directive for people threatened by indiscriminate violence", have called for recital 26, which complements Article 15(c), to be "read down". But to adopt that approach would cut across existing canons of construction of Community legal texts which regard the preamble as a most important aid in determining the scope and purpose of a directive, and as being a provision, which, although having no legal force in itself, should only yield in the face of a contrary provision of the directive (Case C-184/99 Grzelcsyk [2001] ECR I-6193 para 44): to similar effect, see KH, para 26.

109. Another point of consonance is that the AG's Opinion resists giving an interpretation which would have been vulnerable to the criticism that Article 15(c) was essentially otiose, or a mere particularisation of Article 15(b). That would have offended the EU principle of *effet utile:* see KH, para 128. Although not for entirely the same reasons both KH and the AG Opinion agree that Article 15(c) must have some "added value" (KH, paras 28-31) or scope "supplementary to" both Article 3 and Article 15(b) and (a) (AG's Opinion, para 27).

110. Another issue on which we discern no real difference between our case law and the AG's Opinion is that he rejects an interpretation of the concept of "individual threat" which would require a person to show he faces being singled out or uniquely or personally targeted or has, in his words at para 28, "features particular to him". It also endorses the notion that a class of persons who are collectively targeted may sometimes all be individually targeted. At para 34 he states that Art 15(c) is intended to cover "situations of indiscriminate violence which is [are] so serious that, as the case may be, *any individual within the ambit of that violence may be subject to a real risk of serious harm to his person or life."* As he puts it at para 35, "[t]he distinction between a high degree of individual risk and a risk which is based on individual features is of defining importance". Not only does that notion accord with HH and KH, it also accords with common sense and our sense of history, both recent (Tutsis in Rwanda) and not so recent (Jews in Nazi Germany). We would add that we consider his Opinion is particularly helpful in suggesting how the tests in Article 15(c) need to be applied depending on the particular circumstances of an individual case. Our focus in these appeals is on alleged risks to relatively broad categories, e.g. civilians per se. But in many cases there will be many more facts about an individual claimant that will need to be assessed. In this context what the AG proposes at para 37 is that:

> ".. the more the person is individually affected (for example, by reason of his membership of a given social group), the less it will be necessary to show that he faces indiscriminate violence in his country or a part of the territory which is so serious that there is a serious risk that he will be a victim of it himself. Likewise, the less the person is able to show that he is individually affected, the more the violence must be serious and indiscriminate for him to be eligible for the subsidiary protection claimed."

Points of possible discord

111. The ECJ judgment on Elgafaji is expected within the next few months, but that cannot relieve us of the need to clarify why we find difficulty with, and do not follow, the AG's Opinion in its entirety.

112. It does not surprise us that his Opinion makes no mention, for example, of either the UK Tribunal cases, HH or KH, or the decision of the Supreme Federal Administrative Court in Germany (Germany's court of final instance in asylum matters, which expressly mentioned and broadly approved the approach taken in KH), each of which has tackled Article 15(c) in considerable detail. It is not in the tradition of the Luxembourg process to refer to national cases, albeit it might be thought desirable, at least in the context of an entirely new area of ECJ jurisdiction, that an AG opinion at least show conversance with existing national case law approaches. The idea of a jurisprudential blank slate is not easy to reconcile with the notion of the "European legal order" as being a shared responsibility between the ECJ and national judges (see C-117/01, C-101/01). It may be that the fault here lies in part with the ECJ reference process, which (unlike the Strasbourg process) does not encourage the ECJ judiciary to have regard to this dimension since it is only the Member State executives and European institutions, including the Commission, which have a right to make submissions. But more important are the following matters.

113. Despite highlighting the importance of "methodology of interpretation", the AG's approach to Article 15(c) is to seek to interpret two of its main provisions without reference to the wording of the provision read as a whole. It focuses exclusively on the terms "serious and individual [threat]" and "indiscriminate violence" without giving any consideration to whether understanding of the proper meaning of these terms is to be gained by looking at the *other* key terms: "…threat" or "civilian's life or person" or "international or internal armed conflict". It also says nothing about the causal requirement "by reason of indiscriminate violence". This approach might be likened to a house survey of a five bedroom house which inspects the living room and the kitchen and then looks no further. It presupposes, for no apparent good reason, that the provision is comprised of discrete, rather than interlocking, elements. Of course, as a matter of EU law, the approach to interpretation has to be purposive or teleological, but by trying to define key terms in isolation from one another, it might be said that the AG prevented himself from considering the purposive implications of the provisions read as a whole. It may be that the (selective) terms of the Dutch reference have encouraged this (selective) approach (it would seem the Dutch Council of State considered the armed conflict parts acte clair), but that may not be thought to resolve the apparent problem affecting such an approach.

114. It is acte clair that a person cannot come within the terms of Article 15(c) unless he can show he faces a situation of armed conflict. That is the most obvious difference between it and 15(b) which stipulates no situational requirement. Yet the AG's approach appears to proceed on the assumption that the relevant norms on the terrain of 15(c) are solely human rights norms, norms that apply in the same way irrespective of whether the situation is one of war or peace.

115. That is controversial for the following reasons. First, as already noted, wartime is a situation where only nonderogable human rights have application: see Article 15 of the ECHR. But since it may be that the AG's reference to serious violations of fundamental rights is meant to be confined to nonderogable human rights, we leave that reason to one side. Second, the personal scope of such rights protection depends crucially on whether an individual is a combatant or a civilian. In peacetime, if a person is shot at by a tank, that is very likely to be a serious violation of his basic human rights. But Article 15(c) is not about peacetime. It is about wartime. And (at international law), it is not in itself a serious breach of a person's basic human rights to be shot at by a tank if he is a soldier or insurgent. It is only so if he is a civilian and even then only if he is a civilian subjected to illicit acts of military violence. So what becomes crucial is knowing what the laws of war allow in relation to civilians. Seemingly the AG has overlooked a basic principle of international law when one is dealing with armed conflict situations: When the subject area is armed conflict the International Court of Justice has held that IHL is the "*lex specialis*" (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996 [1996] ICJ Rep 66) and, to the extent that the AG thinks it is all about fundamental rights, the ECtHR itself has consistently seen the ECHR as forming part of a wider body of international law, with which State parties must comply (see Bosphorus Airways, Application no. 45036/98 at para 150, Al-Adsani v. the United Kingdom [GC], no. 35763/97, para 55, ECHR 2001-XI). It is true to say that when dealing with situations of armed conflict, the ECtHR, notwithstanding its declared fidelity to international law, has avoided analysis in terms of IHL, but, as noted in KH, para 48, when it has done so it has ended up articulating principles of proportionality and difference which are closely analogous to the laws of war: see e.g. Isayeva v Russia, paras 168-200. The AG's Opinion shows no sign of recognising the relevance of these.

116. Another way of putting the above is that the AG's adoption of a framework based on international norms appears untenably selective. Simply to treat international human rights norms as the "Grundnorm" overlooks that there are other co-existent peremptory international norms and that these are as binding on the Community legal order as are human rights norms. International obligations (including IHL treaties to which most Member States are a party) automatically form part of the laws of Member States and the EU: see Case-540/03 *Parliament v Council*. The rules of IHL (at least insofar as they constitute customary international law) are likewise binding upon the Community institutions and form part of the Community legal order: see C-162/96 *Racke* [1998] ECR 03655, paras 45-6.

117. This links to the most problematic aspect of the AG's Opinion, concerning his approach to the key Article 15(c) term, "indiscriminate violence". It is wholly sensible that the AG does not attempt any technical or exhaustive definition. But, in order to establish his own proposed interpretation, he appears to depend upon a particular approach to the meaning of the concept of "indiscriminate violence". As his paras 34 and 36 make clear, his approach depends on this term meaning *violence which does not have a discriminatory element*. In para 36 he states:

> "…However, the burden of proof will be greater in respect of demonstrating indiscriminate violence, which must be generalised (in the sense of non-discriminatory) and so serious that it raises a strong presumption that the person in question is the target of that violence**."**

118. What this appears to entail is that when deciding whether the violations of fundamental rights are so serious that every individual within their ambit is placed at real risk, the decision-maker can only have regard to one type of violence: the violence which has no discriminatory element. He can only have regard to that because Art 15(c) imposes a quite specific causal requirement: "serious and individual threat *by reason of* indiscriminate violence". It does not say "by reason of all violence, including indiscriminate violence". Put another way, he must disregard all (or at least all the direct) targeted violence. The difficulty here is that in most armed conflicts the overall level of violence will be made up of various types of violence, targeted as well as indiscriminate (in the AG's sense). Take the relentless shelling of Sarejevo in the early 1990s by Bosnian Serbs during the course of which hospitals, schools, shopping and commercial districts, religious sites and apartment complexes were hit. That was most certainly violence which had a discriminatory element, that of subduing the city's Muslim inhabitants. Take Iraq for example (at least for most of 2007/early 2008). Some of the actors were targeting each other because of religion (Sunnis versus Shias, Muslims versus Christians), some because of race or nationality (Sunni extremists versus Kurds, Palestinians

etc), some because of membership of a particular social group (e.g. patriarchal tribes against women seen to have committed crimes of honour). In the course of these types of targeted violence, there are civilians who get caught in the cross-fire and who in that way could be said to be victims of indiscriminate violence in the AG's sense. There are also insurgents who seek to spread terror without any real regard for who the victims are: they too could be said sometimes to be victims of indiscriminate violence in the AG's sense. But overall, limiting oneself to indiscriminate violence in the AG's sense appears to mean leaving out of the picture a huge amount of the violence going on.

119. Of course, under an alternative, IHL, reading of "indiscriminate violence" such as that given in KH, there is also an inevitable limitation, but it does not prevent counting in various types of targeted violence where the means or methods deployed offend the IHL principles of distinction and proportionality. Applied to situations in countries like Iraq and Somalia, the IHL approach, we think, allows for a more flexible and inferential approach to the types and levels of violence than the AG's. At the very least such an approach should be seen to inform in part the meaning of Article 15(c). We seek in this decision to identify a way of approaching the causal requirement in Article 15(c) – "by reason of indiscriminate violence…" - which further assists in deciding what violence in any particular society can be taken into account.

120. If we are right in our critique of the AG's Opinion, then, to follow the latter in full would mean ignoring relevant provisions of international law and would make it very difficult to take into account the realities of modern armed conflicts, whose evils often consist in the combination of targeted and indiscriminate violence. In view of the above, we are not persuaded that the AG's Opinion, whilst shedding valuable light on the way in which Article 15(c) is to be applied in the circumstances of any particular case, offers a tenable or workable interpretation. Save in the respects identified, we would reaffirm the approach taken to Article 15(c) in KH and (with one exception) in HH.

OUR ASSESSMENT: General

121. In order to assess whether either appellant faces risk on return to their respective home areas we need to set out our general conclusions on the situation of violence in the country, the nature of the current conflict and humanitarian situation and the extent to which Somalia is still a clan-based society. Bearing in mind what we said earlier about the en route travel issue, we will also set out our opinion, on an obiter basis, concerning the safety of certain routes from Mogadishu International airport.

122. Both Mr Toal and Miss Laing agree that since the Tribunal heard the appeals of HH in November 2007, the general situation in Somalia has deteriorated.

Historic validity of HH

123. However, part of Mr Toal's submission was that even in relation to the situation before November 2007, the Tribunal's findings in HH were flawed since they failed to take adequate account of significant evidence pointing to the situation then being much worse than was accepted. We do not find this part of his argument at all persuasive, since it plainly sought to rely on the assembling of only those items of evidence pointing in favour of his alternative view. Before the Tribunal will take seriously a challenge to the historic validity of a Tribunal country guidance case, we would need submissions which seek to adduce all relevant evidence, for or against, the proposed different view. A submission which simply selects all the items of evidence pointing in favour of one view, as did Mr Toal's skeleton argument, cannot pass muster.

124. In any event it seems to us that in terms of the factual content of those further items, the Tribunal was well aware of their subject-matter through other sources of evidence that were in fact before it. The only source of evidence identified by Mr Toal in his closing written submissions which he suggests was not taken account of by the Tribunal in HH was the Human Rights Watch Report: Shell Shocked: Civilians under siege in Mogadishu, August 2007. However, as he himself notes, the report was before the Tribunal in HH, being listed in the Appendix and also mentioned specifically in the course of summarising submissions on behalf of HH: see HH paras 189-193 and 245. Further, its report was based on a 6 week fact-finding mission to Kenya and Somalia in April and May 2007 (see p.112 of the report) and subsequent telephone research, whereas the Tribunal had to consider not only a great deal of other evidence covering the same period in Mogadishu but subsequent evidence. Just because no specific assessment was made of this report is no reason to infer the Tribunal did not take it into account, particularly not in the context of a lengthy and comprehensive determination. If Mr Toal's submissions were correct, then Tribunal country guidance cases would have to give "detailed reasons" for accepting or rejecting every significant country report placed before it, even when such reports (as in HH and indeed here) are in their dozens; that in our view would be to mistake the wood for the trees.

HH now

125. The main thrust of Mr Toal's submissions, however, was a challenge to the *continuing validity* of HH as country guidance. Here, we think, he was on stronger ground.

126. We are persuaded by the further evidence before us that there have been a number of significant changes in Somalia relevant to Tribunal country guidance.

127. As a transition to our identification of these changes it is first necessary to consider whether there is an armed conflict in central and southern Somalia.

Armed Conflict

128. In HH the Tribunal found that, for IHL purposes, there was an internal armed conflict in Mogadishu and its environs: see paras 329, 379(3).

129. Mr Toal submitted that the conflict in Somalia was both an international and an internal armed conflict. He pointed to the involvement in the conflict of the Ethiopians. It might, of course, make a material difference to the material and geographic scope of the applicable laws of war if the conflict was international. However, during the hearing Mr Toal did not seek to disagree with Miss Laing when she pointed out that the Ethiopian forces had intervened in Somalia on the invitation and with the consent of the TFG, which in international law terms was the internationally recognised government of the country: see HH, paragraph 336. We note also that all the UN SC resolutions on Somalia since the Ethiopian intervention have proceeded on the basis that their presence in Somalia is consistent with international law. We find that the armed conflict in Somalia is not international.

130. Miss Laing submitted that we should find that the conflict was not an internal armed conflict either. Drawing on the criteria for the existence of an armed conflict as set out in paras 82-84 of KH and paras 320-330 of HH, she contended that as a matter of fact the conflict in Somalia failed to meet two essential requirements, namely requisite organisation and sufficient level of intensity.

131. There is a (partially) extrinsic reason why we find this submission unpromising, namely that the UN SC resolutions, in various places treat the existence of an internal armed conflict as a *sine qua non* for the measures they mandate: see e.g. SC Resolutions 708, 715, 720.

132. As to organisation, Miss Laing accepted that although the parties to the conflict had access to a range of weaponry, "the TFG is an increasingly fragmented entity, and the various insurgent groups are loose, fluctuating and opportunistic groupings" (para 88 of her skeleton argument). Initially she had sought to argue that the organisation criterion could not be met because that required the parties to the conflict to have the ability to enforce IHL, which the current armed groups in Somalia plainly did not. At the end of the hearing we asked her for a further submission on this point, which came in the form of an addendum. In that she made clear that the suggestion was based, inter alia, on the ICRC Commentary to Additional Protocol II, which refers to the party in revolt against the government having "the means of respecting and ensuring respect for the Convention". However, she went on in the addendum to concede, correctly in our view, that subsequent developments in treaty law and the jurisprudence of the ICTY have rejected any customary international law criteria relating to the ability to enforce IHL and she no longer sought to rely on this point.

133. Further on, her addendum helpfully drew attention to what the Trial Chamber of the ICTY said in Prosecutor v Ramush Haradinaj and Others, Case No. IT-04-84-&, confirming that *state governmental forces* may be presumed to dispose of armed forces that satisfy the organisation criterion. The Trial Chamber then saw the criterion, when applied to *armed groups,* as best considered in terms of several indicative factors, none of which were, in themselves, essential to its fulfilment:

> "Such indicative factors include the existence of a command structure and disciplinary rules and mechanisms within the group, the existence of headquarters, the fact that the group controls a certain territory, the ability of the group to gain access to weapons, other military equipments, recruits, and military training, its ability to plan, co-ordinate and carry out military operations, including troop moments and logistics; its ability to define a unified military strategy and use military tactics, its ability to speak with one voice and negotiate and conclude agreements such as a ceasefire or peace accords."

134. Her addendum stated that in all the cases considered by the ICTY "there was a considerable degree of organisation in the relevant armed groups – a far greater degree, it is submitted, than that which obtains in relation to the various insurgents in Somalia and increasingly the TFG".

135. We are not persuaded by this submission. We remind ourselves, as did the Tribunal in KH at para 81, that the Pre-Trial Chamber of the International Criminal Court in Prosecutor v Lubanga, ICC-01/04-01/06-803 stated that to meet this criterion only "some degree of organisation is required". The March 2008 ICRC opinion states that an armed conflict "must show a minimum level of organisation". In HH the Tribunal found that there was the requisite degree of organisation for the purposes of identifying an armed conflict in and around Mogadishu, emphasising the sizeable numbers of combatants, the ability of the insurgents to mount various attacks on the TFG/Ethiopians during 2007, and the strong inference of organisational ability that could be drawn from the figures concerning the numbers and type of weaponry (paras 335-337). We consider these findings were well-founded and that, if anything, developments in 2008 (to date) have strengthened the reasons for finding the organisation criterion satisfied. We have in mind that whereas in HH it could not be said that the insurgents (the UIC and its "allies") had any identifiable territory or control over territory (para 337), the current position is that they have now secured control, even if only on what may turn out to be a temporary basis, of most of central and southern Somalia: the Nairobi evidence contains reference to the TFG/Ethiopians now partly controlling Mogadishu: "Rest of country dominated by ICU on Al-Shabbab, plus freelance militias, operating outside clans ...". In their April 2008 report the UN Arms Embargo Monitoring Group stated that "insurgents such as the Shabaab, Islamic Court Union (ICU) combatants and Muqawama (Resistance) have systematically increased their control over the territory of Somalia".

136. We would agree with Miss Laing that the TFG/Ethiopians have undergone splits and that the TFG has virtually collapsed as a government. But it would be contrary to the evidence to infer from that that the TFG/Ethiopian forces lack a sufficient organisational capacity. For one thing it is not suggested that the Ethiopian troops, whose numbers are estimated currently (they were much higher in late 2006/early 2007) as being between 2,500 (see the October 2008 FCO letter, which refers to "2,500 to 3,000 mainly located within 50k of Mogadishu) and 10,000 (see COIS, 8.38), are not highly organised, and that alone suffices to establish organisational capacity on the governmental side of the conflict. For another, the evidence is not that the TFG forces have disbanded, indeed their numbers were estimated in November to be around 5,000-6,000 (COIS, 8.38) and there is nothing to indicate that there has been any reduction. Rather it is that their organisational hub has devolved to TFG commanders. Thus the 2008 Menkhaus report notes that the commanders refuse to answer to the TFG, constitute autonomous armed groups and increasingly act like warlords.

137. What this conveys, in the words of the UN Monitoring Group in its 24 April 2008 report, is a "concentration of clan-based control over individual forces through allegiances with respective commanders".

138. We would add that according to the ICTY approach, encapsulated in the Tadic test and echoed by the ICRC in their March 2008 opinion (at para 2), an armed conflict can exist even when the warring parties do not include governmental forces. Turning therefore to consider the level of organisation exhibited by the insurgents, we remind ourselves that their armed groups have recently been described in the May 2008 Amnesty International report, as comprised of:

> "remnants of the ICU, supporters of the ARS, and radical Shabab youth militia. They also include clan, sub-clan and local political leaders and militias who have acted as bandits, perpetrating raids, robberies and other abuses against civilians, including rape and other forms of sexual violence…"

139. We would accept that the insurgents do not fully meet the criterion noted by a leading IHL jurist cited by ICRC in their March 2008 opinion that the armed forces of the insurgents should be "under responsible command". And in that regard we readily accept that there is evidence of increased fragmentation. According to the September 2008 Menkhaus report, Al-Shabab is said to have broken with the ARS. Although now the dominant group behind the insurgency, Al-Shabab is said to have no unified structure and in Mogadishu to consist in either jihadist cells answerable to no-one or clan militias simply using the name without in practice having any Islamist ideology. However, we remind ourselves of what the ICTY said in the case cited by Miss Laing (Haradinaj and others) that identification of an internal armed conflict depends on a number of indicators and it is not necessary to meet each one. Further, like the Tribunal in HH, we consider that a degree of collective and co-ordinated activity can be inferred from the fact (now more evident than at the time of HH) that in a relatively short space of time the insurgency has been able to gain at least temporary control over much of central and southern Somalia and has done so by driving out the TFG/Ethiopians by means of armed engagements: e.g. Al Shabab, whatever the precise nature of its presence in Mogadishu, was able to take over Kismayo and thus secure strategic port access. The UNSG report of March 2008 also emphasises the ability of the insurgents to mount operations in various key locations: "The UIC and other anti-governmental elements", it states, "conduct frequent insurgency operations in Mogadishu, Kismayo, Jowhar, Beled Baidoa and Galgayo, among other places, targeting mainly Ethiopian armed forces and the Wayne forces, the TFG, police station and governmental authorities". Whilst stating that the insurgent groups do not have a recognisable command structure, the 17 October 2008 letter from the FCO acknowledges that they "do co-operate and share tactics".

140. We also reiterate the point noted in HH that in the context of an armed conflict characterised by irregular fighting, the axis of much of the organisation inevitably arises at the level of individual, guerrilla-style cells. Whilst Al Shabab has conducted some concerted military actions, it appears much of the time to favour more mobile, small-scale actions, such as "hit and run" raids on small towns. Miss Laing relies on recent sources, e.g. the May 2008 Amnesty International report, that describes the command structure of many of the armed groups as "opaque" or "invisible". Being opaque creates real problems of accountability but opacity or lack of a clear command structure is not to be confused with non-existence in some shape or form. We also bear in mind that, in terms of one of the ICTY-identified indicators of organisation, the ability of armed groups to gain access to arms, and the type of arms involved, the ongoing conflict has seen the TFG/Ethiopians employ heavy artillery and both sides make frequent use of mortars. The UNSC resolutions are a sad testament to the huge range and variety of weapons in use in Somalia and to the fact that, despite the embargo (to the use the words of the UN Secretary General), Somalia is "awash with arms".

141. It is very interesting, in our view, to see how matters are viewed by the body with most knowledge of the use made of arms in Somalia, the UN Arms Embargo Monitoring Group, in their report of 24 April 2008. It described ongoing militarisation by the principal actors as consisting in "the receipt of arms shipments, military training activities, the receipt of military material or logistics and overall efforts to establish command and control capacity combined with military style organisations and structures".

142. Miss Laing also disputes that the conflict in Somalia meets the "protraction" criterion. Again, helpfully, she summarised the treatment of this in Prosecutor v Ramush Haradinaj and Others in which the Trial Chamber of the ICTY concluded that the protraction test was more to do with the intensity of the armed conflict than its duration and that indicative factors included:

> "number, duration and intensity of individual confrontations; the type of weapons and their military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties, the extent of material destruction; and the number of civilians fleeing conflict zones. The involvement of the UN Security Council may also be a reflection of the intensity of conflict". (para 49)

143. Of course, if Miss Laing were right, then the conflict in Somalia would fall merely into the threshold immediately below that of internal armed conflict, namely "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, or other acts of a similar nature" (a formulation which has become part of customary international law via Additional Protocol II, the Rome Statute and ICTY, ICTR and ICC case law). But to describe the conflict in Somalia in terms of that threshold would be purblind. Not only are all the above indicators satisfied, but to find the protraction criterion not met would fly in the face of SC resolutions and UN Secretary General observations. Virtually the only factor that might be taken to indicate lack of sufficient intensity is the number of casualties (estimated by Elman to be 6,501 civilians and 8,516 wounded and 2,716 killed in the first half of 2008) but even here, although the figures are far lower than those for other armed conflicts in Africa (Sudan, DRC for example), they are still sizeable relative to the total population and, as is contended by some with knowledge on the ground, subject to the likelihood of considerable underreporting. We are in no doubt that the conflict in Somalia is protracted and meets that criterion for the existence of an armed conflict.

Geographical Scope of Armed Conflict

144. In HH the Tribunal concluded that the armed conflict in central and southern Somalia was confined to Mogadishu and its environs (paragraph 341). It is clear that by mid – 2008 it had spread to many other areas. In his report of 14 March 2008 the UN Secretary General referred to frequent insurgency operations occurring in Kismayo, Jowhar, Beledweyne, Baidoa and Galkayo. The UN Arms Embargo Monitoring Report of 24 April 2008 noted "a dramatic expansion of the conflict" and noted further that El Bur and Buulo Burte in the Hiraan region and Guriel in the Galgaduud region had fallen under insurgent control. In July 2008 the UN Security General noted that major clashes had become more frequent in and around Baidoa and along the Mogadishu Afgooye – Baidoa highway. We find that a situation of internal armed conflict now exists throughout central and southern Somalia.

Intensity of the Violence

145. In HH the Tribunal found that the armed conflict taking place in Mogadishu (between the TFG/Ethiopians and the UIC) did not amount to indiscriminate violence at such a level of severity as to place the population of Mogadishu at risk of a consistent pattern of indiscriminate violence. To what extent has this situation changed, concentrating first on the general situation in central and southern Somalia?

146. In early 2008 the UN Secretary General, drawing on the UN fact-finding mission to Somalia in January 2008, stated that the security situation in Somalia was "characterised by indiscriminate killings" and has continued so to describe it during 2008 until the present. In March 2008 a report by UN Somalia Humanitarian Overview, made reference to the joint statement by 44 international and local NGOs that the situation in central and southern Somalia was deteriorating rapidly. In its May 2008 report, Amnesty International stated that all parties to the conflict directed attacks at civilian populations (p.82).

147. Manifestly all significant armed parties to the conflict have engaged in indiscriminate attacks. The Ethiopians were noted by Human Rights Watch, in their August 2007 report, Shell Shocked…, to use means of war (firing inherently indiscriminate 'Katyusha' rockets in urban areas) and methods of warfare (using mortars and other indirect weapons without guidance in urban areas) that violated IHL (see COIS 8.39). Although the Tribunal in HH did not find the extent and level of the indiscriminate violence sufficiently severe to give rise to a serious threat to the residents of Mogadishu generally, the cumulative effect of subsequent incidents and patterns of attacks has altered the picture. In its May 2008 report, Amnesty International notes an alteration in the conduct of Ethiopian forces towards civilians after the parading of Ethiopian troops' bodies by insurgents in Mogadishu in November 2007, leading to increased violations against civilians (COIS 8.40). In the same report, AI documents TFG aggression towards civilians and states that their forces are frequently reported to act "as if they believe they are immune from accountability, investigation or prosecution, including for crimes under international law" (COIS, 8.32). The TFG, several sources note, are not paid or only paid poorly and intermittently. AI also describes the insurgents as perpetrating raids, robberies, and other abuses against civilians, including rape and other forms of sexual violence (COIS 9.01). Matt Bryden (see Nairobi evidence) observes that individuals have been killed by Al Shabab for the least transaction with the TFG or Ethiopians: "For example, people have been killed by them for selling cups of tea or soft drinks to TFG or Ethiopian soldiers".

148. In a 1 September 2008 interview submitted as part of the Nairobi evidence, Alex Tyler, Protection Officer, UNHCR Somalia stated that since January 2007 there have been dramatic shifts in the political and security landscape in Somalia and that Mogadishu in particular has experienced arguably the worst period of violations of international human right and humanitarian law, in terms of their scale and scope, which the capital has seen since the early 1990s. He is also recorded as saying that "[t]here is a clear correlation between the massive displacement form Mogadishu and the above mentioned military operations in civilian areas, estimated at 700,000 displaced in 2007 alone, indicating that the conflict between the TFG and Ethiopian forces and the insurgents has been conducted with little regard for the safety of the civilian population." The most recent information available to the IASC Protection Cluster has confirmed Human Rights Watch and Amnesty International concerns about:

> "indiscriminate bombardment of civilian areas; indiscriminate use of roadside bombs and mortars from and in civilian areas; indiscriminate shooting in response to road side bombs; arbitrary arrest and detention of civilians, including children; forced evictions; forced recruitment, including of children; sexual and gender based violence; intimidation and assassination of journalists, aid workers and civilian officials; and extrajudicial killings. "

149. In a September 2008 statement (Nairobi evidence, p.37-38) Tony Burns of SAACID-Australia states that civilians are directly targeted: "[t]here are combatants to the current conflict that mortar markets, and particular neighbourhoods, to suit their military goals…Looting, rape, extortion and murder are commonly carried out by all parties to the conflict. Collective punishment (based on geographic area or fighting age males) is also very common." On 3 October 2008 SAACID stated that "as pure a form of anarchy as is possible now prevails". We shall need to return to the specific situation in Mogadishu shortly.

Deterioration in the Humanitarian Situation and IDPs

150. Coupled with the worsening security situation has been a deteriorating humanitarian situation characterised by mass displacement. In his 14 March 2008 report, the UN Secretary General referred to there having:

> "never been so many people in Somalia in such dire humanitarian circumstances and there has never been such limited ability to support them, mainly because of precarious security conditions."

151. At this point we think it right to remind ourselves of features that are known about IDPs in Somalia currently. We do so against the backdrop that the respondent has taken particular issue with the view that IDPs in Somalia could face, or should ever be seen as facing, harm crossing the threshold of persecution, serious harm or ill-treatment. In HH the Tribunal found that a person displaced from Mogadishu who was likely to have to spend any significant period of time in a makeshift shelter alongside the road to Afgoye, for example, or in an IDP camp, may well experience treatment that would be proscribed by Article 3 of the ECHR (para 299). That echoed what the Tribunal had earlier said in NM.

152. We have already noted that the estimates of numbers displaced from Mogadishu vary from around 400,000 to 750,000. As recently as 20 October 2008 the numbers of IDPs, along a 30km stretch of the Mogadishu-Afgooye road, are estimated at between 250,000-4000,000 and have been described very recently by a Western journalist as "a concentration of utter despair". Since HH, of course, there have begun to be significant displacements from other towns to which the armed clashes have spread. In the course of the reports during 2008 to date, UNOCHA has noted mass displacements throughout central Somalia. Its Monthly Cluster report for May 2008 states that for the first time the numbers displaced in southern and central Somalia exceeded the monthly outflow from Mogadishu (COIS, 4.06).

153. It is also the *qualitative* features about Somali IDPs (as well as their numerical and geographical distribution) which concern us here. Three features stand out (in what follows we draw particularly but not exclusively on the UNOCHA Reports for 2007 and 2008). First, they face particularly serious problems whilst on the move. Their movements are impeded by hundreds of checkpoints manned by one side or the other to the conflict. At these checkpoints they can be subject to threats, intimidation, looting (and in the case of women and girls) rape, abduction and harassment.

154. Second, in the places they arrive at, they face a further set of difficulties. A significant number do not end up in camps or makeshift settlements able to provide an adequate level of security. On the contrary, they face a struggle to obtain shelter, food, water and sanitation, sometimes even having to pay for being able to sit under the shade of a tree. For women and girls there is a risk of abduction, rape and harassment. In March 2008 the ICRC reported that many IDPs displaced by violence in Somalia were surviving on less than one meal a day and spending a large proportion of their meagre income buying drinking water. The poor security situation was said to severely hamper the work of aid agencies seeking to deliver humanitarian assistance to those who needed it: as UNOCHA stated in its July 2008 report, "the security situation is seriously restricting humanitarian operations". Similar observations were made by the UN SG in his July 2008 report.

155. Third, the effect of displacement appears to reduce the ability of IDPs to count on protection from their own clan. Clan protection depends normally on living inside the traditional area of the clan (Danish Report, 329). Thus, for example, although (according to the first BIA Report) most IDPs from Mogadishu are from the majority Hawiye clan (and at January 2008 around 82% were said to have migrated to areas of southern Somalia that are in dire need (COIS, 28.13)), 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. And once they have arrived at a location, even when it is one inside a traditional area for that person's clan, the pressure of numbers and scarce resources can mean that newcomers may not be supported or absorbed by the local community (Danish report, 322 – 324).

Conclusions

156. The above does not, however, persuade us that the situation in central and southern Somalia generally has reached the threshold where civilians per se or Somali civilian IDPs per se can be said to face a real risk of persecution or serious harm or treatment proscribed by Article 3 ECHR. We reach this conclusion for two main reasons. First, although the level of violence has increased in intensity, the numbers of those killed and wounded (so far as they are known) are not of great magnitude. Every single death or injury is to be lamented, but what we have to decide (subject to the need for caution which Mr Toal correctly reminded us of in his skeleton argument at paragraph 72), is whether persecution or serious harm is something that is generally happening or forms a consistent pattern: see AA v Secretary of State for the Home Department [2007] EWCA Civ 149.

157. Secondly, whilst the humanitarian situation is dire, it does not appear that civilians per se face a real risk of denial of basic food and shelter and other bare necessities of life. There are two aspects to this: many appear not to need humanitarian assistance and many who do need it, get help of some kind. The Somali Humanitarian Overview for September 2008 stated

that in that month food aid organisations distributed monthly food rations to nearly 3 million people. As to the first aspect, as catastrophic as aspects of the situation are, it is important to bear in mind the UNOCHA figures, as given for example in their August 2008 report, where it is estimated that the number of people in need of assistance in Somalia has increased to 3.2 (up from 2.6 in April) million people (43% of the population [since the population of Somalia is estimated at around 10 million, we assume that what is meant here is the population of central and southern Somalia only]). Although an increase of 77% from the year before, another way of putting this is that over a half of the population of central and southern Somalia were not in need of humanitarian assistance. As to the second aspect, even though aid agencies can meet with obstruction and dangers in delivering aid to IDPs in need (as documented, e.g. in the COIS, 28.10) a significant percentage of those in need are reached. And the figures for those who are not reached have to be read in the context that (i) in the IDP camps, "most people there are helped by Somalis from the diaspora" (Nairobi evidence, p.25); and (ii) traditional clan areas to which many IDPs flee do allow them to live in their communities, at least until their numbers become too high.

158. Thirdly, the evidence about attacks on IDPs has to be put in the context of the fact that there have been huge numbers of people displaced, well over a million according to some estimates. Seen in that context, it would appear that the great majority of IDPs are able to travel and then subsist in IDP camps or settlements without serious setbacks. If this were not so the figures given in background reports dealing with attacks on IDPs would be markedly different.

159. It is significant in our view to note what was said by Alex Tyler, the Protection Officer for UNHCR, Somalia, in his 1 September 2008 interview. After reiterating UNHCR's previous position that there should be no enforced returns to central and southern Somalia, he went on to say:

> "…it is possible that a returnee from abroad may also face a real risk of serious harm by virtue of being a returnee, although the level of this risk is difficult to assess and would depend on case [sic]. Although I would caution against awarding refugee status simply because of being a returnee, several factors, when combined would add other considerations in an applicant's asylum claim. As mentioned above, there has been a dramatic increase in criminality in Mogadishu, and persons perceived as wealthy are attractive targets for robbery or abduction – returnees would certainly attract attention and be assumed to have money. If the individual has been outside of Somalia for a significant period of time, he or she will not possess the knowledge and experience necessary to be able to manage and avoid risk in the current situation. Al Shabab cells are likely to investigate any newcomer to their areas to determine whether the individual is connected with the TFG or otherwise opposed to them…"

160. From this and other reports we discern that assessment of the extent to which IDPs face greater or lesser hardships, at least outside Mogadishu (where security considerations are particularly grave), will vary significantly depending on a number of factors: e.g. IDPs from more influential clans or sub-clans appear to have a better chance of being tolerated in the area to which they have fled (Danish Report, p. 320); IDPs who have a traditional clan area they can travel to, especially if in that area they have family, or friends, or close clan or sub-clan affiliations, appear to have better prospects of finding safety and support, although not if the area concerned is already saturated with fellow – IDPs (Danish Report, pp. 320 – 329); those who lack recent experience of living in Somalia appear more likely to have difficulty dealing with the changed environment in which clan loyalties have to some extent fractured (Nairobi evidence); persons returning to their home area from the UK may be perceived as having relative wealth and be more susceptible to extortion, abduction and the like as a result (Nairobi evidence); those who live in areas not particularly affected by the fighting and which are seen as not important strategically to any of the main parties to the conflict would appear less subject to security problems; whether the IDP is a female also appears a significant factor, given the evidence of the additional risks women and girls face of abduction, rape and harassment. To these factors, of course, one has to add the variables of age and state of health. Also relevant will be the evidence about the prevailing economic conditions in the area, bearing in mind the recent history of cruel droughts, poor harvests and rising food prices.

161. We do not present these as an exhaustive list of factors, but they are, we think, helpful indicators for making a proper decision in any particular case.

Clan Matrix and Loyalties

162. A principal contention of Mr Toal in these appeals is that there has been a significant change in the clan-based character of Somali society since the Tribunal evaluated such matters in NM and HH. At paragraph 111c of his skeleton argument he stated:

> "The Tribunal should now find a reasonable likelihood that in general, membership of a particular clan does not by itself protect an individual from serious harm."

163. In support of this contention he cited a number of sources suggesting that a person could no longer expect to be protected by his or her own clan (as stated in the Danish Report, 329). He highlighted: that clans and sub-clans are beginning to fracture under increasing economic stress (COI para 20.26); that the intensification of the armed conflict had led to uncertainty about whom to trust, even at sub-sub clan level (ibid); that in areas most affected by the armed conflict, small militias increasingly fight for their own narrow ends and answer to no one (USSG, July 2008, Danish Report, 5); and that there are now a "multiplication of identities unconnected with clan (including Islamist, pro or anti TFG; pro or anti western)"(paragraph 117 of his skeleton; see also COI paragraph 20.06). He also laid emphasis on the evidence, highlighted by some of the Nairobi statements and interviews, that one of the major majority clans, the Hawiye, had been disarmed by the TFG/Ethiopians.

164. We do not doubt that recent events have altered the character and dynamics of clan and sub-clan activities in Somalia to a significant degree. We accept that as compared with the early 1990s clan protection is no longer as effective as it was. We are sure that Matt Bryden is right and that "[p]olitics and clan no longer converge to the same degree" (Nairobi evidence). We also accept that conflicts over scarce resources have complicated the situation and made it unpredictable. But we cannot agree with Mr Toal that the clan or sub-clan has somehow ceased to be the primary entity to which individuals turn for protection. Our reasons are threefold. First, the evidence he himself cites describes not so much an eclipse of clan protection as a restructuring or devolution down to sub-units. Indeed it would appear that this has been a trend which began some time ago: it was the view of Menkhaus back in 2004 that over the past fifteen years Somali clan politics have "devolved to much lower (sub-sub clan) lineage levels" (Danish Report, 442). Second, there is ample evidence that in terms of the use of arms, the basic units who carry arms continue to be, at least on the insurgents' side, clan-based or sub-sub clan based militia. Thus the UNSG Report of May 2008 on Children and Armed Conflict refers to the rise of clan militias. In May 2008 Amnesty International noted that checkpoints and roadblocks outside Mogadishu were operated by the TFG, TFG allied militia and armed clan factions. On 11 September 2008 the BBC Report noted inter-sub-clan fighting over control of farmland and the resumption of clan fighting condoned by elders. Closely inter-related is the emerging evidence of a resurgence of clan-based militia activity. We must also bear in mind that in certain areas, most notably Kismayo, the conflicts are described as essentially inter-clan (COIS, 8.02). We think the preponderance of evidence is crystallised in the words of Matt Bryden (see Nairobi evidence) as follows: "Clans remain important but are no longer able to provide the level of protection or support that they used to".

165. So far as concerns whether the Hawiye have been disarmed, whilst that appears to have been the position for some period after December 2006, the most recent evidence (from SAACID) relating to Mogadishu is that the civilian population has now largely rearmed, and has begun stocking ammunition (COIS, A.7). If the reality in most other areas of central and southern Somalia is that the TFG/Ethiopians have been driven out or are struggling to maintain a foothold, we think it highly unlikely that they would any longer be in a position to prevent local populations, or key sections of them, re-arming and doing so much of the time on a clan basis.

Minority clans and groupings

166. So far as the position of minority clans is concerned neither party asked us to take a different view from that taken in HH, save in respect of their situation as civilians and/or IDPs. We would only note, so far as Mogadishu is concerned, that whilst it appears that a significant number of minority clan or group members have chosen to stay on in Mogadishu (some from other areas have even moved to there), we go on to find below that the situation in Mogadishu for the great majority of residents is currently precarious. In our view the situation of minority clans in Mogadishu would be a fortiori precarious.

Sheikhal Logobe

167. By virtue of the accepted fact that AM2 is from the Sheikhal Logobe, we must specifically address their general position. In doing so we bear in mind several things. First, the Danish report on Minority groups in Somalia, 17-24 September 2000 noted that in the Arta peace conference in Djibouti around that period, "[a] few of the minority communities such as the Sheikhal Logobe have been included in the Hawiye clan-family's TNA seat allocation", which reflected the fact, noted in some other sources also, that at that time the Sheikhal had been able to secure Hawiye patronage and protection. According to the information gathered by the Netherlands Embassy in June 1999 the Sheikhal Logobe are a sub-clan of the Sheikhal (COIS Reply 2 September 2008).

168. Second, in a former country guidance case, FK (Sheikhal Gandershe) Somalia CG [2004] UKIAT 000124 the Tribunal drew upon an earlier decision in which issues relating to the Sheikhal had been considered by the Tribunal in an earlier appeal in 2002:

> "13. These issues were considered by the Tribunal in Mohammed [promulgated on the 29 November 2002]. That Tribunal had before it the Minorities Report and evidence from Dr Luling. Paragraph 19 of that determination reads as follows:
>
> > "The Shekhal are not one but several groups not necessarily related and with different cultures and dialects. The word is simply the plural of Sheikh and signifies the lineage who have an inherited religious status. They all trace descent from the same ancestor Sheikh Faqi Cumar who travelled around Somalia and married wives in each location.
> >
> > The Shekhal of Jasira and Gandhershe are ethnically distinct from other groups such as the Shekhal Loboge. Jasira and Gandhershe are both places on the coast between Mogadishu and Merce. Shekhal in that area belong to the light skinned Benadiri population of Arab descent who are found along the coast, like the Bravenese and the Reer Hamar of Mogadishu."
>
> 14. Having reviewed all the evidence before it, the Tribunal concluded that the Shekhal Gandhershe and the Shekhal Jasira were minority groups which were not protected by the Hawiye. The respondent had failed to make an important distinction between the Shekhal Gandhershe and the Shekhal Jasira on the one hand and the Shekhal Loboge on the other. The latter group were protected by the Hawiye. The Shekhal were not one discrete sub-clan but were distinct and separate groups and as such ethnically distinct from the majority of the Somalis. The Tribunal found that members of the Shekhal Gandhershe were a minority group then at risk if returned to Somalia. It went on to find that a member of the Shekhal Gandhershe clan would be considered to be a Benadiri and as such among the groups recognised by the Home Office as qualifying for refugee status. On that basis the appeal was allowed."

169. Third, however, we bear in mind that one of the more recent items of evidence we have is from a Mr CA who described himself as chief of the Logobe sub-clan of the Sheikhal and was also a religious scholar. There is a lengthy statement from him dated 5 September 2008. Albeit he was not called as a witness or subjected to cross-examination, we consider it a measured and thoughtful analysis. His evidence was that the Sheikhal are neither Hawiye nor Darod. They are not a militarised clan. They originate from Arabia via the Ogaden region of Ethiopia; they have a scattered presence in Somalia but their presence is greatest in middle and lower Juba regions. Due to the status attached to their knowledge of Islam and their education they had been able to forge relations with both the Darod and the Hawiye and even inter-marry with the Hawiye. The conflicts of the 1990s saw the Darod turn against his clan and their own relations with the Hawiye also fractured during internal fighting between the Abgal and Habargidir. By the end of the 1990s they could no longer rely on the protection of the Hawiye and "became a minority clan in a sense." He as a clan elder had sided with the TFG in 2003. During the subsequent fighting between the UIC and the TFG, and then the insurgents and the TFG/Ethiopians, his clan was accused by both sides of supporting and assisting the other. He had been forced to flee Mogadishu in mid-2007. The current position was that:

> "The whole of the Sheikhal/Logobe clan is believed by Al Shabab to be supporters of the TFG because of my part in the formation and support for the TFG. …There is also a group of the UIC called Alislah and founders of this group are Sheikhal. Al Shabab sees Alislah as a threat to them and people associated to them…The Sheikhal Logobe are mostly now in Dabaab Refugee Camp or Haragdhere Refugee camp…"

170. Considering the evidence as a whole, the above three sources in particular, we consider that, as a result of the current conflict between the TFG/Ethiopians and the insurgents, the Sheikhal clan (including the Sheikhal Logobe), by virtue of the hostile attitude taken towards them by Al Shabab, is less able to secure protection for its members than previously, although both as regards their risk of persecution and serious harm and protection much will depend on the particular circumstances of individual clan members.

Mogadishu

171. What we have said above about risk to civilians and IDP civilians in central and southern Somalia requires some modification in relation to the situation in Mogadishu. The city is divided into 16 districts. Neither party was able to give us a precise figure for the normal population of Mogadishu, although the sources they noted give figures in the range of 1 to 2 million. The International Crisis Group in January 2007 gave a figure of 1.5 million. (COIS, 14.02).

172. As already noted the movements of population out of Mogadishu in the past two years have been unprecedented. UN sources have estimated (at various times) that 400,000, up to as many as 750,000 (or around one third to a half), of the population of Mogadishu have been displaced. An 8 April 2008 Voice of America report states that two thirds of Mogadishu have been turned into an urban battleground. Since the beginning of 2008 there have been significantly fewer returns. Whatever the precise figures, it is clear that the ongoing violence has forced substantial numbers to flee the city more than once and flight seems an ongoing process: the IRIN report of 29 September 2008 cites Elman estimates that 18,500 people recently fled their homes due to the fighting and shelling (COIS, A 4). The COIS Reply dated 24 October 2008 states that: "[a]ccording to the UNHCR an estimated 5,500 people were displaced from the city during the week and over 61,000 since 21 September 2008". Armed clashes have increasingly destroyed housing, market areas (Bakara market has been deliberately shelled) and infrastructure and the recent closure of the airport is likely to make matters in Mogadishu worse. According to Grayson and Munk, the aid community has been largely ineffective in providing the necessary aid to those who have stayed in Mogadishu (Nairobi evidence 65). They also state that Mogadishu is a "ghost town" and that only the most vulnerable remain there.

173. We attach weight to the evidence indicating that in certain areas of the city, where the more affluent live, they are able to afford strong personal protection. We accept also that there do appear to be some small numbers of persons who have fled other parts of central and southern Somalia and gone to Mogadishu. Sometimes, following fresh fighting, displacement is to safer districts within the city (15,000 in this category in September 2008, according to UNOCHA, 26 September 2008) rather than to places outside. There is also evidence to show that when the international airport is open, passengers with business to conduct or who have powerful clan and/or armed group connections there, are able to arrange for travel to and/or from Mogadishu. However, bearing in mind that since late 2007 the main movements have been away from the city, we think it unwise to attach great significance to those factors and wrong in particular to equate transient business visits to the city with normal residence.

174. In a situation many sources describe as "anarchical" it is difficult to gain a precise picture of the spread of violence in Mogadishu. For sure, however, things have changed a great deal from mid-2007 when the BIA fact finding mission estimated it as being "fairly low" (COIS, 8.03). According to the May 2008 Amnesty International report fighting was taking place in southern districts of the city such as Hodan, Hodan/Waaberi, Haal Warang and Wardingley. There is also mention of Boondhe and Yaaqshid, the latter which is in the north. In a June 2008 report IRIN said that the fighting was "mostly concentrated in the districts of Wardingely in the south and Yaqshid in north Mogadishu" (COIS 8.22). Other sources also mention Hurwa [Heliwa] and Hunair, Abdiziz and Al Hidayya mosque. Whereas the northern parts of the city, which are said to contain the most affluent districts, have been relatively unaffected, in January 2008 OCHA reported that IDPs were leaving areas of Mogadishu hitherto considered relatively safe, "such as the large northern suburb of Daynille". Heavy fighting in Daynille was mentioned in a Press TV cutting of 2 October 2008. Mention has also been made in April 2008 of conflict in "parts of Heliwa, Kaaraan and Hawi-Wadaay districts of northern Mogadishu as well" (COIS, 28.09).

175. Moreover, as will be evident from the references we gave (when analysing the nature of violence in central and southern Somalia as a whole) to the violence in Mogadishu (see above paras 150-160) the violence in that city has exhibited particularly dire features over a concerted period of time. Its nature has become increasingly indiscriminate in the sense that the different armed groups involved in the fighting routinely fail to distinguish between civilian and military targets and use disproportionate methods. The COIS at A.3 notes the very recent SAACID report of 3 October 2008 and its statement that:

> "The AU military response to opposition attacks on its forces – by mortaring markets in Mogadishu (essentially following the Ethiopian/TFG practice of random murder as a collective punishment response) – has now made the AU 'peacekeeping' intervention a complete anathema to all Somalis from all clans as part of any proposed political solution that Western and UN interests continue to aspire to."

The COIS at D.7-D8 details that:

> "One of the main security incidents in Mogadishu in August 2008 was the 15 August 2008 bus massacres. The TFG/Ethiopian forces opened fire in a retaliatory attack on two buses outside Mogadishu, which left over 40 civilians dead. On the same day 56 people were killed and 80 wounded in incidents in and around Mogadishu.
>
> IRIN reported that schools are currently closed in Mogadishu, because they have been targeted in the latest fighting in the city. Ninety percent of schools are affected. The targeting of schools is reported to be "unprecedented" in the past eighteen years' conflicts".

176. COIS at B.6 describes the conflict having "hit a new intensity" with the exchanges of fire on Monday 22 September 2008. TFG, Ethiopian and AMISON forces were variously pitted against insurgent forces around Bakara market (IRIN, 23 September 2008). Other reports have stated that at least 33 civilians were killed in the exchanges. Grayson and Munk state that civilians in Mogadishu are seen as part of the conflict and that "[i]f you do not support the TFG or the Ethiopian troops you are perceived as supporting the opposition" (Nairobi evidence,67). We note that there is recent evidence, alluded to in the COIS Reply dated 15 October 2008 that some TFG soldiers have been arrested and detained in Mogadishu jails for crimes against civilians, but there is no evidence that this has altered the conduct of TFG combatants still in the field. The overall situation as seen by the UN Secretary General in his July 2008 and October 2008 reports is that there continue to be "frequent attacks on civilians" and that:

> "the incessant level of harassment and intimidation by all militarised actors in the city is making living conditions for the civil population intolerable".

177. Contrary to the position when the Tribunal in HH considered matters (when although there were large numbers of residents fleeing the city, there were also very significant number of returns), since March 2008 the UNOCHA reports show that there has been no large-scale return of IDPs to the city. In its May 2008 Report, Amnesty International stated that the number of attacks on those fleeing Mogadishu "was reportedly on the rise, as was the level of violence exhibited towards those already vulnerable. In particular, gender-based violence including rape, as well as shootings, beatings and abductions were reported."

178. In light of the above, we accept that since HH the situation in Mogadishu has changed significantly, both in terms of the extent of population displacement away from the city, the intensity of the fighting and of the security conditions there. On the present evidence we consider that Mogadishu is no longer safe as a place to live for the great majority of its citizens. We do not rule out that notwithstanding the above there may be certain individuals who on the facts may be considered to be able to live safely in the city, for example if they are likely to have close connections with powerful actors in Mogadishu, such as prominent businessmen or senior figures in the insurgency or in powerful criminal gangs. However, barring cases of this kind, we consider that in the case of persons found to come from Mogadishu who are returnees from the UK, they would face on return to live there a real risk of persecution or serious harm and it is reasonably likely, if they tried staying there, that they would soon be forced to leave or that they would decide not to try and live there in the first place.

179. It will be evident from the above findings relating to Mogadishu that although we follow KH (Iraq) in considering that Article 15(c) has a protective scope additional to that afforded by the Refugee Convention and Article 15(b) of the Qualification Directive (and Article 3 of the ECHR), it is unnecessary on the facts of this case to rely on such additional scope, since return to that city for the great majority would amount to a real risk of persecution, serious harm and ill-treatment.

180. In assessing risk to IDPs who have fled from direct exposure to the fighting, we have given careful consideration to Mr Toal's submission that we should view their adverse experiences as amounting to persecution, serious harm (and ill treatment) by virtue of the clear correlation between that exposure and their subsequent plight. He urged us to find that such consequences, albeit indirect, satisfy the "by reason of" test contained within Article 15(c) in particular

181. We do not think that this argument assists any IDP from cities, towns or areas other than Mogadishu, since, for reasons given above, we do not find the evidence regarding them to establish a consistent pattern of the violence they have fled being indiscriminate and giving rise to a serious and individual threat.

182. In relation to IDPs who have fled Mogadishu in recent times, however, we are prepared to accept that their plight is connected to what happened to them there, sufficient to meet the "by reason of" test contained within Article 15(c) of the Qualification Directive.

183. The question we have to decide, however, is how these findings assist applicants for international protection or Article 3 protection who are in the UK presently. If they are from Mogadishu, then, on our earlier finding (that the great majority of persons facing return to Mogadishu would be at real risk of persecution or serious harm there), in order to succeed they need only show that they have no viable internal relocation alternative. We shall come back to this scenario in a moment.

184. However, if they are not from Mogadishu, then we do not in general think they will be able to show their home area is unsafe, simply on the basis that they are a civilian and from such and such a home area. We would accept that much will depend on the precise state of the background evidence relating to their home area at the date of decision or hearing. If such evidence indicates, as we think it does in respect of Mogadishu (but not elsewhere) currently, that the nature of the violence in their home area is such that there is a consistent pattern of indiscriminate violence giving rise to a serious and individual threat, then a person from that area may well be able to establish a need for international protection or Article 3 protection, subject to establishing they have no viable internal relocation alternative.

Jowhar

185. In March 2008 Reuters reported that Somali Islamists (UIC) had seized Jowhar. During mid-2008 Jowhar was the scene of heavy fighting between the UIC and other insurgent factions; however, talks were ongoing. On 2 September 2008 IRIN reported the situation in the "strategic town of Jowhar" as tense after clashes between opposition militia. In early September the Sheikhal Logobe clan chief, Mr CA, said in his statement taken in Nairobi that "the Islamists are now also fighting amongst themselves in Jowhar". On the latest evidence, however, Jowhar has fallen under the control of the UIC insurgents. A Garowonline report of 23 October 2008 states that Jowhar is under the control of Islamic Courts rulers. It reports the Islamic Courts chief and regional administrator, Sheikh Dahir Addow Alasow announcing the imposition of a curfew to "ensure security". It states that "[t]here were also reports of nightime robberies inside Jowhar, where Islamist fighters maintain order". Taking this evidence together with that indicating that the Islamist insurgents have taken control of most of central and southern Somalia, we consider that Jowhar is no longer a theatre of major conflict either between the TFG/Ethiopians and the insurgents or the UIC insurgents and other insurgent factions, although routes to and from the town have roadblocks manned by freelance militias who commit banditry. The evidence does not indicate that since March 2008 the clashes between the UIC and other insurgent factions have been characterised by indiscriminate violence and, so far as the present situation is concerned, there is nothing to suggest that the population of the town in general is exposed to persecution or serious harm or treatment contrary to Article 3. The evidence does not indicate that the TFG or the Ethiopians are any longer in a position to renew fighting there or to recapture it.

Internal relocation

186. We turn then to internal relocation. We bear in mind here that Article 8 of the Qualification Directive (para 339O of the Immigration Rules) has the effect of unifying the test for the viability of internal relocation (protection) in refugee cases and under Article 15(b) and (c). Article 8 imposes a safety and a reasonableness requirement. As regards reasonableness, we remind ourselves of two propositions clarified by their lordships in AH (Sudan) [2008] UKHL 49. First:

> "The decision-maker, taking account of all relevant circumstances pertaining to the claimant and his country of origin, must decide whether it is reasonable to expect the claimant to relocate or whether it would be unduly harsh to expect him to do so…There is…a spectrum of cases. The decision-maker must do his best to decide, on such material as is available, where on the spectrum the particular falls…All must depend on a fair assessment of the relevant facts". (Lord Bingham at para 5, citing from himself in Januzi [2006] UKHL 5).

187. Second, that:

> "although the test of 'reasonableness' is a stringent one – whether it would be 'unduly harsh' to expect the claimant to return – it is not to be equated with a real risk that the claimant would be subjected to inhuman or degrading treatment or punishment so serious as to meet the high threshold set by Art 3 of the European Convention…" (Baroness Hale, para 22)

188. It seems to us that if within the context of central and southern Somalia a person is able to establish a real risk of persecution or serious harm in their home area, he or she may, depending on the particular facts, be able to show that they do not have a viable internal relocation alternative. We do not consider that in respect of Mogadishu or any other home area the evidence shows that a person having to relocate from that home area will necessarily have to become an IDP or that there is even a reasonable likelihood of them becoming so. Even in respect of Mogadishu, whilst many residents who have been displaced from there have become IDPs, equally a sizeable number appear to have made their way to areas of southern Somalia where they have traditional clan connections: see above paras 155-158.

189. At para 95 we set out the passage from Mr Toal's skeleton argument where he contended that if in consequence of (the threat of) indiscriminate violence a population is displaced to a region where it is likely to die of starvation and disease, those consequences would be by reason of the indiscriminate violence. We accept that persons who have been displaced from Mogadishu in the period since late 2007 can be said to be displaced by reason of the indiscriminate violence in that city arising as part of the armed conflict. We also accept that persons whose home area is Mogadishu who face return from the UK involving relocation could be said currently to be placed in that position by reason of the indiscriminate violence in Mogadishu. But it is important to be aware of the limited consequences of accepting these matters. Those who end up in such a place will have been driven there by the effective cause of the violence in Mogadishu, but that does not as such have anything

to tell us about the risk of Mogadishu residents in general ending up there or of risks they will face there. When dealing with internal relocation, the first issue is safety and that is all about risk. For the reason we have already given we do not accept that those who end up (after relocating) in an IDP camp in general face a real risk of persecution or serious harm or ill treatment: the risk (as will the reasonableness of them having to live in an IDP camp) will depend on a variety of circumstances.

190. Returning to the issue of relocation in respect of persons with home areas anywhere in central and southern Somalia, we agree with the Tribunal in HH that if any person has to spend a substantial period of time in an IDP camp that is likely to mean his relocation would be unreasonable. But we would emphasise the great importance of a case-by-case approach. That is what is enjoined by the House of Lords in Januzi and AH (Sudan) and is also what is entailed by Article 8 of the Qualification Directive (see para 339O of the Immigration Rules), which refers to having "…regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant". Amongst the relevant general circumstances will be to what extent there are parts of central or southern Somalia which an applicant can access where there is not the prevalence of ongoing fighting (because for example one side has established or re-established territorial control). Amongst the relevant personal considerations will be whether the applicant is reasonably likely to be isolated or unprotected, to what extent they have family connections and whether they are from a majority or minority clan. Their age, sex, health and whether they have to look after children will be of particular importance.

Safety of en route travel from Mogadishu International airport

191. As noted earlier, we do not consider, in the context of Somali appeals currently, that it is possible to say that matters relating to the method of return are implicit in the immigration decision and on that basis it does not fall within our jurisdiction to assess risk relating to it. However, we promised earlier to consider the issue of safety of en route return from Mogadishu International airport (the accepted point of return) on an obiter basis, as envisaged by Hooper LJ in AG, para 123. According to the COIS at 27.12, Mogadishu International Airport (MIA) is known locally (since July 2007) as the Aden-Adde International airport. Of course, there are many other airports in the country, estimated at 61 in number, used by private and chartered aircraft (COIS 27.10), but , as noted earlier, returns to central and southern Somalia are accepted by the respondent as being to MIA. The airport is one of the facilities patrolled by AMISON troops (COIS, 27.13). According to Somalia Humanitarian Overview, September 2008, normally at least 5 commercial flights arrive and depart on a weekly basis to and from the rest of Somalia, Kenya, Djibouti and Dubai. The COIS Reply of 24 October 2008 notes that it is expected in the next month or so that thousands will leave via MIA to perform Haj in Saudi Arabia. At the time of HH, the airport was fully operational with flights arriving and departing regularly. However in 2008 the situation has been unsettled. There were attacks of some kind in January 2008 and the downing of a plane by a missile in March 2008 (COIS, 27.13). The airport was attacked by insurgents on 1 June 2008 as the President's plane left for talks in Djibouti. On 14 September 2008 a group identifying themselves as Al Shabab threatened to shut the airport down, although a counter-report from UIC said that the Islamist forces did not intend to close it. It was closed on 16 September. On 28 September there were mortar attacks on it upon the arrival of an AMISON military plane (COIS, A.2). A Press TV cutting dated 2 October 2008 states that 5 heavy mortars landed inside MIA injuring a number of soldiers. The assailants apparently targeted a plane trying to land. A COIS Reply dated 15 October 2008 reports an Al Shabab source as saying that on 9 October a civilian plane carrying 120 Somali deportees from Saudi Arabia managed to land without incident. A 13 October press report refers to several mortar attacks on the airport. We were told by the respondent at the outset of the hearing that removals to Somalia were temporarily suspended because of travel documentation problems, but 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 in any event.

Roadblocks and Checkpoints in and around Mogadishu

192. In HH the Tribunal concluded that those moving around Mogadishu and the environs would in general not be at risk of serious harm at checkpoints, although it left open the possibility that the situation might be different if a person were likely to encounter a non-TFG checkpoint alone, without friends, family or other clan members (para 302). The Tribunal was particularly struck by the evidence from the BIA fact finding mission of 2007 that there had been "a remarkable reduction in checkpoints" and from Dr Mullen that the TFG had cleared away most militia checkpoints. The position now, contended Mr Toal, could not be more different. We agree. From the second half of 2007 UNOCHA estimates of the number of roadblocks/checkpoints in central and southern Somalia show an increase from 238 in July 2007 to 400 in July 2008 and considerably more than half now being under the control of insurgents (COIS 27.04). The UN OCHA Monthly Cluster report for August 2008 estimated the number of roadblocks along the main roads to Mogadishu in South/Central Somalia as 325 (COIS, B.9).

193. However, even though the TFG appears by and large to have lost control of many of the roadblocks and checkpoints in central and southern Somalia, the evidence continues to indicate that they retain control of the main road from the MIA into Mogadishu. One of the international aid worker witness statements (p.13 of the Nairobi evidence) describes the TFG/Ethiopians as having lost control of the north of the city and now controlling only parts of the south including the roads to the airport. An international aid worker in one of the Nairobi evidence statements (p.15) stated that the road from the airport to K4 (which is the road one must take to travel into the city) is patrolled by the TFG/Ethiopians and is swept on a daily basis for mines. However, the same source states that the road does come under attack from insurgents on a daily basis.

194. Mr Toal urged us to find that this change in circumstances meant that there would be a real risk of persecution, serious harm or ill-treatment to returnees en route to Mogadishu (or elsewhere). However, even aside from the evidence indicating apparent retention of TFG control over this route, there is also evidence of continuing heavy traffic to and from the airport. The

description given by the Voice of America in April 2008 was that "[t]he 4 kilometre road from the airport to the first main junction is clogged with people, cars and trucks…Near the airport, the city's main seaport also hums with activity." More recent cuttings, covering September and October, e.g. that concerned with street children living off shoe shining along this road, does not indicate any significant change to this description. Further, the evidence we have about what is left of the business community in Mogadishu is that it continues to be able to exert considerable influence with a view to ensuring persons on incoming flights are able to travel to the capital without serious incident. As Mr Toal conceded, "they have the capacity to minimise risk". For them the flow of airport traffic is an economic imperative (just as for the city as a whole it is an economic lifeline). We accept that the prime interest of the powerful businesses will be in protecting those coming to do business with them, but it is a reasonable inference that they would do that by trying to ensure safe travel for all passengers. We note too the words of Tony Burns of SAACID-Australia in his Nairobi evidence statement (p.36) that "[a]ll of the police/military checkpoints in and around Mogadishu International airport are operated for profit; with money being taken in exchange for the freedom of movement." We also observe that despite very detailed reports about various incidents at checkpoints and roadblocks, there are only very isolated instances recorded of travellers from MIA to any destination in Somalia meeting with serious harm (the Nairobi evidence contains reference to a Somali who came from Canada in 2008 being kidnapped and detained for 3 months by Al Shabab, whose release was secured by clan elders (p.27), a colleague of Tony Burns being murdered in April 2008 (p.36) and a mention by two security advisers to all NGOs of a Somali who arrived from the USA being kidnapped by the ICU "earlier this year". We are prepared to accept that travellers may well have to pay bribes (see the Nairobi evidence, 74), but we do not consider that this in itself amounts to persecution, serious harm or ill treatment.

195. In such circumstances we consider that, whilst the situation is characterised by arbitrariness, the evidence does not demonstrate that for travellers from MIA to Mogadishu there is a real risk of en route of persecution or serious harm.

196. Mr Toal submitted that there was a separate dimension to the problem of en route travel. In NM, he said the evidence was that, in order to secure protection, failed asylum seekers would be able to arrange in advance of returning to be met by a clan militia escort. That was no longer reasonably likely, he said, as the Hawiye had been disarmed, the dominant Al-Shabab were too ideological and whoever manned the main checkpoints – TFG/ Ethiopians or insurgents – would have as one of their main functions to disarm any militia seeking to pass. Among the items of evidence he cited in support were what was said by an international aid worker (p.14 of the Nairobi evidence) and also the recorded words of Alex Tyler, Protection Officer UNHC, Somalia in September 2008:

> "On arrival in Mogadishu last year [December 2006], the TFG has attempted to enforce the disarmament of the militias in Mogadishu. Consequently, anyone carrying arms in Mogadishu, including a protective militia escort, who is not part of the TFG, Ethiopian or African Union forces could be perceived as an insurgent and targeted by the TFG or Ethiopians, if travelling through the few areas they control. At the same time, the TFG has failed to create a secure environment in which engagement of an armed escort is not necessary to achieve some degree of persons safety."

197. However, as we know from other evidence (and as the final sentence might be thought to hint at), there is clearly a great deal of ongoing movement of people along the roads in central and southern Somalia and in and around MIA. We have a general puzzlement about the state of the evidence on this matter, much of which is merely evidence of what various persons (in statements forming part of the Nairobi evidence) think happens, not evidence of what has happened or is happening . Whilst it makes sense that those manning the roadblocks/checkpoints would seek to prevent (if they could) large armed bands or armed groups carrying or seeking to move sizeable arms or ammunition, it is less easy to see in general that disarming would extend to personal escorts consisting in no more than a few individuals, each with their own small arms weapon. But in any event we can find no clear evidence that armed men in vehicles escorting passengers are disarmed. Significantly one of the journalists who gave a statement in Nairobi in September 2008 (see pp.21-28) , despite noting that since 1998 he had paid 4 gunmen to protect him wherever he went in Somalia (costing him about 40% of his income) and who spoke of going to Mogadishu in April-June 2008, made no mention of his gunmen being disarmed.

Hammar Jahid

198. We have not been able to find any specific evidence regarding the Hammar Jahid area of Mogadishu (where AM2 lived), but since it is in or very near to Mogadishu city itself we consider that for our purposes we can treat AM2 as someone facing return to Mogadishu.

En route travel from Mogadishu airport to Jowhar and other locations

199. The evidence relating to the safety of the main routes from MIA to locations in central and southern Somalia other than Mogadishu is somewhat different in character inasmuch that there does not appear the same ability of any one power bloc, as one finds in respect of the business community in Mogadishu, to influence the warring parties to ensure relative safety of travel. (In any event we consider that evaluation of the relative safety of en route travel to any particular destination - even in respect of Mogadishu - would require assessment of the particular circumstances prevailing at the relevant time.)

Jowhar

200. As regards Jowhar, it is stated in the Amnesty International May 2008 report, that "one of the most dangerous routes is the road between Jowhar and Beletweyne, the main road north out of Mogadishu.." (COIS, 27.06). It would appear that AM2's route from the airport would be through or around the outskirts of Mogadishu and then onto this road. An international aid

worker statement contained within the Nairobi evidence (p.15) states that travel from Jowhar road from Mogadishu was "very very dangerous…To travel to Jowhar you would need to leave the area from Tafig and pass through an area controlled by Al Shabab and also freelance militias…" A COIS Reply dated 24 October 2008 cited Garow Online reporting that: "[l]ocals told Radio Garowe that freelance militiamen have robbed civilians travelling the 90 Km stretch of road linking Jowhar to the national capital, Mogadishu". On the basis of this evidence we consider that travel from MIA to Jowhar would not be safe for involuntary returnees presently.

Refugee Convention reasons

201. Given our earlier finding that there is now a greater risk for those facing enforced removal to Somalia, at least for those from Mogadishu, such that it may often be the case that an individual can show a real risk of persecution, we need to address whether either appellant can establish the existence of the Refugee Convention reason and a causal nexus between that reason and their persecution. Of course in the case of Somali claimants who are able to satisfy the respondent or the Tribunal that they have given a credible account of the existence of a risk personal to them, there will often be little difficulty in showing a Convention ground based on race (clan) or religion (if pro- or anti-jihadist) or political opinion (if perceived as pro- or anti-government or pro- or anti-insurgents). However (excluding the fact that in the case of AM2 it is an accepted fact that he is a member of the Sheikhal Logobe clan), our focus in these appeals is confined to persons who have failed to show any personal risk characteristics beyond their nationality and home area. Is it possible to identify any Convention ground at this level of generality? We think not.

202. Mr Toal conceded at the hearing that he did not pursue the argument that IDPs constituted a particular social group (PSG), nor did he seek to press one suggestion made in pre-hearing correspondence between the parties, that of young men of military age. Although he did not mention it, the Tribunal in a reported case has held that women in Somalia form a particular group (see HM (Somali Women: Particular Social Group) Somalia [2005] UKIAT 00040) and neither party said anything to suggest any reason why we ought to depart from this finding. In practice, therefore, Mr Toal's submission would only be necessary to support the cases of male appellants or, if female, in respect of the question of causal nexus.

203. Regarding Refugee Convention reasons other than PSG, we cannot see they can exist in respect of those found not credible as to their past history and personal circumstances. In his closing written submission Mr Toal sought to argue that merely being a civilian or a civilian returnee would mean that a person would have a political opinion imputed to him because of being mistakenly believed to belong to one side or other in the conflict. In support he referred to several items of evidence detailing, inter alia, round ups of civilians (predominantly males), murder of civilians "likely related to their perceived political affiliation" (UNOCHA, February 2008) and Mogadishu residents being defined not just by their clan but by their perceived political affiliation (in the words of Alex Tyler, "either they are perceived to be for the TFG or with one of the insurgent groups"). However, we consider that the very few items of evidence he identifies fall well short of establishing that such attribution is generally happening, particularly bearing in mind that none of the major country reports portray the situation for civilians as having become endemically politicised.

204. Doubtless recognising the difficulties in establishing grounds of race, religion, nationality or political opinion in respect of persons merely on the basis of being civilians or civilian returnees, Mr Toal put most of his efforts (see his skeleton argument, paras 58-61) into persuading us that the relevant Convention ground to be applied in these cases was PSG, with the PSG identified as being either returnees or returnees known to have arrived from a Western country. He advanced the view that this PSG met both limbs of the requirement contained in Article 9 of the Qualification Directive (Reg 5 of the 2006 Protection Regulations): they shared the immutable characteristic of being persons returned from abroad; as newly arrived persons "viewed with huge suspicion and as having wealth returnees" they "are a clearly recognisable group from the viewpoint of the surrounding society". (He in fact submitted that it was sufficient to show either limb, but acknowledged that the Tribunal in a reported case had not accepted such a reading: see SB (PSG – Protection Regulations – Reg 6) Moldova CG [2008] UKAIT 00002. We find no reason to depart from SB)

205. We reject this view. As regards returnees, it would be wrong in our opinion to treat as a group sharing an immutable characteristic a collection of people whose identity as returnees depends entirely on the contingencies of travel. It would mean, for example, considering as part of the same category, the thousands of persons who each year return from the Haj pilgrimage in Saudi Arabia. Such a category could also be said to render the need for a Refugee Convention reason of PSG otiose, since all asylum-seekers hypothetically fall into this category. Nor do we consider that all returnees meet the second limb (known as the "social perception" test). Although there is some evidence of returnees being the target of banditry and violence, this appears to be an incidental feature of the targeting by armed groups of travellers, including those recently or newly returned, of all kinds. It is to do with their perceived wealth rather than anything to do with their status: see Montoya [2002] EWCA Civ 620. There is not even evidence (as we sometimes have in relation to other countries) that those who are involuntary returnees are separately processed on return. Not surprisingly in our view Mr Toal was unable to cite any authority for the view that returnees – or wealthy returnees – to any country have been found to be a PSG.

206. We do not rule out, however, that where on the given facts all a Somali claimant can point to is a particular clan identity, he may be able to show a Refugee Convention reason consisting in either race or a PSG or even (imputed) political opinion. We do not consider such a person would be able to do so simply by virtue of his being accepted as a majority clan member. That is far too amorphous a category for the purposes of establishing any of the five Convention grounds. But where a specific clan or sub-clan can be identified, even if it is one of the majority clans, we consider that the ground of race may well be established, depending on the evidence.

OUR ASSESSMENT: AMI

207. As noted earlier, the only accepted fact regarding AM1 is that he is from Jowhar. On the latest evidence the population of the town is not in general exposed to serious harms and there is no longer any significant fighting there, as the insurgents have gained control of it (as they have of most of central and southern Somalia). Very recently, the UIC appears to have won the internal battle of control amongst the insurgents: see para 185 above. There is evidence that en route travel to Jowhar is hazardous, but, for reasons given earlier, that is not a matter which falls for our consideration in the context of Somalia appeals currently: it must be a matter for the respondent, as and when removal arrangements are being finalised, to satisfy herself that there would be safe en route travel for this appellant. Accordingly the appellant has failed to show that if removed he would face a real risk of persecution, serious harm or treatment contrary to Article 3 ECHR. The decision we substitute for that of the immigration judge (who materially erred in law), is to dismiss AM1's appeal.

OUR ASSESSMENT: AM2

208. In relation to AM2, as we have already noted, he is from a part of Mogadishu. Although he is relatively young and able-bodied we see nothing to indicate that he is someone who would be likely to have connections with powerful actors in Mogadishu, such as prominent businessmen or senior figures in the insurgency or in powerful criminal gangs. He had family members in the city at the time of the hearing of his case before IJ Beg in July 2007, but in view of the major displacement of the city's population since then we think it unlikely that, even if they are still there, they are any longer in a position to protect him as they did previously. The fact that he and his family members are from the Sheikhal Logobe clan, which is not as such a majority clan, further decreases the likelihood that he could achieve protection from serious harm in that city. In this regard, we attach significant weight to the evidence of AC that as a result of events between 2003-2007 in Mogadishu the Al Shabab has come to perceive the Sheikhal Logobe adversely as TFG supporters. Accordingly, we are satisfied that in his home area he faces a real risk of persecution, serious harm and treatment contrary to Article 3. We are also satisfied that the risk of persecution in his home area would have as one of its effective reasons, his race or ethnicity, in the form of his clan identity as Sheikhal Logobe.

Internal relocation

209. There are two aspects of AM2's situation that we need to consider here: safety and reasonableness. As regards safety, he is from the Sheikhal Logobe clan, which appears to have lost its ability to achieve protection from majority clans in the way it managed previously. It particularly concerns us that, as a result of events in Mogadishu between 2003-2007, the ascendant Al Shabab organisation appears to have come to perceive the Sheikhal Logobe as having sided with the TFG and also to distrust their historic position as a clan with particular knowledge of Islam. In such circumstances, whilst we do not think the evidence suffices to show members of that clan face targeting from Al Shabab as such, the ongoing risk of animus from Al Shabab members is a relevant consideration. Turning to reasonableness, AM2 is now in his early 20s and is able-bodied with no significant health problems. It was found by IJ Beg that he had family not only in Mogadishu but also elsewhere in southern Somalia. On the other hand, he is also someone who left Somalia when still a minor, who has been out of Somalia for over 5 years and will be less adept than persons living there currently at dealing with ongoing difficulties. It is also reasonably likely that it will become known he has been in the UK and that as a consequence he will be perceived as someone who has or has access to relative wealth. Whilst we do not think that the factors we have just identified under the reasonableness head suffice on their own to demonstrate that to expect this appellant to relocate would be unduly harsh, we do think, when adding to the overall picture, the likely animus from the ascendant Al Shabab in particular, that the appellant does not have a viable internal relocation alternative. Accordingly we are satisfied that the appellant if returned would face a real risk of persecution, serious harm and treatment contrary to Article 3 ECHR. The immigration judge having materially erred in law, the decision we substitute is to allow AM2's appeal on asylum grounds and Article 3 ECHR grounds.

210. For the above reasons we conclude:

The appeal of AMI is dismissed on asylum, humanitarian protection and human rights grounds.

The appeal of AM2 is allowed on asylum and human rights grounds.

Signed Date

Senior Immigration Judge Storey

Annex 1: decision as to material error of law in the case of AM1 by SIJ Storey dated 4 August 2008

"The appellant is a national of Somalia. In a determination notified on 18 February 2008 Immigration Judge D N Harris dismissed his appeal against a decision dated 10 November 2007 to remove him as an illegal entrant. The immigration judge made adverse credibility findings.

The grounds do not challenge the immigration judge's findings of fact in relation to the appellant's history. They focus rather on the immigration judge's approach to the issue of whether or not the appellant was eligible for humanitarian protection under 339C(iv)/Article 15(c) of the Refugee Qualification Directive.

I consider that the grounds are correct in stating that the judge materially erred in law in his approach to the issue of eligibility under para 339C(iv)/Article 15(c). The determination fails to give reasons for the conclusion that the appellant could not demonstrate eligibility for humanitarian protection because there is not an armed conflict in southern Somalia.

The immigration judge's error was compounded by the fact that he appeared to see the issue of whether or not the appellant could or could not show under 339C(iv)/15(c) a "serious and individual threat" as hinging in part on whether "… he would be particularly at risk …on making the journey from Mogadishu to his home town". However, the Court of Appeal in AG (Somalia) has held that the issue of internal safety was not one which should form part of the assessment of risk on return.

Manifestly, these errors had a possible bearing on the outcome of the appellant's appeal.

Since the IJ decided this case the Tribunal has reported two cases dealing with Article 15(c), HH and others and KH (Iraq). The former gives specific guidance on the application of 15 (c) in the context of Somalia and that guidance is endorsed by KH (Iraq) except in one respect relating to threats from criminal violence.

At the resumed hearing it is highly unlikely there will be any need to re-open the issue of whether or not there is an internal armed conflict in southern Somalia within the meaning of para 339C(iv)/Article 15(c). There is. The focus will need to be on the remaining requirements of this provision. Whilst on the strength of HH and others the appellant is unlikely to be able to succeed in showing a serious and individual threat, he is at least entitled to have his particular circumstances considered on the basis of the correct legal tests and it will be open to the parties, of course, to adduce fresh evidence as to whether more recent developments in Somalia require a different view being taken as regards Article 15(c).

I would re-emphasise, however, that there has been no challenge to the immigration judge's findings of fact in relation to the appellant's past experiences and those findings must be preserved."

Annex 2: decision as to material error of law in the case of AM2 by SIJ Jordan, 23 January 2008

"1. This is an oral determination, I am satisfied that the Immigration Judge made a material error of law as identified in paragraph 5 of the grounds of application settled by the appellant's Counsel. This concerns the Immigration Judge's handling of the risks that the appellant faces immediately on arrival at Mogadishu International Airport and the journey to Mogadishu where the Immigration Judge found members of his family were living.

2. It was submitted in paragraph 40 of the skeleton argument that the Home Office COIS report referred to a mission which had been sent to Mogadishu in 2007 and a report published in May 2007 which suggested there was a substantially changed situation for those returning. In the grounds of application specific reference is made to the European Commission Delegation and the results of interviews that were conducted dealing with the area between the airport and Mogadishu City and the circumstances in which an appellant might travel with sufficient safety to the centre of Mogadishu. In my judgment the Immigration Judge did not deal with this element of the case.

3. It was argued on behalf of the Secretary of State that this was not a material omission because the report of the information gathering mission of April 2007 was only concerned with single returnees and was not concerned with the situation of those who had got appropriate military or armed assistance as the Immigration Judge found the appellant would have.

4. In my view, whilst there may well be differences between the position of a sole returnee unprotected by any militia and somebody who may be able to return to support to assist in his relocation to Mogadishu, I am not satisfied that the background material to which I have been referred suggests that there is a clear-cut means by which those who have got militia support are able to leave the airport. It seems to me that this is an issue which will have to be reconsidered by the Tribunal.

5. I am conscious of the fact that the decision principally relied on by the Immigration Judge, NM [2005] UKIAT 00076, offered guidance in relation to the circumstances as they existed in 2005 and this is a swiftly changing situation. It may well therefore be that the guidance offered is somewhat out of date and should be revisited. This, in my judgment, is sufficient to merit the second stage reconsideration.

6. The grounds of application also contain a number of other grounds to which I should briefly refer. In paragraph 8 of the grounds it is asserted that the Immigration Judge failed to deal with the question of humanitarian protection by reference to paragraph 339C(iv) of the Immigration Rules HC 395. This now

contains a definition of serious harm which includes the serious and individual threat to a civilian's life or person by means of indiscriminate violence in situations of international or internal armed conflict. I am aware of the fact that the Tribunal will, in a relatively short time, be issuing guidance on the proper interpretation of the Immigration Rules which will have a bearing not simply on the conditions in Iraq, to which I understand the case immediately applies, but also in relation to other areas of conflict upon the globe. It seems to me, therefore, that it is not possible for me to make any sustainable findings on what is the meaning of this difficult expression until the Tribunal has issued its guidance.

7. In these circumstances, the appropriate route is merely to say that I am unable and do not make any findings on this part of the grounds of appeal and these will have to be argued at the second stage of the reconsideration which will occur in due course.

8. In addition, it is said in paragraph 6 of the grounds of application that the Immigration Judge was wrong in law in failing to recognise the fact that in using the help of armed militia the appellant will be complicit in breaches of resolutions put forward by the UN Security Council made under the provisions of the UN Charter. I was asked by Mr Toal not to make any findings on this element of the claim. I am, however, prepared to say that the questions raised in AG v SSHD [2006] EWCA Civ 1342 do not obviously apply to a case such as the appellant's. In AG v SSHD the Court of Appeal decided that where the Secretary of State had not decided the travel arrangements he intended to adopt for the return of an appellant, it was not possible to make any findings upon the consequences of those travel arrangements and the associated travel risks. The risks could only be identified when specific plans for removal and return had been made and notified to the appellant. That decision would give rise to an appeal or review by the Administrative Court on conventional grounds of irrationality or illegality. In my judgment that cannot apply in relation to the appellant's case because there is no dispute that the appellant will be returned to Mogadishu International Airport and will then have to make his way to Mogadishu itself.

9. My decision is in line with the decision in AG v SSHD [2006] EWCA Civ 1342 and the practical good sense of making findings on risk on return which are not hypothetical and which might be of assistance in formulating specific travel arrangements. Hooper LJ said as much in the following passages:

> 29….I disagree with the proposition that the AIT is never obliged to consider whether there is a real risk of persecution or Article 3 ill-treatment at the airport or on the way home. As to "guess work", the AIT cannot just throw up its hands and not deal with relevant issues.
>
> 123. Although Mr Jay is critical of *NM* in the light of *GH*, it seems to me that in a Country Guidance case it may well be helpful for all concerned to know the dangers inherent in a method of return that is likely to be used, if known. Those dangers can then inform the SSHD when (or if) removal directions are made.

For these reasons I consider that the Tribunal in due course is required to grapple with the issue of the travel risks associated with the appellant.

10. One of the other issues which is raised in paragraph 6 of the grounds of application concerns the question of whether the funding of armed militia is in breach of the United Nations resolutions. This issue may well be determined by reference to whether the actions of the individual by taking steps to protect himself are lawful acts of self protection or self defence or whether they go to assisting in financing or helping militias in circumstances which violate the embargos made by the United Nations resolutions. In my judgment it cannot seriously be stated that an individual who merely takes steps to protect himself will violate any United Nations resolutions. In other words it is, in my judgment, inconceivable that ordinary acts of self defence will be covered by the United Nations embargo. However, it is clear that in the circumstances of any individual case it might be that the procurement of militiamen to assist in the relocation of an individual from the International Airport to a safe haven will go beyond lawful self-help and will constitute a violation of the embargo but that will depend on the individual circumstances of a case. This ground was raised in AG v SSHD [2006] EWCA Civ 1342 and dismissed as unsustainable by Hooper LJ in paragraph 35 of the Court's judgment.

11. In paragraph 2 of the grounds of application (which was not otherwise pursued by Mr Toal), it is said that the Immigration Judge's adverse credibility findings were erroneous. It seems to me that the Immigration Judge's findings in paragraphs 22 and 23 were properly open to the Immigration Judge and do not amount to a material error of law. In paragraph 22 the Immigration Judge recorded the fact that the appellant claimed that his brother was shot dead in 1999 and his father in 2001 by the USC armed militia. This followed the account that the appellant had given in his statement, paragraphs 5 and 6, in which the appellant said,

> "5. On account of my age I do not remember the exact dates of many incidents I have described. I do remember that my brother Jamal was killed in 1999 this was a major incident and I was a little older then. He was shot dead by the USC, I was at home at the time, he went out one day and he was shot dead. I do not know why he was killed.

6. My father was shot dead in 2001 by the USC near the restaurant he worked at. For some reason the militia killed him but I do not know why".

12. The Immigration Judge in dealing with this part of the evidence said in paragraph 22,

> "There is no credible evidence that they were targeted because of their clan membership. The appellant has given very little information with regard to the circumstances of their deaths. The appellant's family were able to retain their home until it was sold. The appellant claims that the militia may not have forcibly taken the house because they would not have been able to maintain legal ownership of it. I find that if the appellant and his family were deemed to be minority clan members without any majority support it is highly unlikely that they would have been able to retain their home in what Mr Toal has described as a no go area and a very dangerous part of Mogadishu according to the reporting of the information gathering mission in April 2007. I find that the militia could well have forced the appellant's mother to sign over the legal deeds of the property if they wanted legal ownership of the property in order to sell it on."

13. It seems to me that the Immigration Judge was here finding that if the appellant's account that he and his family were able to conduct an orderly sale of the family home, this could not have happened if they were minority clan members. This pointed to the fact that the appellant and his family had sufficient protection within the community to avoid the deprivation of their property by majority clan members or militias supporting them. There is nothing in my judgment which is irrational or perverse in that finding and there is nothing that amounts to improper speculation about the exercise in which the Immigration Judge engaged.

14. Dealing with paragraph 3 of the grounds of application, it is submitted that the Immigration Judge erred in law in his findings of fact. This is a specific reference to the judge's findings in paragraphs 34 and 35 of the determination. In paragraph 34 of the determination the Immigration Judge found that the appellant could make appropriate arrangements to be received at Mogadishu Airport by clan members and also with an armed escort. He found that the appellant was in contact with his mother and brother and indeed with clan members with whom they are staying. He found, therefore, the appellant did have what he described as clan protection in Mogadishu. Similarly, in paragraph 35 of the determination he found that the appellant could take the opportunity to arrange to be met at Mogadishu Airport by his family and clan members together with an armed escort to enable him to safely travel from the airport to his home area. He found that the appellant was able to access clan protection in his home area in Mogadishu.

15. These findings carry on from the Immigration Judge's analysis of the evidence in relation to those issues. It was always the case of the Secretary of State that the appellant was able to access support and assistance. In the refusal letter referred to in paragraph 4 of the determination the respondent's decision is set out. As Somalia is one of the poorest countries in the world, the Secretary of State found it highly unlikely that the appellant's mother would have been able to raise sufficient funds to pay both for his release and for his journey out of the country unless she was able to access resources and protection. The respondent also noted that if the appellant's mother had been able to raise money she would have used it to move all the family to a nearer safe country rather than just the appellant to the United Kingdom.

16. It seems to me that these issues which were not directly addressed by the Immigration Judge were relevant for two purposes. First, they were an indication as to whether or not the appellant was a member of a minority clan, it being clear that minority clan members are at risk of arbitrary seizure of their possessions by majority clan members; and secondly, it was indicative of a person with sufficient wealth to make effective arrangements to afford the appellant protection on return. Those who have used their wealth to effect departure are at least liable to be deemed capable of using their wealth to affect a safe return. In the present case the Immigration Judge made significant findings about the circumstances in which the appellant left his mother and brother in Mogadishu. The appellant had stated that he last spoke to his mother at the end of 2006 when he said she was living in Mogadishu in the accommodation to which they had moved for a period of seven or eight months. He said that the clan members with whom the family were staying were attacked on a number of occasions but there were no valuables in the house and the looters just took other items. There were shouts but no one was hurt. In these circumstances it was open to the Immigration Judge to find that the circumstances of the appellant, his mother and brother did not amount to being at serious risk.

17. He made specific findings in relation to the contact that he had been able to maintain with his mother. In paragraph 25 of the determination he said that he did not find it credible that the appellant would not make arrangements to remain in contact with his mother after he had travelled to the United Kingdom and that he had made no effort to trace his mother since arriving in the United Kingdom. In those circumstances he found that the reasons for his doing this was that he knew exactly where his mother and brother were staying and how they could be reached. He found at paragraph 26 that the appellant's mother and brother were still in Mogadishu living with clan members where the appellant left them. He found that the appellant had not sought to find his mother and brother because he already knew *full well* where they were actually living. It

seems to me that, by implication, the Immigration Judge was also finding that they were living in circumstances of sufficient safety for the appellant not to wish to reveal this fact to the Immigration Judge.

18. In these circumstances, the Immigration Judge made sustainable findings that the appellant and brother were living in sufficient safety to avoid the immediate risk of serious harm. Although it has been submitted that this was not the case, the Immigration Judge found in paragraph 31 that it was clear that there are clan members willing and able to look after the appellant's mother and brother and indeed the appellant, when he was there for about seven or eight months living with them. He found that the appellant's mother and brother continued to live with clan members in Mogadishu and that the appellant left his family in Somalia in the knowledge that, in the absence of his father, they had the protection of clan members with whom they were living. In my judgment those findings were sustainable. They cannot be classified as perverse and it may therefore be that the Immigration Judge was not making any global findings that the appellant had clan protection in a general sense; all that he was finding was that, in circumstances which the appellant had failed properly to reveal, the appellant's mother and brother had managed to effect safety mechanisms in Mogadishu which enabled them to continue their life without being at risk. That obviously involved individuals who were either relatives or members of the same clan affording them with protection. Whether that situation is the same as saying that the appellant has general clan protection in Mogadishu is not important. It seems to me, however, the important issue is that they were able to access protection in the circumstances in which they found themselves in Mogadishu and it was on that basis that he found that protection was also available to him on return.

19. For these reasons I reject the criticisms which are made in the grounds of application that his findings on risk in Mogadishu were perverse or illogical. This leaves open, however, the real issue in this appeal and that is whether the appellant is able to access protection in the circumstances in which he finds himself on return to Mogadishu International Airport. In that event he will not be returning simply as an unidentified individual, he will be returning as a member of the Sheikhal clan. This is a clan which is not consistently dealt with in the background information. It will be open to the appellant to deal with whether members of the Sheikhal clan in general (as well as the appellant in particular) have any specific or different protection needs."

Appendix: BACKGROUND MATERIALS

1. 1		FCO Africa Research Analyst comment on 'COI Project Somalia: Minority Groups'	
1. 2		Somali passport of CA	
1. 3		Certificate of participation of CA	
1. 4		Article on peace talks with CA photographed	
1. 5		ID card of CA in respect of Somali National Reconciliation Conference	
1. 6		US Citizenship and immigration Services website - Information on Temporary Protected Status	
1. 7		Rebuilding Somalia: issues and possibilities for Puntland WSPA Somali programme	
1. 8		Human Rights Watch Report	
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